SECURITIES AND EXCHANGE COMMISSION

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

CHRISTOPHER COX, CHAIRMAN

PAUL S. ATKINS, COMMISSIONER

KATHLEEN L. CASEY, COMMISSIONER

46 Documents

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8915 / May 1, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13030

In the Matter of BANC OF AMERICA INVESTMENT SERVICES, INC., and COLUMBIA MANAGEMENT ADVISORS, LLC, as successor in interest to Banc of America Capital Management, LLC, Respondents.	ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION.

I.

Banc of America Investment Services, Inc. ("BAISI") and Columbia Management Advisors, LLC ("CMA") (collectively "Respondents") have submitted a letter, dated March 20, 2008, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from Respondents' settlement of an administrative proceeding commenced by the Commission.

II.

On May 1, 2008, pursuant to Respondents' Offers of Settlement, the Commission issued an Order Instituting Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 9(b) of the Investment Company Act of 1940, and Sections 203(e) and (k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Orders, Penalties, and Other Relief against Respondents. Under the Order, the Commission found that between July 2002 and December 2004, BAISI selected at least two affiliated funds (Nations Funds) for inclusion in BAISI's wrap fee program using a methodology that favored Nations Funds and was inconsistent with the objective methodology previously disclosed to clients. The Commission further found that BAISI's affiliate, CMA, earned additional fees as a result because its management fees were based, in part, on Nations Funds' asset size. In the Order, the Commission ordered BAISI to pay

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disgorgement of $3,310,206, prejudgment interest of $793,773 and a civil monetary penalty of $2,000,000 and ordered CMA to pay disgorgement of $2,143,273, prejudgment interest of $516,382 and a civil monetary penalty of $1,000,000. Additionally, the Order requires that Respondents cease and desist from all of the alleged violations; a censure; and requires Respondents to comply with certain undertakings as to adoption of policies and procedures designed to prevent further violations.

III.

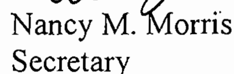
The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if, as set forth in Rule 602(c)(3), an investment adviser or underwriter for the securities to be offered is subject to an order of the Commission entered pursuant to Section 15(b) of the Securities Exchange Act of 1934 or Section 203(e) of the Investment Advisers Act of 1940. 17 C.F.R. § 230.602(c)(3). Rule 602(e) of the Securities Act of 1933 ("Securities Act") provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied." 17 C.F.R. § 230.602(e).

IV.

Based upon the representations set forth in Respondents' request, the Commission has determined that pursuant to Rule 602(e) under the Securities Act a showing of good cause has been made that it is not necessary under the circumstances that the exemption be denied as a result of the Order.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provision of Rule 602(c)(3) under the Securities Act resulting from the entry of the Order is hereby granted.

By the Commission.



Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
RELEASE NO. 8913 / MAY 1, 2008

SECURITIES EXCHANGE ACT OF 1934
RELEASE NO. 57748 / MAY 1, 2008

INVESTMENT ADVISERS ACT OF 1940
RELEASE NO. 2733 / MAY 1, 2008

INVESTMENT COMPANY ACT OF 1940
RELEASE NO. 28261 / May 1, 2008

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13030

In The Matter Of **BANC OF AMERICA INVESTMENT SERVICES, INC. and COLUMBIA MANAGEMENT ADVISORS, LLC, as successor in interest to Banc of America Capital Management, LLC,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940, and SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND MAKING FINDINGS AND IMPOSING CEASE-AND-DESIST ORDERS, PENALTIES, AND OTHER RELIEF**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 9(b) of the

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Investment Company Act of 1940 ("Company Act"), and Sections 203(e) and (k) of the Investment Advisers Act of 1940 ("Advisers Act") be and hereby are instituted against Banc of America Investment Services, Inc., and that public administrative and cease-and-desist proceedings pursuant to Section 9(b) of the Company Act and Sections 203(e) and (k) of the Advisers Act be and hereby are instituted against Columbia Management Advisors, LLC, as successor in interest to Banc of America Capital Management, LLC.

II.

In anticipation of the institution of these proceedings, Banc of America Investment Services, Inc. and Columbia Management Advisors, LLC, as successor in interest to Banc of America Capital Management, LLC (collectively, "Respondents") have each submitted an Offer of Settlement ("Offers") to the Commission, 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, the Respondents, without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and over the subject matter of these proceedings, consent to the entry of this Order Instituting Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934, Section 9(b) of the Investment Company Act of 1940, and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Making Findings and Imposing Cease-and-Desist Orders, Penalties, And Other Relief ("Order").

III.

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

A. RESPONDENTS

1. **Banc of America Investment Services, Inc.**, a Florida corporation with its principal place of business in Boston, Massachusetts, is a wholly-owned subsidiary of Bank of America Corporation. Banc of America Investment Services is a broker-dealer and investment adviser registered with the Commission pursuant to Section 15(b) of the Exchange Act and Section 203(c) of the Advisers Act, respectively, and is a member of Financial Industry Regulatory Authority. Banc of America Investment Services engages in a nationwide securities business, in which it operates a wrap fee program, and is the principal retail brokerage unit of Bank of America Corporation.

2. **Columbia Management Advisors, LLC**, a Delaware limited liability corporation with its principal place of business in Boston, Massachusetts, is the successor in interest to **Banc of America Capital Management, LLC.** Columbia Management Advisors is an investment adviser registered with the Commission pursuant to Section 203(c) of the Advisers Act. At the time of the violations described in this Order, Banc of America Capital Management was a North Carolina limited liability company with its principal place of business in Charlotte, North Carolina, and was a wholly-owned

subsidiary of Bank of America Corporation. Banc of America Capital Management was an investment adviser registered with the Commission pursuant to Section 203(c) of the Advisers Act. Banc of America Capital Management acted as an investment adviser to Bank of America proprietary mutual funds sold under the brand "Nations Funds" and, through its research division, also researched and recommended mutual funds to be purchased for discretionary clients in the mutual fund wrap fee program operated by its affiliate, Banc of America Investment Services. In September 2005, Banc of America Capital Management merged with Colonial Advisory Services, Inc., and Columbia Management Advisers, Inc., to form a new entity named Columbia Management Advisors, LLC, which is a subsidiary of Columbia Management Group, LLC, which in turn is a subsidiary of Bank of America Corporation. In 2005, Banc of America Capital Management transferred its mutual fund research division and its business of researching and recommending mutual funds to Banc of America Investment Advisors, Inc., an affiliated adviser. The events discussed in this Order predate the formation of Columbia Management Advisors, LLC.

B. SUMMARY

This matter involves material misrepresentations and omissions by Banc of America Investment Services to its clients for whom it maintained discretionary mutual fund wrap fee accounts between July 2002 and December 2004 (the "relevant period"). Banc of America Investment Services selected at least two affiliated funds (Nations Funds), using a methodology that was contrary to prior statements to clients, for inclusion within Banc of America Investment Services' wrap fee accounts. Banc of America Investment Services' affiliate, Banc of America Capital Management, earned additional fees as a result because its management fees were based on Nations Funds' asset size.

During the relevant period, Banc of America Capital Management was both an investment adviser to Nations Funds, from which it derived asset-based fees, and the entity recommending model portfolios for Banc of America Investment Services' mutual fund wrap fee accounts. As an investment adviser to clients in its mutual fund wrap fee program, Banc of America Investment Services had a fiduciary duty to act in the best interests of its clients. This duty required Banc of America Investment Services to disclose all material information concerning potential or actual conflicts of interest, and precluded it from any undisclosed use of its clients' assets to benefit itself.

During the relevant period, Banc of America Capital Management made recommendations, which Banc of America Investment Services approved, of all mutual funds selected for wrap fee clients with discretionary accounts, including the Nations Funds that are the subject of this proceeding. The recommendations were supposed to be based upon an objective and unbiased research methodology that was outlined for clients and prospective clients in promotional literature and disclosures. However, in certain instances, Banc of America Investment Services and Banc of America Capital Management focused on subjective criteria in the research process, which favored Nations Funds, and resulted in increased assets under management for Banc of America Capital Management. The selection of affiliated funds gave rise to a conflict of interest

between Banc of America Investment Services' and Banc of America Capital Management's desire to increase the amount of advisory fees paid to Banc of America Capital Management, and Banc of America Investment Services' fiduciary duty to act in the best interest of its discretionary wrap fee clients by selecting the most appropriate mutual funds on their behalf, regardless of whether such funds were Nations Funds or non-affiliated.

In its disclosures, Banc of America Investment Services stated that 1) it utilized a rigorous and objective research process to identify the most appropriate mutual funds from a "vast universe" of funds; 2) it scrutinized performance, returns and consistency, and only considered funds or fund managers with established track records; and 3) funds managed by its affiliates were "selected based upon the same criteria" as funds managed by unaffiliated firms. Those procedures were not uniformly followed in selecting mutual funds for the model portfolios. Banc of America Investment Services also omitted to disclose the scope of its conflict of interests, and the bias in the recommendation and selection process.

As a result, Banc of America Investment Services violated Section 17(a)(2) and (3) of the Securities Act, Sections 206(2), 206(4), and 207 of the Advisers Act and Advisers Act Rule 206(4)-1(a)(5), and Banc of America Capital Management aided and abetted and caused violations of Sections 206(2) and 206(4) of the Advisers Act and Advisers Act Rule 206(4)-1(a)(5).

C. FACTS

1. Background

Since at least 2000, Banc of America Investment Services has managed a mutual fund wrap fee program under which clients, most of whom are individual investors, could choose to maintain discretionary accounts. In a mutual fund discretionary wrap fee program, a client gives its adviser, here Banc of America Investment Services, discretion to select the mutual funds that the client purchases, and, in lieu of separate transaction fees, is charged an asset-based fee for transactions and advisory services.

In 2002, Banc of America Investment Services delegated to its affiliate, Banc of America Capital Management, the research and evaluation functions of selecting mutual funds for a recommended list (called the "Fund Focus List") provided to non-discretionary mutual fund wrap fee clients. Banc of America Capital Management also assumed responsibility for creating model portfolios and selecting the most appropriate funds from the Fund Focus List for clients with discretionary mutual fund accounts. The research division of Banc of America Capital Management performed the evaluation and recommendation process for the Fund Focus List and the model portfolios. Banc of America Investment Services approved the research process developed by Banc of America Capital Management, which was supposed to provide unbiased recommendations. After conducting research and evaluation, Banc of America Capital Management relayed recommendations to a committee of Banc of America Investment

Services, which approved the recommendations for every mutual fund added or dropped from the Fund Focus List and the model portfolios.

2. Banc of America Capital Management Did Not Uniformly Follow Its Stated Research Process

When Banc of America Capital Management took over the research and recommendation functions in 2002, it developed a six-step research process. The Investment Policy Committee of Banc of America Investment Services approved this process in May 2002 and the process was implemented shortly thereafter. According to the approved process, which was summarized in promotional literature, Banc of America Capital Management did the following:

- Screened a "vast universe of available investment managers" based upon "competitive absolute performance" and "competitive risk-adjusted performance";

- Screened investment managers who made the first cut by evaluating certain "business thresholds," including "credible length of track record," which was "generally five years";

- Performed "more stringent quantitative analysis", including assessing competitive returns, rolling performance, consistency of performance, and trailing returns over one, three, and five-year periods;

- Performed a qualitative analysis, focusing on investment philosophy, investment process, business model, and other subjective factors;

- Made recommendations based on the screening and evaluations performed; and

- Performed ongoing research.

In materials distributed to clients and prospective clients, Banc of America Investment Services represented that the research process would provide unbiased recommendations of the most appropriate mutual funds based upon "continuous, disciplined screening." In practice, however, Banc of America Capital Management omitted the first two screening steps, discounted quantitative analysis, and emphasized subjective factors, which favored proprietary funds. Contrary to its stated research process, Banc of America Capital Management did not require track-record or absolute performance thresholds for screening, evaluating, or recommending its proprietary Nations Funds, but instead focused primarily on subjective factors in evaluating those funds.

Banc of America Capital Management developed a "positioning" presentation concerning mutual fund selection. In that presentation, the research division explained

that, by adopting this "positioning" work, Banc of America Capital Management could "more competitively position itself within [the asset-based fee] programs and beyond some of [Banc of America Capital Management's] current weaknesses (i.e. performance)." In an analysis prepared to show the potential market share of Banc of America Capital Management-advised funds within the asset-based fee programs, a research employee noted that, with respect to one program, "[f]rom a 5-year return perspective, [Banc of America Capital Management] either doesn't have or has the worst 5-year absolute return within each respective asset class." The presentation set forth a "positioning" strategy that would favor Nations Funds by relying "more on qualitative issues and away from performance." Ultimately, pursuant to that strategy Banc of America Capital Management recommended -- and Banc of America Investment Services approved -- the use of two Nations Funds in the model portfolios for mutual fund wrap fee clients: the Nations Large Cap Value Fund and the Nations Small Company Fund.

a. Nations Large Cap Value Fund

In or around November 2001, Banc of America Capital Management launched the Nations Large Cap Value Fund. To manage that fund, Banc of America Capital Management hired a new investment manager who its executives believed would be able to achieve positive results for the fund. To promote the fund, a Banc of America Capital Management executive looked for opportunities to give "exposure" to the new manager.

In mid-2002, a co-president of Banc of America Capital Management directed the research division to evaluate the Nations Large Cap Value Fund for inclusion in the mutual fund wrap fee program. The research division assessed the new manager's investment style and methodology, but could not evaluate the fund's long-term performance because the fund had been in operation for less than nine months (the research process required at least a three-year performance history). In addition, although the new manager had substantial experience with a previous employer, her track record was not portable under industry standards because the other investment decision makers with whom she had worked at her previous employer did not move with her to Banc of America Capital Management.. Moreover, during its limited existence, the Large Cap Value Fund had underperformed its benchmark and was below the industry average return for its asset class. When it first appeared in the Fund Focus List for September 30, 2002, the Nations Large Cap Value Fund had the lowest return for the prior quarter – and the highest expense ratio -- of the seven large cap value funds on the Fund Focus List.

In a 2002 memorandum, a research division employee suggested that the Large Cap Value Fund be placed on the Fund Focus List as a "special consideration" (for clients with non-discretionary accounts), and not be considered for discretionary accounts until it developed an appropriate track record. The employee noted that, while the new manager was intelligent and had a sound investment philosophy, she did not have "a pattern of repeatable success driven by a repeatable process." In the memorandum, the employee also expressed concern that recommending the Large Cap Value Fund for the discretionary models might undercut the credibility of the research division. Despite such concern within the research division, and the fact that the Large Cap Value Fund did

not meet the stated criteria for consideration, Banc of America Capital Management recommended the Fund for discretionary accounts.

Banc of America Capital Management derived management and other fees as a result of the increased assets in the Large Cap Value Fund attributable to its recommendation -- and Banc of America Investment Services' approval -- of the Large Cap Value Fund for inclusion in the discretionary mutual fund wrap fee accounts. Shortly after implementation, approximately eight percent (8%) of all discretionary clients' assets were invested in the Nations Large Cap Value Fund. The Large Cap Value Fund remained in the discretionary models throughout the relevant period.

b. Nations Small Company Fund

In July 2002, Banc of America Capital Management recommended, and Banc of America Investment Services approved, the Nations Small Company Fund for inclusion in the model portfolios for the "small capitalization growth" asset category. In making the recommendation, Banc of America Capital Management did not follow the stated research and evaluation process that required it to screen a universe of small capitalization growth funds and to perform a "rigorous analysis" to determine the most appropriate fund for Banc of America Investment Services' discretionary wrap fee clients. In particular, Banc of America Capital Management did not evaluate the consistency of "investment style and past performance" to identify funds with "histories of consistent investment practices."

As of July 2002, the Nations Small Company Fund had lower historical returns than a similar non-proprietary fund on the Fund Focus List. Nevertheless, Banc of America Capital Management did not evaluate the non-proprietary fund. Further, Banc of America Investment Services had previously included the Nations Small Company Fund on the Fund Focus List only as a "special consideration," noting that it did not satisfy the standard criteria for inclusion, and had categorized the fund's investment style as being "without preference for growth or value." Banc of America Capital Management then reclassified the fund in discretionary models as a "growth" fund. The Nations Small Company Fund remained in the discretionary models from July 2002 until the second quarter of 2004.

3. Banc of America Investment Services Failed Adequately to Disclose the Conflict of Interests

During a portion of the relevant period, the research division and the mutual fund investment adviser division of Banc of America Capital Management reported to the same executive. Banc of America Capital Management derived asset-based fees for its investment management of the Nations Funds. Including more Nations Funds in discretionary wrap fee accounts increased the fees paid to Banc of America Capital Management.

The Respondents' selection of Nations Funds for inclusion in the mutual fund wrap fee accounts was inconsistent with the disclosed selection criteria. Further, Respondents failed to disclose a material conflict of interests arising from the selection of affiliated mutual funds between their pecuniary interests and the best interests of Banc of America Investment Services' advisory clients.

4. Banc of America Investment Services' Disclosures to Clients Were False and Misleading

In promotional materials and program disclosure documents distributed to clients and prospective clients, deemed filed with the Commission as Part II of Form ADV, Banc of America Investment Services made a number of statements that were not accurate and complete. Banc of America Investment Services represented that it utilized a "continuous, disciplined screening" process designed to identify the "most appropriate" mutual funds for the Funds Focus List and model portfolios. Banc of America Investment Services also represented that it performed an ongoing screening and review of previously selected funds. In fact, Banc of America Investment Services and Banc of America Capital Management did not use the unbiased, internally-established research and review process outlined to investors in promotional literature.

In promotional materials, Banc of America Investment Services also represented that it scrutinized performance -- both returns and consistency -- and only considered funds or fund managers with established track records. In fact, Banc of America Investment Services and Banc of America Capital Management made an exception to the track record and performance thresholds for the Nations Large Cap Value Fund discussed above.

In the required Disclosure Statements for the mutual fund wrap fee program, Banc of America Investment Services stated that, in selecting funds for discretionary portfolios, funds managed by affiliated firms and funds managed by unaffiliated firms would "be selected based upon the same criteria." Banc of America Investment Services also represented that "the fact that a fund pays a fee to [Banc of America Investment Services] or to any affiliate including Bank of America will not be considered a factor in the selection of which mutual funds to recommend to or purchase for clients." In fact, Banc of America Investment Services and Banc of America Capital Management did not use the same criteria when evaluating and selecting Nations Funds and favored at least two Nations Funds over non-affiliated funds, resulting in Banc of America Capital Management receiving management fees for mutual funds included in the discretionary wrap fee accounts.

D. LEGAL DISCUSSION

A. Section 17(a) of the Securities Act

Section 17(a)(2) of the Securities Act prohibits any person from obtaining money by means of an untrue statement or material omission in the offer or sale of securities.

Section 17(a)(3) prohibits any transaction, practice or course of business which would operate as a fraud or deceit upon actual or potential purchasers. Violations of Sections 17(a)(2) and (3) do not require proof of scienter and can be proven by negligent conduct. Aaron v. SEC, 446 U.S. 680, 694 (1980).

In misrepresenting its research process and failing to disclose the conflicts of interest inherent in the selection of funds for its discretionary clients, Banc of America Investment Services violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

B. Section 206 of the Advisers Act

Section 206(2) of the Advisers Act prohibits an investment adviser from engaging in any transaction, practice or course of business that operates as a fraud on clients; Section 206(4) prohibits an investment adviser from engaging in any act, practice or course of business which is fraudulent, deceptive, or manipulative under Rules promulgated by the Commission. Rule 206(4)-1(a)(5), promulgated pursuant to Section 206(4), prohibits an investment adviser from publishing, circulating or distributing any advertisement that "contains any untrue statement of a material fact, or which is otherwise false or misleading."

Sections 206(2) and (4) establish a fiduciary duty for investment advisers to act for the benefit of their clients. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979). This fiduciary duty precludes the adviser from any undisclosed use of its clients' assets to benefit itself. Kingsley, Jennison McNulty & Morse Inc., Advisers Act Rel. No. 1396, 55 SEC Docket 2434, 2438 (Dec. 23, 1993). Further, an investment adviser has a duty to disclose to clients all material information which might incline an investment adviser consciously or unconsciously to render advice which is not disinterested. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92 (1963). As a fiduciary, an investment adviser has a duty to disclose to clients "all material information which is intended 'to eliminate, or at least expose,' all potential or actual conflicts of interest 'which might incline an investment adviser consciously or unconsciously - to render advice which is not disinterested.'" 1986 Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Rel. No. 23170 (April 23, 1986), 1986 SEC LEXIS 1689 (quoting Capital Gains Research, 375 U.S. at 191-92); Kingsley, 1991 SEC LEXIS 2587 at 38. Proof of scienter is not required to establish a violation of Section 206(2). Capital Gains, 375 U.S. at 195. Nor is proof of scienter necessary to prove a violation of Section 206(4). SEC v. Steadman, 967 F.2d 636, 647 (D.C. Cir. 1992).

Banc of America Investment Services violated Section 206(2) of the Advisers Act by misrepresenting to clients that funds in the model portfolios would be chosen according to the approved research process. Banc of America Investment Services also violated Section 206(2) by failing to disclose the conflict of interests in its selection of affiliated funds for inclusion in the model portfolios. As an investment adviser, Banc of America Investment Services owed a fiduciary duty to its discretionary mutual fund wrap fee clients to disclose all material facts, including all situations involving an actual or

potential conflict of interests with a client. Contrary to its fiduciary duties, Banc of America Investment Services placed its and Banc of America Capital Management's pecuniary interests ahead of its clients' interests. In doing so, Banc of America Investment Services violated Section 206(2) of the Advisers Act.

Because Banc of America Investment Services made these material misrepresentations and omissions in advertising and promotional materials for the mutual fund wrap fee programs and because those advertisements and promotional materials were distributed to clients and prospective clients, Banc of America Investment Services violated Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, which prohibits an investment adviser from publishing, circulating, or distributing any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading.

C. Section 207 of the Advisers Act

Section 207 of the Advisers Act 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 required to be stated therein. A person violates Section 207 by filing a false Form ADV, including any amended Forms ADV. In re: Stanley Peter Kerry, Advisers Act Rel. No. 1550, 61 SEC Docket 431 (Jan. 25, 1996). Violations of Section 207 do not require a showing of scienter. In re: Parnassus Investments, Inc., Initial Dec. Rel. No. 131, 67 SEC Docket 2760, 2784 (Sept. 3, 1998). Under Section 207 of the Advisers Act, an investment adviser has a duty to file Forms ADV that are not false or misleading and that do not omit to state material facts required to be stated therein. See In re: S Squared Tech. Corp., Advisers Act Rel. No. 1575, 62 SEC Docket 1560, 1567 (Aug. 7, 1996). Form ADV embodies mandatory disclosure requirements to ensure that material information regarding the method for selecting securities for clients is disclosed to investors. See Investment Adviser Requirements Concerning Disclosure, Recordkeeping, Applications for Registration and Annual Filings, Advisers Act Rel. No. 664, 16 SEC Docket 901 (Jan. 30, 1979).

Banc of America Investment Services made untrue statements of material fact in Part II of its Form ADV. Part II of Form ADV is deemed filed with the Commission pursuant to Section 204 of the Advisers Act and Rule 204-1(c) thereunder.

E. FINDINGS

As a result of the conduct described above, Banc of America Investment Services willfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act, Sections 206(2), 206(4), and 207 of the Advisers Act, and Advisers Act Rule 206(4)-1(a)(5).

As a result of the conduct described above, Columbia Management Advisors, as successor in interest to Banc of America Capital Management, willfully aided and abetted

and caused Banc of America Investment Services' violations of Sections 206(2) and 206(4) of the Advisers Act, and Advisers Act Rule 206(4)-1(a)(5).

F. UNDERTAKINGS

Respondents have undertaken as follows:

1. Banc of America Investment Services shall place and maintain on its website within 15 days of the date of entry of the Order disclosures respecting the manner of selecting funds for any discretionary program and identifying any funds affiliated with Banc of America Investment Services or Columbia Management Advisors, as successor in interest to Banc of America Capital Management, that are included in the program and the aggregate percentage of affiliated funds included in such program. Banc of America Investment Services shall make this information available via a hyperlink on the home page of its website for at least 18 months from the date the information is first made available.

2. Banc of America Investment Services shall place on its website, within 15 days of the date of entry of this Order, a summary of the Order in a form not unacceptable to the Commission's staff with a hyperlink to the Order. Banc of America Investment Services shall maintain the summary and hyperlink on its website for at least 18 months after its initial posting.

3. In a periodic statement or report sent to each discretionary mutual fund wrap fee client on at least a quarterly basis, Banc of America Investment Services shall specifically identify all funds or fund families advised by any affiliate of Banc of America Investment Services. Such disclosure shall continue for at least 18 months from the date of the statement in which it is first included and be in type no smaller than the type used for the listing of any transactions reported or assets held in the periodic report or statement.

4. Banc of America Investment Services shall conduct a comprehensive review of: (i) whether the method of selecting mutual funds to be included in any discretionary program advised by Banc of America Investment Services is adequately disclosed; (ii) the adequacy of disclosures respecting any discretionary program advised by Banc of America Investment Services; and (iii) the adequacy of the policies and procedures respecting Banc of America Investment Services' recommendations to mutual fund wrap fee account clients. That review shall be completed within 90 days after the entry of this Order. Upon completion of the review, Banc of America Investment Services shall forward to the staff of the Commission a complete description of the items listed above, a description of any deficiencies found during the review, and the manner in which it plans to remediate any deficiencies. Within 120 days after the entry of this Order, Banc of America Investment Services shall implement remedial actions to address any deficiencies found in its review.

5. Banc of America Investment Services shall be responsible for distributing the sums ordered as disgorgement in Paragraphs IV.D. and IV.F, plus interest and the full amount of the penalties ordered in Paragraphs IV.E. and IV.G. Banc of America Investment Services shall pay to clients and former clients who participated in its discretionary mutual fund wrap fee program the Disgorgement Amount of $5,453,479, prejudgment interest of $1,310,155, plus the penalty amounts of $3,000,000, proportionally to the amount and length of time each client had invested in the Nations Funds Large Cap Value and Nations Small Company Funds between July 1, 2002 and December 31, 2004; however, Banc of America Investment Services shall not be required to make any disbursement to any client or former client if that client is due less than $100 pursuant to the method outlined above. If Banc of America Investment Services is unable to pay any client due to factors beyond its control, any portion of the disgorgement, prejudgment interest, and penalties, and any sums that are not paid to any client or former client who is due less than $100, such remaining sums shall be paid to the United States Treasury within 120 days of the date on which Banc of America Investment Services initially sends payment to such client. 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 Banc of America Investment Services 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 Kenneth Lench, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, DC 20549.

6. Banc of America Investment Services shall retain the services of and be exclusively responsible for the compensation and expenses of an independent third party not unacceptable to the Commission's staff who shall, within 120 days of the date of entry of this Order, submit for the Commission's review an accounting and certification of the disposition of the moneys paid pursuant to this Order. Banc of America Investment Services and Columbia Management Advisors shall cooperate with reasonable requests for information in connection with the accounting and certification. The accounting and certification shall be in a form not unacceptable to Commission's staff, and shall include: (a) each payee's name and address; (b) the amount paid to each payee; (c) the date of each payment; (d) the check number or other identifier of money transferred; (e) the date and amount of any returned payment; (f) a description of any effort to locate a prospective payee whose payment was returned, or to whom payment was not made due to an inability to locate that prospective payment; (g) the amounts paid to the Commission pursuant to Section III.F. above with respect to any prospective payees who Banc of America Investment Services and Columbia Management Advisors are not able to locate, or who would be entitled to less than $100 under the method set forth in Paragraph III.F.5., above; and (h) a final statement totaling all payments, which shall agree with the amounts ordered under Sections IV.D., E., F. and G. above. Any and all supporting documentation for the accounting and certification shall be provided to the Commission's staff upon request.

7. No later than 21 months after the date of entry of the Order, Respondent Banc of America Investment Services' chief executive officer shall certify to the Commission in writing that Banc of America Investment Services has fully adopted and complied in all material respects with the undertakings set forth in this section and, in the event of material non-compliance, shall describe such material non-compliance.

8. Respondent Banc of America Investment Services shall preserve for a period not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of Respondent's compliance with the undertakings set forth herein.

For good cause shown, the Commission's staff may extend any of the procedural dates set forth above.

IV.

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

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

A. Respondent Banc of America Investment Services, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and Section 203(k) of the Advisers Act, 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, Sections 206(2), 206(4), and 207 of the Advisers Act, and Rule 206(4)-1(a)(5) promulgated thereunder.

B. Respondent Columbia Management Advisors, as successor in interest to Banc of America Capital Management, LLC, pursuant to Section 203(k) of the Advisers Act, cease and desist from committing or causing any violations and any future violations of Section 206(2) and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder.

C. Respondents are censured pursuant to Section 203(e) of the Advisers Act and Banc of America Investment Services is also censured pursuant to Section 15(b)(4) of the Exchange Act.

D. Respondent Banc of America Investment Services shall, within 90 days of the entry of this Order, and pursuant to Section 21B of the Securities Act, Section 9(e) of the Company Act, and Section 203(j) of the Advisers Act, pay disgorgement in the total amount of $3,310,206 and prejudgment interest of $793,773, consistent with the provisions of Paragraph III.F.5., above.

E. Respondent Banc of America Investment Services, within 90 days of the entry of this Order, and pursuant to Section 15(b)(4) and Section 21B of the Exchange Act, Section 9(d) of the Company Act and Section 203(i) of the Advisers Act, shall pay a civil monetary penalty of $2,000,000, in accordance with the provisions of Paragraph III.F.5., above.

F. Respondent Columbia Management Advisors, as successor in interest to Banc of America Capital Management, LLC, within 90 days of the entry of this Order, and pursuant to Section 9(e) of the Company Act and Section 203(j) of the Advisers Act, shall pay disgorgement of $2,143,273, and prejudgment interest of $516,382, consistent with the provisions of Paragraph III.F.5. above.

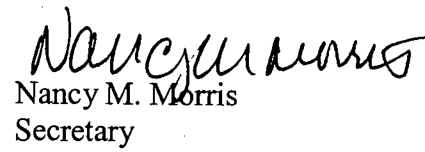
G. Respondent Columbia Management Advisors, as successor in interest to Banc of America Capital Management, LLC, within 90 days of the entry of this Order, and pursuant to Section 9(d) of the Company Act and Section 203(i) of the Advisers Act, shall pay a civil monetary penalty of $1,000,000 in accordance with the provisions of Paragraph III.F.5., above.

H. Respondents shall comply with the undertakings contained in Section III., F, above.

I. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as Penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that they shall not, after offset or reduction in any Related Investor Action based upon Respondents' payment of disgorgement in this action, argue that it is entitled to, nor shall they further benefit by offset or reduction of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents, and each of them, agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For the purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents, or either of them, by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

J. There shall be, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund established for the penalty funds described in subparagraphs D, E, F, and G above.

By the Commission.



Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57755 / May 1, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13032

In the Matter of A. CARLOS MARTINEZ Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER AND A PENALTY PURSUANT TO SECTIONS 15(b), 21B and 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

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

II.

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

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III.

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

A. Respondent

A. Carlos Martinez, 41, has served as Chanin Capital Partners LLC's Chief Financial Officer since, approximately, late 1997. Starting on or about the time he was hired, and at all times relevant hereto, Martinez also functioned as the compliance officer for Chanin, and was solely responsible for implementing and enforcing compliance and insider trading policies for both Chanin and Chanin & Co.

B. Related Party

Chanin Capital LLC ("Chanin") was a broker-dealer registered with the Commission during the relevant period that serviced clients of Chanin & Co LLC ("Chanin & Co."), an investment bank headquartered in Los Angeles, California, with offices in New York and London. Chanin Capital Partners LLC was the holding company for Chanin and Chanin & Co. Throughout the relevant period, Chanin & Co. employed, approximately, thirty-five to sixty employees, some of whom also were registered representatives licensed to conduct securities transactions through Chanin. On November 1, 2006, Chanin Capital Partners LLC announced that it had been acquired by Duff & Phelps, a financial advisory firm, which indicated that Chanin Capital Partners LLC would continue to operate as a business unit of Duff & Phelps. In connection with the acquisition, Chanin ceased functioning as a broker-dealer on or about October 31, 2006. Also in connection with the acquisition, Chanin deregistered as a broker-dealer effective April 1, 2007.

C. Summary

This matter concerns the failure to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information at Chanin in violation of Section 15(f) of the Exchange Act. Between January 1999 and September 15, 2003, Chanin had certain written policies and procedures designed to prevent the misuse of material nonpublic information, including a written insider trading policy requiring employee acknowledgement, an employee handbook with a section that proscribed insider trading that also required employee acknowledgement, and a requirement that employees disclose in writing, and receive prior approval for stock purchases and sales. Despite the legal requirement to do so, between 1999 and September 15, 2003, Chanin, through Martinez, did not enforce these written policies. In addition, Chanin failed to maintain a watch list or a restricted list of companies about which Chanin was in possession of material nonpublic information.[1]

In September 2003, Chanin revised its written policies and procedures. In addition to retaining the policies described above, Chanin added a training program for its employees and

[1] Generally, a "watch list" is a list of securities in which employees or associated persons of company may trade in only with approval; a "restricted list" is a list of securities in which employees or associated persons may not trade.

Notwithstanding its much improved adherence to its own policies and procedures after September 15, 2003, Chanin continued to lack policies and procedures reasonably designed to address the continued maintenance and enforcement of its new compliance program. For example, neither of Chanin's two principals signed an acknowledgment of the firm's insider trading policy when it was revised in 2003, although both were subject to the firm's policies. Ultimately, one of Chanin's principals signed the policy nearly a year after its enactment, in August 2004, and the other nearly two years later, in July 2005. Chanin had no policy or procedure in place for continued training of its personnel on its insider trading policies or procedures. Moreover, while the firm's policy required employees and associated persons to identify securities trading accounts and provide copies of account statements to the firm, there was no policy or procedure addressing securities trading accounts opened after employees and associated persons made their initial certification.

E. Legal Discussion

Section 15(f) of the Exchange Act requires brokers and dealers registered with the Commission to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse, in violation of the Exchange Act and the rules and regulations thereunder, of material nonpublic information by such broker or dealer or any person associated with such broker or dealer. Under Section 3(a)(18) of the Exchange Act, a "person associated with a broker or dealer" includes any person "directly or indirectly . . . controlled by, or under common control with such broker or dealer" other than persons whose functions are solely ministerial or clerical.

Section 15(f) was enacted as part of the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"). Since 1988, the Commission has made clear in a series of enforcement actions that compliance with Section 15(f) is important, and that broker-dealers must take seriously their responsibilities not only to establish, but to maintain and enforce, sufficiently robust policies and procedures to prevent the misuse of material nonpublic information.[4] The requirement that a broker or dealer implement and maintain policies and procedures consistent with the nature of its business "is critical to effectively preventing the misuse of material, nonpublic information." *In re Gabelli & Co., Inc.*, Exch. Act Rel. No. 35057, 1994 SEC LEXIS 3744 at *11 (Dec. 8, 1994). Where brokers and dealers have failed to establish policies and procedures pursuant to the requirements of Section 15(f), the Commission has repeatedly issued sanctions. *See, e.g., In re Morgan Stanley & Co.,* Exch. Act Rel. No. 54047, SEC LEXIS 1465 (Jun. 27, 2006); *In re*

[4] Following the enactment of ITSFEA, the Division of Market Regulation issued a report in 1990 detailing, among other things, what it viewed as "minimum standards" for compliance with Section 15(f) that included "maintenance of watch lists and restricted lists . . . and the concomitant review of employee and proprietary trading." *Broker-Dealer Policies and Procedures Designed to Segment the Flow and Prevent the Misuse of Material Nonpublic Information* (Div. of Market Regulation, March 1990) ("Market Regulation Report") at 20. Following the issuance of the Market Regulation Report, the National Association of Securities Dealers, the New York Stock Exchange, and a committee of the Securities Industry Association issued a joint memorandum explaining their view of the "minimum elements" of adequate "Chinese Wall" policies and procedures. *NASD/NYSE Joint Memo*, 1991 WL 1124794 (July 1991). The memo states, among other things, that a "firm must reasonably inquire into or investigate for possible misuse of material, non-public information transactions by any employee or the firm's proprietary accounts, particularly those transactions in restricted list or watch list securities." *Id.* at *3.

Goldman Sachs & Co., Exch. Act Rel. No. 48436, SEC LEXIS 2100 (Sept. 4, 2003); *In re Gintel Asset Management, Inc.*, Inv. Adv. Act of 1940 Rel. No. 2079, SEC LEXIS 2868 (Nov. 8, 2002); *In re Guy P. Wyser-Pratte*, Exch. Act Rel. No. 44283, SEC LEXIS 885 (May 9, 2001); *In re Certain Market Making Activities on NASDAQ*, Exch. Act Rel. No. 40910, SEC LEXIS 59 (Jan. 11, 1999), *In re Fox-Pitt Kelton, Inc.*, Exch. Act Rel. No. 37940, SEC LEXIS 3219 (Nov. 12, 1996).

As described above, Chanin failed to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of Chanin's business, to prevent misuse, in violation of the federal securities laws, of material nonpublic information by Chanin or by persons associated with Chanin. For example, although Chanin had written policies in place from 1999 through September 15, 2003, requiring that its employees and associated persons read and acknowledge receipt of the firm's policies, and requiring its employees and associated persons to pre-clear and create a written record of their trading activities, Chanin failed to maintain and enforce those policies with respect to its personnel and associated persons. Chanin's failure to adhere to its own policies occurred for over four years notwithstanding Martinez's explicit recognition of Chanin's compliance obligations. Moreover during that time period, Chanin maintained no watch list or restricted list. While Chanin subsequently improved its enforcement of its written policies and added new policies, including what it called a restricted list after September 15, 2003, Chanin's efforts continued to be inadequate to address whether its policies and procedures were maintained and enforced. As discussed above, Chanin did not address whether all employees received its mandatory training and it did not address whether all persons subject to the requirement to acknowledge its insider trading policies did so. Chanin also did not have in place any method to obtain updated information regarding the existence of securities trading accounts of employees or associated persons following an individual's initial identification of trading accounts for monitoring. Taking into consideration Chanin's failure to implement, maintain or enforce its own written policies and procedures designed to prevent the misuse of material nonpublic information prior to September 15, 2003, including its failure to have a watch list or restricted list, and Chanin's failure to adequately implement, maintain or enforce such policies after September 15, 2003, Chanin violated Section 15(f) of the Exchange Act.

As a result of the conduct described above, Martinez willfully aided and abetted and caused Chanin's violation of Section 15(f) of the Exchange Act.[5] Martinez was charged with the responsibility to enforce and maintain Chanin's policies and procedures to prevent the misuse of material nonpublic information. By failing to do so, Martinez willfully aided and abetted and caused Chanin's failure to implement, maintain or enforce its own written policies and procedures prior to September 15, 2003, and its failure to adequately implement, maintain or enforce its policies and procedures after September 15, 2003. Accordingly, Martinez willfully aided and abetted and caused Chanin's violation of Section 15(f) of the Exchange Act.

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[5] "Willfully" as used in this Order means intentionally committing the act which constitutes the violation. *See Wonsover v. SEC*, 20 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965).

IV.

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

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

A. Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Martinez be, and hereby is, censured;

B. Pursuant to Section 21B of the Exchange Act, within 10 days of the entry of this Order, Respondent Martinez shall pay 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 Martinez as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Christopher Conte, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-4631; and

C. Pursuant to Section 21C of the Exchange Act, Respondent Martinez shall cease and desist from causing any violations and any future violations of Section 15(f) of the Exchange Act.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57756 / May 1, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2823 / May 1, 2008

ADMINISTRATIVE PROCEEDING
FILE NO. 3-13033

In the Matter of **SAVVIDES & PARTNERS/PKF CYPRUS** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be instituted against Respondent Savvides & Partners/PKF Cyprus ("PKF Cyprus" or "Respondent") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, prior to a hearing pursuant to the Commission's Rules of Practice, 17 C.F.R. § 201.1 *et seq.*, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them, the subject matter of these

[1] Rule 102(e)(3)(i) provides, in pertinent part, that: The Commission, with due regard to the public interest and without preliminary hearing, may, by order, ... suspend from appearing or practicing before it any ... accountant ... who has been by name ... permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

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proceedings, and the findings contained in Section III subsection (2) below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. PKF Cyprus is a Limassol, Cyprus accounting firm operating in the form of a partnership. The firm's primary address is Meliza Court, 229, Arch. Makarios III Avenue, Limassol, Cyprus. PKF Cyprus is a member of PKF International Ltd., a network of independent firms of accountants and business advisors with more than 430 offices and 12,800 staff and partners in more than 100 countries.

2. On March 21, 2006, the Commission filed a complaint against Respondent in *SEC v. Savvides & Partners/PKF Cyprus, et al.* Civil Action No. 06 CV 2223 (S.D.N.Y.) naming Savvides & Partners/PKF Cyprus, Pavlos Meletiou ("Meletiou"), R.K. Dhawan and Co., and R.K. Dhawan as defendants. On March 7, 2008, Respondent, without admitting or denying the allegations in the complaint, consented to the entry of a final judgment against it, permanently enjoining it from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5 and from aiding and abetting future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, and Exchange Act Rules 12b-20, 13a-1 and 13b2-1. On April 29, 2008, the Court entered the aforementioned permanent injunction. The final judgment also orders PKF Cyprus to pay total disgorgement of $155,052 (including prejudgment interest of $48,539), and to pay a $106,513 civil penalty.

3. The Commission's complaint alleged, among other things, that PKF Cyprus issued unqualified audit reports for one AremisSoft Corporation ("AremisSoft") subsidiary in 1999 and two AremisSoft subsidiaries in 2000 that falsely stated that its audits were conducted in accordance with U.S. Generally Accepted Auditing Standards ("GAAS") and that the AremisSoft subsidiaries' financial statements were fairly presented in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"). The complaint further alleged that Meletiou was a partner of PKF Cyprus while AremisSoft was a public company, that he was responsible for the audits and reviews conducted by PKF Cyprus of the three AremisSoft subsidiaries, and that he had no training or experience in GAAS or GAAP.

4. The complaint also alleged that PKF Cyprus failed to meet numerous GAAS requirements in that Meletiou: (a) did not obtain sufficient competent evidential matter to afford a reasonable basis for an opinion regarding the financial statements under audit; (b) did not exercise due professional care in the performance of the audits and the preparation of the audit reports; (c) did not have adequate technical training and proficiency with respect to GAAS and GAAP; (d) did not consider the risk of misstatement arising from fraudulent financial reporting during the planning of the audits

and the performance of substantive audit procedures; and (e) did not obtain a sufficient understanding of the internal controls of the two AremisSoft subsidiaries that PKF audited in 2000 to plan the audit.

5. The complaint further alleged that Meletiou knew or was reckless in not knowing that the statements in PKF Cyprus' 2000 audit reports of two AremisSoft subsidiaries were materially false and misleading. The complaint also alleged that the false financial statements of the two AremisSoft subsidiaries were included in AremisSoft's consolidated financial statements for 2000, AremisSoft's 2000 Form 10-K, and in AremisSoft's registration statements that incorporated the financial information.

6. In addition, the complaint alleged that PKF Cyprus issued an unqualified audit report on an AremisSoft subsidiary covering the period 1997 through 1999 that stated PKF Cyprus had conducted its audit in accordance with GAAS and that the subsidiary's financial statements presented the subsidiary's consolidated financial position fairly, in conformity with GAAP. The complaint also alleged that the PKF Cyprus audit report was included in AremisSoft's 1999 Annual Report on Form 10-K filed with the Commission. The complaint further alleged that contrary to the representations in PKF Cyprus' audit report, the subsidiary's financial statements did not conform to GAAP and the audit was not conducted in accordance with GAAS in effect at the time of the audit. The complaint also alleged that, among other things, the PKF Cyprus audit report stated that the subsidiary had more than three million dollars of revenues in 1999, when in fact the company had virtually no assets, business, revenues, or income and, according to its own corporate records, had not even begun business operations as of March 31, 2000.

7. The complaint also alleged that the PKF Cyprus audit workpapers prepared by Meletiou during the 2000 audits of two AremisSoft subsidiaries, which were found in a trash heap outside AremisSoft's Indian offices, included phony customer and bank confirmations.

IV.

UNDERTAKINGS BY PKF CYPRUS

PKF Cyprus undertakes to:

1. maintain for a period of not less than seven years, all audit work papers and other information with respect to any issuer[2] audit report filed with the Commission prior to the date of this Order;

2. produce to the SEC within 10 days upon request all audit or review documentation associated in any way with any issuer audit report filed with the Commission prior to the date of this Order; and

[2] As used in this order, the term "issuer" has the same meaning as in Section 2(a)(7) of the Sarbanes-Oxley Act of 2002.

3. obtain an independent partner review on any future engagements associated in any way with any issuer audit report.

In determining whether to accept PKF Cyprus' Offer, the Commission has considered these undertakings.

V.

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

Accordingly, IT IS HEREBY ORDERED, effective immediately, that:

A. PKF Cyprus is censured pursuant to Rule 102(e) of the Commission's Rules of Practice.

B. PKF Cyprus is suspended from appearing or practicing before the Commission as an accountant.

C. After five years from the date of this order, Respondent PKF Cyprus may request that the Commission consider its reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as an independent accountant. Such an application must satisfy the Commission that:

1. Respondent PKF Cyprus is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective. However, if registration with the Board is dependant upon reinstatement by the Commission, the Commission will consider an application on its other merits;

2. Respondent PKF Cyprus has hired an independent CPA consultant ("consultant"), who is not unacceptable to the staff of the Commission and is affiliated with a public accounting firm registered with the Board, that has conducted a review of PKF Cyprus's quality control system and submitted to the staff of the Commission a report that describes the review conducted and procedures performed, and represents that the review did not identify any criticisms of or potential defects in the firm's quality control system that would indicate that any of PKF Cyprus' employees will not receive appropriate supervision. PKF Cyprus agrees to require the consultant, if and when retained, to enter into an agreement that provides that for the period of review and for a period of two years from completion of the review, the consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with PKF Cyprus, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the consultant in performance of his/her duties under this Order shall not, without prior written consent of the staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with PKF Cyprus, or any of its present or former affiliates,

directors, officers, employees, or agents acting in their capacity as such for the period of the review and for a period of two years after the review.

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

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

D. The Commission will consider an application by Respondent PKF Cyprus to resume appearing or practicing before the Commission provided that its licenses with the Institute of Certified Public Accountants of Cyprus ("ICPAC") or the successor regulatory organization are current and it has resolved any disciplinary issues with ICPAC. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57754 / May 1, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2821 / May 1, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13031

In the Matter of UTStarcom, Inc., Hong Liang Lu and Michael J. Sophie, Respondents.	ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against UTStarcom, Inc. ("UTSI"), Hong Liang Lu ("Lu") and Michael J. Sophie ("Sophie") (collectively "Respondents").

II.

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

III.

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

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Summary

1. This matter involves recurring internal control deficiencies and inaccurate financial filings by UTSI, a publicly-traded telecommunications company that has restated its financial statements three times since 2005 to correct multiple accounting irregularities. Since 2000, UTSI has improperly recognized revenue on transactions subject to undisclosed side agreements, failed to properly disclose and account for related party transactions, and failed to properly record compensation expenses related to employee stock options. Despite being put on notice of potential accounting issues by, among other things, material weakness letters sent by the company's outside auditors, CEO Hong Liang Lu and former CFO Michael J. Sophie failed to implement and maintain adequate internal controls and falsely certified that UTSI's financial statements and books and records were accurate.

Respondents

2. UTSI, a Delaware corporation with headquarters in Alameda, California, is a telecommunications company that sells software and hardware products in emerging and established telecommunications markets around the world. The majority of UTSI's operations are in Hangzhou, China and overseas. UTSI went public in 2000, and its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the NASDAQ Global Select Market under the symbol UTSI.

3. Lu, 53, is a co-founder of UTSI and has served as a board member and Chief Executive Officer since 1995. Lu resides in San Ramon, California and Hangzhou, China.

4. Sophie, 50, was UTSI's Chief Financial Officer from 2000 through August 2005 and UTSI's Chief Operating Officer from June 2005 through May 2006. Sophie resides in Pleasanton, California.

Facts

Background

5. Historically, China has been UTSI's largest market. Between 1995 and 2002, nearly all of UTSI's revenue derived from sales by UTSI's subsidiary in China ("UT-China"). By late 2002, UTSI's business plan was expanded to include growth on an international scale. UTSI defines "international" sales as all sales outside of China, including sales in the U.S., Japan, India, and other overseas markets. In 2003 and 2004, sales in China accounted for 86% and 79% of UTSI's revenue, respectively. By 2006, sales in China accounted for 32% of UTSI's revenue. The finance department at UT-China handled the accounting for all transactions in China, and UTSI's finance department in the U.S. handled the accounting for all international transactions.

6. In March 2003, UTSI received a Management Recommendation letter from its auditors detailing internal control weaknesses identified during the December 31, 2002 year-end audit. The letter was addressed to the audit committee and copied to Lu and Sophie. Among other things, the letter specifically noted that UTSI should "strengthen procedures to ensure side letters and contract amendments are communicated and accounted for in a timely manner." In its

written response to the auditor's letter, UTSI said it had implemented the necessary controls to track and monitor side letters and non-routine transactions. UTSI sometimes used letter agreements, or side letters, to supplement or amend contractual terms. Such letters were allowed so long as the accounting for them was done properly.

7. UTSI received another Management Recommendation letter from its auditors in April 2004 detailing multiple internal control weaknesses (many classified as material) identified during the December 31, 2003 year-end audit. The letter was copied to Lu and Sophie, and again noted concerns about the use of side letters that were not forwarded to the finance department. The auditors also expressed concerns with many complex related-party transactions entered into by UTSI. The auditors informed UTSI that the company did not adequately disclose significant transactions involving joint venture arrangements between UTSI and its customers. In its written response, UTSI said it had strengthened controls to identify side letters and implemented monitoring procedures to identify significant joint venture transactions.

8. UTSI also received management recommendation letters from its auditors noting multiple material weaknesses in connection with the 2004 and 2005 year-end audits.

UTSI Prematurely Recognized Revenue From International Sales Subject To Undisclosed Side Agreements

9. Between 2003 and 2005, UTSI prematurely recognized nearly $50 million in net revenue from international sales, all of which occurred outside the U.S., which were subject to side agreements that had been concealed from the company's finance personnel. Because these agreements promised future performance by UTSI, revenue should not have been recognized under Generally Accepted Accounting Principles ("GAAP").

10. Among other contingent transactions, UTSI improperly recognized revenue from the sale of a $22 million network system to a purchaser in India. At the time of the sale, securities analysts had expressed concerns about UTSI's ability to enter markets outside China, and Lu specifically highlighted this deal as indicative of UTSI's success in gaining traction in India.

11. UTSI delivered the system and recognized revenue from the $22 million sale in phases over several quarters, including the second quarter of 2004 and the second quarter of 2005. Before recognizing the revenue, UTSI's finance department required the purchaser to sign a final acceptance certificate certifying that all elements of the phase had been delivered and successfully installed.

12. During the second quarter of 2004, the purchaser sent UTSI the final acceptance certificate, but included a proposed side agreement requiring UTSI to upgrade the system after the end of the quarter. Lu and Sophie were aware of the proposed side agreement. UTSI's revenue recognition manager, with the knowledge of Lu and Sophie, specifically admonished that approving the side agreement would prevent revenue recognition. Lu personally communicated with the customer to request that they accept the products without a side agreement.

13. Notwithstanding these directions, a UTSI sales executive signed a side agreement with the purchaser, but failed to adequately disclose the agreement to finance personnel, resulting in the improper recognition of revenue by the company. Lu and Sophie failed to take adequate steps to determine how the customer's request for a side agreement had been resolved and whether revenue recognition was appropriate.

14. During the second quarter of 2005, UTSI recognized additional revenue from the India sale. Once again, a UTSI sales executive had signed a side letter making the customer's acceptance contingent on future upgrades (and thus rendering revenue recognition improper under GAAP). Lu and Sophie were aware the customer had made such a request, but received a communication from finance personnel that the final acceptance certificates received from the customer were acceptable. Neither Lu nor Sophie took steps to determine how the issue was resolved and whether revenue was properly recognized.

15. In addition to the India transaction, UTSI entered into five other international sales transactions totaling $27.5 million in net revenue where side agreements had been entered into promising future products or services. These side agreements should have precluded revenue recognition. On June 26, 2006, UTSI restated its financial statements for the period between Q1 2003 through Q3 2005, reversing $49.5 million in net revenue that had been improperly recognized by the company.

UTSI Prematurely Recognized Revenue On Sales In China With Undisclosed Contract Modifications

16. Between 2000 and 2005, UTSI prematurely recognized over $350 million in revenue from 78 sales transactions in China. On some occasions, UTSI sales personnel entered into contracts that contained non-standard product upgrade provisions precluding revenue recognition. In some instances, sales personnel documented the sales on two separate contracts, and only the company's standard contract (without the upgrade provisions) was made available to UTSI's finance personnel. As a result, UTSI repeatedly recognized revenue for contingent sales in violation of GAAP.

17. Lu and Sophie had been on notice since at least 2003 of significant internal control weaknesses in China, including the fact that in some instances side letters and contract amendments introducing revenue contingencies were not forwarded by sales offices to the contract and finance departments. Although Lu and Sophie took steps to improve internal controls in response to this information, neither those steps nor the resulting controls were sufficient to detect the improper dual contract practices and failed to prevent certain improprieties.

18. On October 10, 2007, UTSI restated its financial statements from 2000 through the second quarter of 2006 to reverse $271 million in net revenue improperly recognized by the company.

UTSI Failed to Disclose and Properly Account for Related Party Transactions

19. In 2001, a China-based company called MDC was formed in order to provide value-added services to UTSI products. The father of UT-China's Executive Vice President

founded MDC; the UT-China executive served as the "alternate" chairman of MDC's board of directors. Numerous officers and other employees of UT-China invested in MDC, and certain UT-China employees worked for MDC while their salaries were paid by UT-China.

20. In 2003, UT-China entered into a complex transaction involving MDC and another customer in China, whereby MDC took ownership of UTSI inventory that had decreased in value. Because UTSI failed properly to treat MDC as a consolidated entity, no impairment of the inventory value was recorded by UTSI at the time.

21. Lu and Sophie had been on notice of concerns raised by the company's auditors about UTSI's failure to adequately disclose related party transactions entered into by UTSI. Although Lu and Sophie took steps to improve internal controls in response to this information, neither those steps nor the resulting controls were sufficient to detect the improper transaction with MDC and failed to prevent inaccurate reporting of certain related party transactions.

22. On April 13, 2005, UTSI restated its 2003 financial statements in part to consolidate MDC, as MDC was deemed a related party controlled by UTSI. The restatement resulted in the write down of $7.5 million in UTSI inventory held by MDC.

UTSI Failed Properly to Account for Stock Compensation Expenses

23. UTSI failed properly to account for certain stock option grants because the company used incorrect grant dates for determining compensation expenses. Under GAAP, UTSI was required to record an expense on its financial statements for any stock options granted "in-the-money" – i.e. where the exercise price of the option was less than the market price for the security on the date the option was granted.

24. Certain grants to UTSI officers were backdated or accounted for with incorrect grant dates prior to the proper authorization of the grant by the company's Compensation Committee. This resulted in an exercise price below market price on the date of the grant, yet no expense was recorded by the company.

25. UTSI failed to establish and implement adequate internal controls for the granting of employee stock options. Among other things, UTSI failed to maintain necessary documentation showing when the grants were actually authorized by the Compensation Committee.

26. On October 10, 2007, UTSI restated its financial statements from 1998 through the second quarter of 2006 to recognize an additional $27 million in compensation expenses related to employee stock options.

Respondents Lu And Sophie Signed False Certifications Under Section 302 Of The Sarbanes-Oxley Act

27. Lu and Sophie, as UTSI's CEO and CFO, were required to sign certifications each fiscal quarter and fiscal year stating that, based on their knowledge, the company's quarterly and annual reports did not contain any misstatements or omit material information, that the reports disclosed all significant deficiencies in the design or operation of UTSI's internal controls, and

that the reports fairly presented in all material respects UTSI's financial condition and results of operations. Lu executed such certifications for the quarters and years from the first quarter of 2004 through the second quarter of 2006, and Sophie executed such certifications for the quarters and years from the first quarter of 2004 through the second quarter of 2005. For the reasons set forth above, these certifications were false.

Violations

28. As a result of the conduct described above, UTSI violated Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder by filing inaccurate periodic reports with the Commission, by failing to make and keep accurate books and records, and by failing to devise and maintain an adequate system of internal accounting controls. The company filed inaccurate periodic reports and failed to keep accurate books and records because the company improperly recorded revenue for transactions that involved side agreements with revenue contingencies and failed properly to account for related-party transactions and stock compensation expenses. In addition, UTSI failed to devise and maintain an effective system of internal controls relating to side agreements, related parties and stock option practices.

29. As a result of the conduct described above, Lu and Sophie caused UTSI's violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder insofar as they did not take steps adequate to ensure that UTSI filed accurate financial statements, made and kept accurate books and records, and implemented and maintained adequate internal controls. Also as a result of the conduct described above, Lu and Sophie violated Exchange Act Rule 13a-14 by falsely certifying that UTSI's periodic filings did not contain any material misstatements or omissions, disclosed all significant deficiencies in UTSI's internal controls, and fairly presented UTSI's financial condition and results of operations.

UTSI's Remedial Efforts

In determining to accept the Offer, the Commission considered remedial acts undertaken by UTSI.

IV.

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

Accordingly, it is hereby ORDERED that:

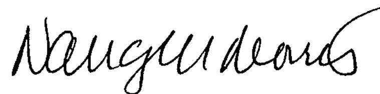
A. Respondent UTSI cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder;

B. Respondent Lu 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 13a-1

and 13a-13 thereunder, and from committing any violations and any future violations of Rule 13a-14 thereunder; and

C. Respondent Sophie 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 13a-1 and 13a-13 thereunder, and from committing any violations and any future violations of Rule 13a-14 thereunder.

By the Commission.



Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8914A / May 1, 2008

SECURITIES EXCHANGE ACT OF 1934
Release No. 57749A / May 1, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13030

In the Matter of BANC OF AMERICA INVESTMENT SERVICES, INC., AND COLUMBIA MANAGEMENT ADVISORS, LLC, as successor in interest to Banc of America Capital Management, LLC, Respondents.	CORRECTED ORDER UNDER SECTION 27(A)(b) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO BANC OF AMERICA INVESTMENT SERVICES, INC., COLUMBIA MANAGEMENT ADVISORS, LLC, AND THEIR AFFILIATES

Banc of America Investment Services, Inc. ("BAISI") and Columbia Management Advisors, LLC ("CMA")(collectively "Respondents") have submitted a letter on behalf of themselves and their affiliates, including Bank of America Corporation, dated March 20, 2008, for a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from their settlement of an administrative proceeding commenced by the Commission. On May 1, 2008, pursuant to Offers of Settlement by Respondents, the Commission issued an Order Instituting Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 9(b) of the Investment Company Act of 1940, and Sections 203(e) and (k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Orders, Penalties, and Other Relief against Respondents.

Under the Order, the Commission found that between July 2002 and December 2004, BAISI selected at least two affiliated funds ("Nations Funds") for inclusion in BAISI's wrap fee program using a methodology that favored Nations Funds and was inconsistent with the

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objective methodology previously disclosed to clients. The Commission further found that BAISI's affiliate, CMA, earned additional fees as a result because its management fees were based, in part, on Nations Funds' asset size. In the Order, the Commission ordered BAISI to pay disgorgement of $3,310,206, prejudgment interest of $793,773 and a civil monetary penalty of $2,000,000 and ordered CMA to pay disgorgement of $2,143,273, prejudgment interest of $516,382 and a civil monetary penalty of $1,000,000. Additionally, the Order requires that Respondents cease and desist from all of the alleged violations; a censure; and requires Respondents to comply with certain undertakings as to adoption of policies and procedures designed to prevent further violations.

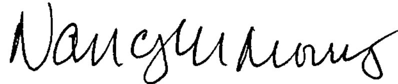
Among other things, the Order finds that BAISI violated Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 206(2) and 206(4) of the Investment Advisers Act of 1940 (and CMA aided and abetted BAISI's violations of Sections 206(2) and 206(4) of the Investment Advisers Act of 1940) in that BAISI made misrepresentations about the research process and failed to disclose conflicts of interest inherent in the selection of funds for BAISI's discretionary clients between July 2002 and December 2004. Under the terms of the Order, BAISI will pay disgorgement of $3,310,206, prejudgment interest of $793,773 and a civil monetary penalty of $2,000,000. CMA will pay disgorgement of $2,143,273, prejudgment interest of $516,382 and a civil monetary penalty of $1,000,000. Additionally, the Order includes a cease and desist with respect to all of the violations; a censure; and certain undertakings as to adoption of policies and procedures designed to prevent further violations.

The safe harbor provisions of Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward looking statement that is "made with respect to the business or operations of an issuer, if the issuer . . . during the 3-year period preceding the date on which the statement was first made . . . has been made the subject of an . . . administrative decree or order arising out of a governmental action that (I) prohibits future violations of the antifraud provisions of the federal securities laws; (II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or (III) determines that the issuer violated the antifraud provisions of the securities laws[.]" Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act. The disqualifications may be waived "to the extent otherwise specifically provided by rule, regulation, or order of the Commission." Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act.

Based on the representations set forth in Respondents' letter, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Order is appropriate and should be granted.

Accordingly, **IT IS ORDERED**, pursuant to Section 27A(b) of the Securities Act and Section 27E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to Respondents and their affiliates, including Bank of America Corporation, resulting from the entry of the Order is hereby granted.

By the Commission.



Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33-8916; 34-57766 / May 2, 2008]

Order Making Fiscal Year 2009 Annual Adjustments to the Fee Rates Applicable under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b), and 31(c) of the Securities Exchange Act of 1934

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 ("Securities Act") requires the Commission to collect fees from issuers on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.[3] Finally, Sections 31(b) and (c) of the Exchange Act require national securities exchanges and national securities associations, respectively, to pay fees to the Commission on transactions in specified securities.[4]

The Investor and Capital Markets Fee Relief Act ("Fee Relief Act")[5] amended Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act to require the Commission to make annual adjustments to the fee rates applicable under

[1] 15 U.S.C. 77f(b).

[2] 15 U.S.C. 78m(e).

[3] 15 U.S.C. 78n(g).

[4] 15 U.S.C. 78ee(b) and (c). In addition, Section 31(d) of the Exchange Act requires the Commission to collect assessments from national securities exchanges and national securities associations for round turn transactions on security futures. 15 U.S.C. 78ee(d).

[5] Pub. L. No. 107-123, 115 Stat. 2390 (2002).

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these sections for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates under these sections for fiscal year 2012 and beyond.[6]

II. Fiscal Year 2009 Annual Adjustment to the Fee Rates Applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act

Section 6(b)(5) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act in each of the fiscal years 2003 through 2011.[7] In those same fiscal years, Sections 13(e)(5) and 14(g)(5) of the Exchange Act require the Commission to adjust the fee rates under Sections 13(e) and 14(g) to a rate that is equal to the rate that is applicable under Section 6(b). In other words, the annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.

Section 6(b)(5) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2009. Specifically, the Commission must adjust the fee rate under Section 6(b) to a "rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2009], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target offsetting collection amount for [fiscal year 2009]." That is, the adjusted rate is

[6] See 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5), 78n(g)(6), 78ee(j)(1), and 78ee(j)(3). Section 31(j)(2) of the Exchange Act, 15 U.S.C. 78ee(j)(2), also requires the Commission, in specified circumstances, to make a mid-year adjustment to the fee rates under Sections 31(b) and (c) of the Exchange Act in fiscal years 2002 through 2011.

[7] The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the "target offsetting collection amount" specified in Section 6(b)(11)(A) for that fiscal year.

determined by dividing the "target offsetting collection amount" for fiscal year 2009 by the "baseline estimate of the aggregate maximum offering prices" for fiscal year 2009.

Section 6(b)(11)(A) specifies that the "target offsetting collection amount" for fiscal year 2009 is $284,000,000.[8] Section 6(b)(11)(B) defines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2009 as "the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2009] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget . . . ."

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2009, the Commission is using the same methodology it developed in consultation with the Congressional Budget Office ("CBO") and Office of Management and Budget ("OMB") to project aggregate offering price for purposes of the fiscal year 2008 annual adjustment. Using this methodology, the Commission determines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2009 to be $5,091,289,629,574.[9] Based on this estimate, the Commission calculates the fee rate for

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8 Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO's January 2001 projections of the aggregate maximum offering prices for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual adjustment mechanism will result in additional fee rate reductions if the CBO's January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too low, and fee rate increases if the CBO's January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too high.

9 Appendix A explains how we determined the "baseline estimate of the aggregate maximum offering price" for fiscal year 2009 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2009 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its "baseline estimate of the aggregate maximum offering price" for fiscal year 2009.

fiscal 2009 to be $55.80 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act.

III. Fiscal Year 2009 Annual Adjustment to the Fee Rates Applicable under Sections 31(b) and (c) of the Exchange Act

Section 31(b) of the Exchange Act requires each national securities exchange to pay the Commission a fee at a rate, as adjusted by our order pursuant to Section 31(j)(2),[10] which currently is $5.60 per million of the aggregate dollar amount of sales of specified securities transacted on the exchange. Similarly, Section 31(c) requires each national securities association to pay the Commission a fee at the same adjusted rate on the aggregate dollar amount of sales of specified securities transacted by or through any member of the association otherwise than on an exchange. Section 31(j)(1) requires the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011.[11]

Section 31(j)(1) specifies the method for determining the annual adjustment for fiscal year 2009. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for [fiscal year 2009], is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under

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10 Order Making Fiscal 2008 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934, Rel. No. 34-57407 (February 29, 2008), 73 FR 12228 (March 6, 2008).

11 The annual adjustments, as well as the mid-year adjustments required in specified circumstances under Section 31(j)(2) in fiscal years 2002 through 2011, are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section 31 equal to the "target offsetting collection amount" specified in Section 31(l)(1) for that fiscal year.

[Section 31(d)]) that are equal to the target offsetting collection amount for [fiscal year 2009]."

Section 31(l)(1) specifies that the "target offsetting collection amount" for fiscal year 2009 is $1,023,000,000.[12] Section 31(l)(2) defines the "baseline estimate of the aggregate dollar amount of sales" as "the baseline estimate of the aggregate dollar amount of sales of securities . . . to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during [fiscal year 2009] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget . . . ."

To make the baseline estimate of the aggregate dollar amount of sales for fiscal year 2009, the Commission is using the same methodology it developed in consultation with the CBO and OMB to project dollar volume for purposes of prior fee adjustments.[13] Using this methodology, the Commission calculates the baseline estimate of the aggregate dollar amount of sales for fiscal year 2009 to be $113,703,210,464,919. Based on this estimate, and an estimated collection of $18,755 in assessments on security

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12 Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO's January 2001 projections of dollar volume for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual and, in specified circumstances, mid-year adjustment mechanisms will result in additional fee rate reductions if the CBO's January 2001 projection of dollar volume for the fiscal year proves to be too low, and fee rate increases if the CBO's January 2001 projection of dollar volume for the fiscal year proves to be too high.

13 Appendix B explains how we determined the "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2009 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2009 annual adjustment based on that estimate. The appendix also includes the data used by the Commission in making its "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2009.

futures transactions under Section 31(d) in fiscal year 2009, the uniform adjusted rate for fiscal year 2009 is $9.30 per million.[14]

IV. Effective Dates of the Annual Adjustments

Section 6(b)(8)(A) of the Securities Act provides that the fiscal year 2009 annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act shall take effect on the later of October 1, 2008, or five days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted.[15] Sections 13(e)(8)(A) and 14(g)(8)(A) of the Exchange Act provide for the same effective date for the annual adjustments to the fee rates applicable under Sections 13(e) and 14(g) of the Exchange Act.[16]

Section 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2009 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2008, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted.

V. Conclusion

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act,[17]

IT IS HEREBY ORDERED that the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be $55.80 per

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[14] The calculation of the adjusted fee rate assumes that the current fee rate of $5.60 per million will apply through October 31, 2008, due to the operation of the effective date provision contained in Section 31(j)(4)(A) of the Exchange Act.

[15] 15 U.S.C. 77f(b)(8)(A).

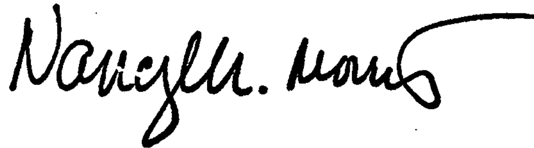
[16] 15 U.S.C. 78m(e)(8)(A) and 78n(g)(8)(A).

[17] 15 U.S.C. 77f(b), 78m(e), 78n(g), and 78ee(j).

million effective on the later of October 1, 2008, or five days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted; and

IT IS FURTHER ORDERED that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be $9.30 per million effective on the later of October 1, 2008, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2009 is enacted.

By the Commission.



Nancy M. Morris
Secretary

APPENDIX A

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the "aggregate maximum offering prices," which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2009, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to March 2008, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline estimate of the aggregate maximum offering prices for fiscal year 2009.

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (March 1998 - March 2008). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more "typical" value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from March 1998 to March 2008.

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(AAMOP_t) - \log(AAMOP_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \alpha - \beta e_{t-1}$. The model can be estimated using standard commercially available software such as SAS or Eviews. Using least squares, the estimated parameter values are α=0.00154 and β=–0.87424.

6. For the month of April 2008 forecast $\Delta_{t=4/08} = \alpha + \beta e_{t=3/08}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for June 2008 is given by $FLAAMOP_{t=6/08} = \log(AAMOP_{t=3/08}) + \Delta_{t=4/08} + \Delta_{t=5/08} + \Delta_{t=6/08}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(FLAAMOP_t + \sigma_n^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For June 2008, this gives a forecast AAMOP of $19.7 Billion (Column I), and a forecast AMOP of $414.1 Billion (Column J).

10. Iterate this process through September 2009 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2009 of $5,091,289,629,574.

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

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/08 and 9/30/09 to be $5,091,289,629,574.

2. The rate necessary to collect the target $284,000,000 in fee revenues set by Congress is then calculated as: $284,000,000 ÷ $5,091,289,629,574 = 0.00005578.

3. Round the result to the seventh decimal point, yielding a rate of .0000558 (or $55.80 per million).

Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/08 to 9/30/08 ($Millions)	5,091,290
b. Implied fee rate ($284 Million / a)	$55.80

Data.

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in $Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in $Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP, in $Millions	(J) Forecast Aggregate Maximum Offering Prices, in $Millions
Mar-98	22	378,185	17,190	23.568					
Apr-98	21	242,310	11,539	23.169	-0.399				
May-98	20	298,454	14,923	23.426	0.257				
Jun-98	22	328,994	14,954	23.428	0.002				
Jul-98	22	272,957	12,407	23.242	-0.187				
Aug-98	21	392,104	18,672	23.650	0.409				
Sep-98	21	325,144	15,483	23.463	-0.187				
Oct-98	22	139,786	6,354	22.572	-0.891				
Nov-98	20	269,065	13,453	23.322	0.750				
Dec-98	22	248,596	11,300	23.148	-0.174				
Jan-99	19	253,448	13,339	23.314	0.166				
Feb-99	19	217,433	11,444	23.161	-0.153				
Mar-99	23	415,145	18,050	23.616	0.456				
Apr-99	21	431,280	20,537	23.746	0.129				
May-99	20	229,082	11,454	23.162	-0.584				
Jun-99	22	367,943	16,725	23.540	0.379				
Jul-99	21	332,623	15,839	23.486	-0.054				
Aug-99	22	240,157	10,916	23.114	-0.372				
Sep-99	21	236,011	11,239	23.143	0.029				
Oct-99	21	216,883	10,328	23.058	-0.085				
Nov-99	21	372,582	17,742	23.599	0.541				
Dec-99	22	319,846	14,538	23.400	-0.199				
Jan-00	20	282,165	14,108	23.370	-0.030				
Feb-00	20	665,367	33,268	24.228	0.858				
Mar-00	23	550,107	23,918	23.898	-0.330				
Apr-00	19	244,510	12,869	23.278	-0.620				
May-00	22	269,774	12,262	23.230	-0.048				

Jun-00	22	406,409	18,473	23.640	0.410				
Jul-00	20	230,894	11,545	23.169	-0.470				
Aug-00	23	257,797	11,209	23.140	-0.030				
Sep-00	20	332,120	16,606	23.533	0.393				
Oct-00	22	362,493	16,477	23.525	-0.008				
Nov-00	21	317,653	15,126	23.440	-0.086				
Dec-00	20	246,006	12,300	23.233	-0.207				
Jan-01	21	462,726	22,035	23.816	0.583				
Feb-01	19	388,304	20,437	23.741	-0.075				
Mar-01	22	523,443	23,793	23.893	0.152				
Apr-01	20	289,212	14,461	23.395	-0.498				
May-01	22	274,298	12,468	23.246	-0.148				
Jun-01	21	348,268	16,584	23.532	0.285				
Jul-01	21	264,590	12,600	23.257	-0.275				
Aug-01	23	245,591	10,678	23.091	-0.165				
Sep-01	15	178,524	11,902	23.200	0.108				
Oct-01	23	260,719	11,336	23.151	-0.049				
Nov-01	21	286,199	13,629	23.335	0.184				
Dec-01	20	395,230	19,762	23.707	0.372				
Jan-02	21	401,290	19,109	23.673	-0.034				
Feb-02	19	476,837	25,097	23.946	0.273				
Mar-02	20	380,160	19,008	23.668	-0.278				
Apr-02	22	282,947	12,861	23.277	-0.391				
May-02	22	215,645	9,802	23.006	-0.272				
Jun-02	20	277,757	13,888	23.354	0.348				
Jul-02	22	208,638	9,484	22.973	-0.381				
Aug-02	22	265,750	12,080	23.215	0.242				
Sep-02	20	109,565	5,478	22.424	-0.791				
Oct-02	23	179,374	7,799	22.777	0.353				
Nov-02	20	243,590	12,179	23.223	0.446				
Dec-02	21	212,838	10,135	23.039	-0.184				
Jan-03	21	201,839	9,611	22.986	-0.053				
Feb-03	19	144,642	7,613	22.753	-0.233				
Mar-03	21	444,331	21,159	23.775	1.022				

Apr-03	21	142,373	6,780	22.637	-1.138				
May-03	21	328,792	15,657	23.474	0.837				
Jun-03	21	281,580	13,409	23.319	-0.155				
Jul-03	22	304,383	13,836	23.351	0.031				
Aug-03	21	328,351	15,636	23.473	0.122				
Sep-03	21	459,563	21,884	23.809	0.336				
Oct-03	23	285,039	12,393	23.240	-0.569				
Nov-03	19	257,779	13,567	23.331	0.091				
Dec-03	22	244,998	11,136	23.133	-0.197				
Jan-04	20	369,784	18,489	23.640	0.507				
Feb-04	19	221,517	11,659	23.179	-0.461				
Mar-04	23	448,543	19,502	23.694	0.514				
Apr-04	21	260,029	12,382	23.240	-0.454				
May-04	20	227,239	11,362	23.154	-0.086				
Jun-04	21	370,668	17,651	23.594	0.441				
Jul-04	21	305,519	14,549	23.401	-0.193				
Aug-04	22	179,688	8,168	22.823	-0.577				
Sep-04	21	357,007	17,000	23.556	0.733				
Oct-04	21	254,489	12,119	23.218	-0.338				
Nov-04	21	363,406	17,305	23.574	0.356				
Dec-04	22	570,918	25,951	23.979	0.405				
Jan-05	20	375,484	18,774	23.656	-0.324				
Feb-05	19	338,922	17,838	23.605	-0.051				
Mar-05	22	590,862	26,857	24.014	0.409				
Apr-05	21	282,018	13,429	23.321	-0.693				
May-05	21	323,652	15,412	23.458	0.138				
Jun-05	22	517,022	23,501	23.880	0.422				
Jul-05	20	457,487	22,874	23.853	-0.027				
Aug-05	23	605,534	26,328	23.994	0.141				
Sep-05	21	312,281	14,871	23.423	-0.571				
Oct-05	21	258,956	12,331	23.235	-0.187				
Nov-05	21	192,736	9,178	22.940	-0.295				
Dec-05	21	308,134	14,673	23.409	0.469				
Jan-06	20	526,550	26,328	23.994	0.585				

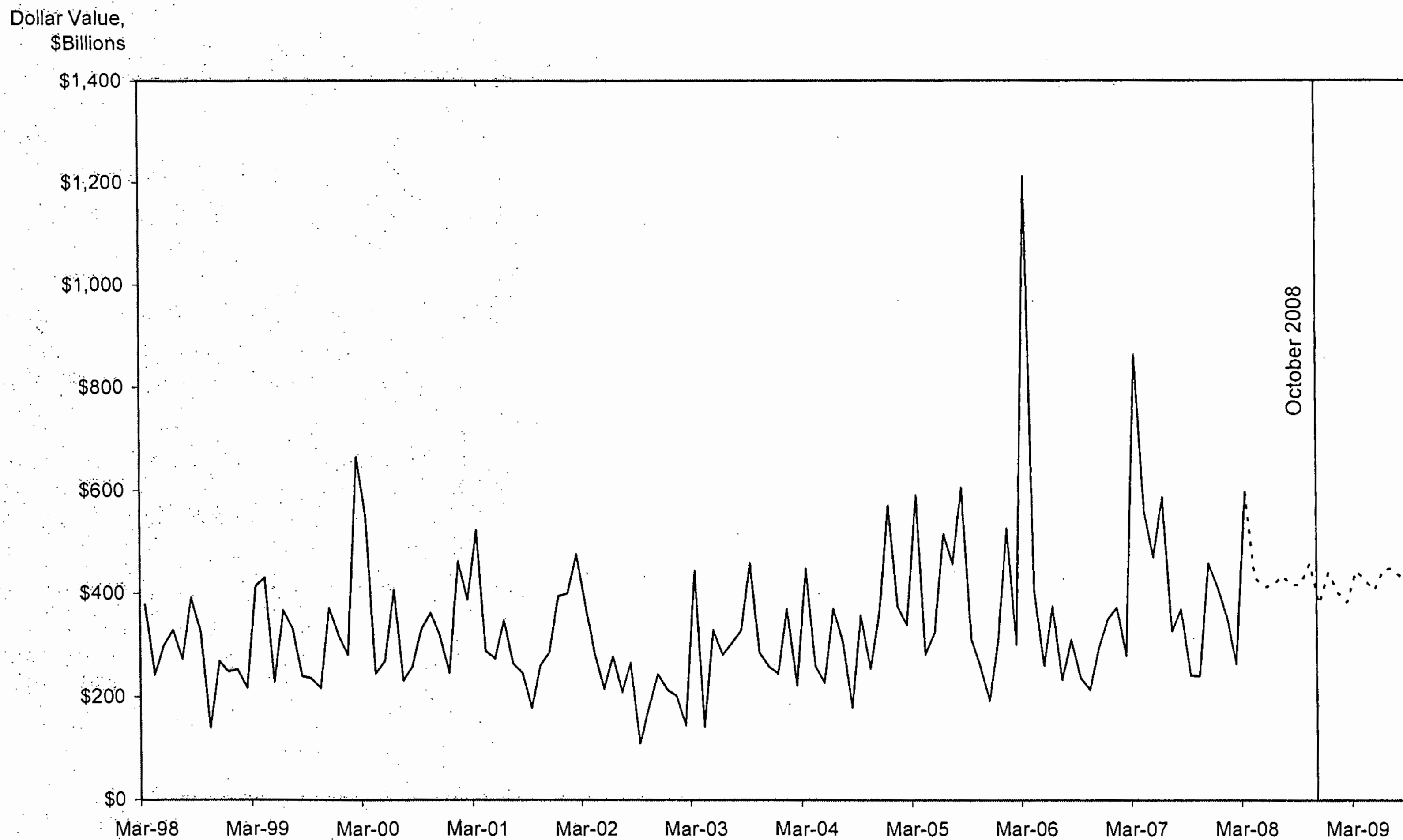
Feb-06	19	301,446	15,866	23.487	-0.506				
Mar-06	23	1,211,344	52,667	24.687	1.200				
Apr-06	19	407,345	21,439	23.788	-0.899				
May-06	22	260,121	11,824	23.193	-0.595				
Jun-06	22	375,296	17,059	23.560	0.367				
Jul-06	20	232,654	11,633	23.177	-0.383				
Aug-06	23	310,050	13,480	23.325	0.147				
Sep-06	20	236,782	11,839	23.195	-0.130				
Oct-06	22	213,342	9,697	22.995	-0.200				
Nov-06	21	292,456	13,926	23.357	0.362				
Dec-06	20	349,512	17,476	23.584	0.227				
Jan-07	20	372,740	18,637	23.648	0.064				
Feb-07	19	278,753	14,671	23.409	-0.239				
Mar-07	22	862,786	39,218	24.392	0.983				
Apr-07	20	562,103	28,105	24.059	-0.333				
May-07	22	470,843	21,402	23.787	-0.272				
Jun-07	21	586,822	27,944	24.053	0.267				
Jul-07	21	326,612	15,553	23.468	-0.586				
Aug-07	23	369,172	16,051	23.499	0.032				
Sep-07	19	241,059	12,687	23.264	-0.235				
Oct-07	23	239,652	10,420	23.067	-0.197				
Nov-07	21	458,654	21,841	23.807	0.740				
Dec-07	20	410,200	20,510	23.744	-0.063				
Jan-08	21	354,433	16,878	23.549	-0.195				
Feb-08	20	263,410	13,171	23.301	-0.248				
Mar-08	20	596,923	29,846	24.119	0.818				
Apr-08	22					23.635	0.359	19,616	431,562
May-08	21					23.637	0.362	19,667	413,000
Jun-08	21					23.638	0.365	19,717	414,058
Jul-08	22					23.640	0.367	19,768	434,886
Aug-08	21					23.641	0.370	19,818	416,181
Sep-08	21					23.643	0.373	19,869	417,247
Oct-08	23					23.644	0.376	19,920	458,155
Nov-08	19					23.646	0.378	19,971	379,445

Dec-08	22					23.648	0.381	20,022	440,482
Jan-09	20					23.649	0.384	20,073	401,463
Feb-09	19					23.651	0.386	20,125	382,367
Mar-09	22					23.652	0.389	20,176	443,874
Apr-09	21					23.654	0.392	20,228	424,783
May-09	20					23.655	0.394	20,280	405,591
Jun-09	22					23.657	0.397	20,331	447,293
Jul-09	22					23.658	0.399	20,384	448,438
Aug-09	21					23.660	0.402	20,436	429,150
Sep-09	21					23.661	0.404	20,488	430,249

Figure A

Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)

(Dashed Line Indicates Forecast Values)



APPENDIX B

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to investors based on the value of their transactions. This appendix provides the formula for determining such fees, which the Commission adjusts annually, and may adjust semi-annually.[18] In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected dollar transaction volume on the securities exchanges and certain over-the-counter markets over the course of the year. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected dollar transaction volume.

For 2009, the Commission has estimated dollar transaction volume by projecting forward the trend established in the previous decade. More specifically, dollar transaction volume was forecasted for months subsequent to March 2008, the last month for which the Commission has data on transaction volume.

The following sections describe this process in detail.

A. Baseline estimate of the aggregate dollar amount of sales for fiscal year 2009.

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (March 1998 - March 2008). The monthly aggregate dollar amount of sales (exchange plus certain over-the-counter markets) is presented in column C of Table B.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.015 and the standard deviation is 0.126. Assuming the monthly percentage change in ADS follows a random walk,

[18] Congress requires that the Commission make a mid-year adjustment to the fee rate if four months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 2.3%.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for March 2008 ($338,395,058,873) to forecast ADS for April 2008 ($346,177,695,873= $338,395,058,873x 1.023).[19] Multiply by the number of trading days in April 2008 (22) to obtain a forecast of the total dollar volume for the month ($7,615,909,309,196). Repeat the method to generate forecasts for subsequent months.

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

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

2. For each month t, calculate the change in ADS from the previous month as $\Delta_t = \log(ADS_t / ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \ldots, \Delta_{120}\}$. These are given by $\mu = 0.015$ and $\sigma = 0.126$, respectively.

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

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t / ADS_{t-1} is given by $\exp(\mu + \sigma^2/2)$, or on average $ADS_t = 1.023 \times ADS_{t-1}$.

[19] The value 1.023 has been rounded. All computations are done with the unrounded value.

6. For April 2008, this gives a forecast ADS of 1.023 × \$338,395,058,873= \$346,177,695,873. Multiply this figure by the 22 trading days in April 2008 to obtain a total dollar volume forecast of \$7,615,909,309,196.

7. For May 2008, multiply the April 2008 ADS forecast by 1.023 to obtain a forecast ADS of \$354,139,323,188. Multiply this figure by the 21 trading days in May 2008 to obtain a total dollar volume forecast of \$7,436,925,786,952.

8. Repeat this procedure for subsequent months.

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

1. Use Table B to estimate fees collected for the period 10/1/08 through 10/31/08. The projected aggregate dollar amount of sales for this period is \$9,125,934,321,266. Projected fee collections at the current fee rate of 0.0000056 are \$51,105,232.

2. Estimate the amount of assessments on securities futures products collected during 10/1/08 and 9/30/09 to be \$18,755 by projecting a 2.3% monthly increase from a base of \$1,173 in March 2008.

3. Subtract the amounts \$51,105,232 and \$18,755 from the target offsetting collection amount set by Congress of \$1,023,000,000 leaving \$971,876,013 to be collected on dollar volume for the period 11/1/08 through 9/30/09.

4. Use Table B to estimate dollar volume for the period 11/1/08 through 9/30/09. The estimate is \$104,577,276,143,653. Finally, compute the fee rate required to produce the additional \$971,876,013 in revenue. This rate is \$971,876,013 divided by \$104,577,276,143,653 or 0.0000092934.

5. Round the result to the seventh decimal point, yielding a rate of .0000093 (or $9.30 per million).

Table B. Estimation of baseline of the aggregate dollar amount of sales.

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/08 to 10/31/08 ($Millions)	9,125,934
b. Baseline estimate of the aggregate dollar amount of sales, 11/1/08 to 9/30/09 ($Millions)	104,577,276
c. Estimated collections in assessments on securities futures products in FY 2009 ($Millions)	0.019
d. Implied fee rate (($1023,000,000 - 0.0000056*a - c) /b)	$9.3

Data

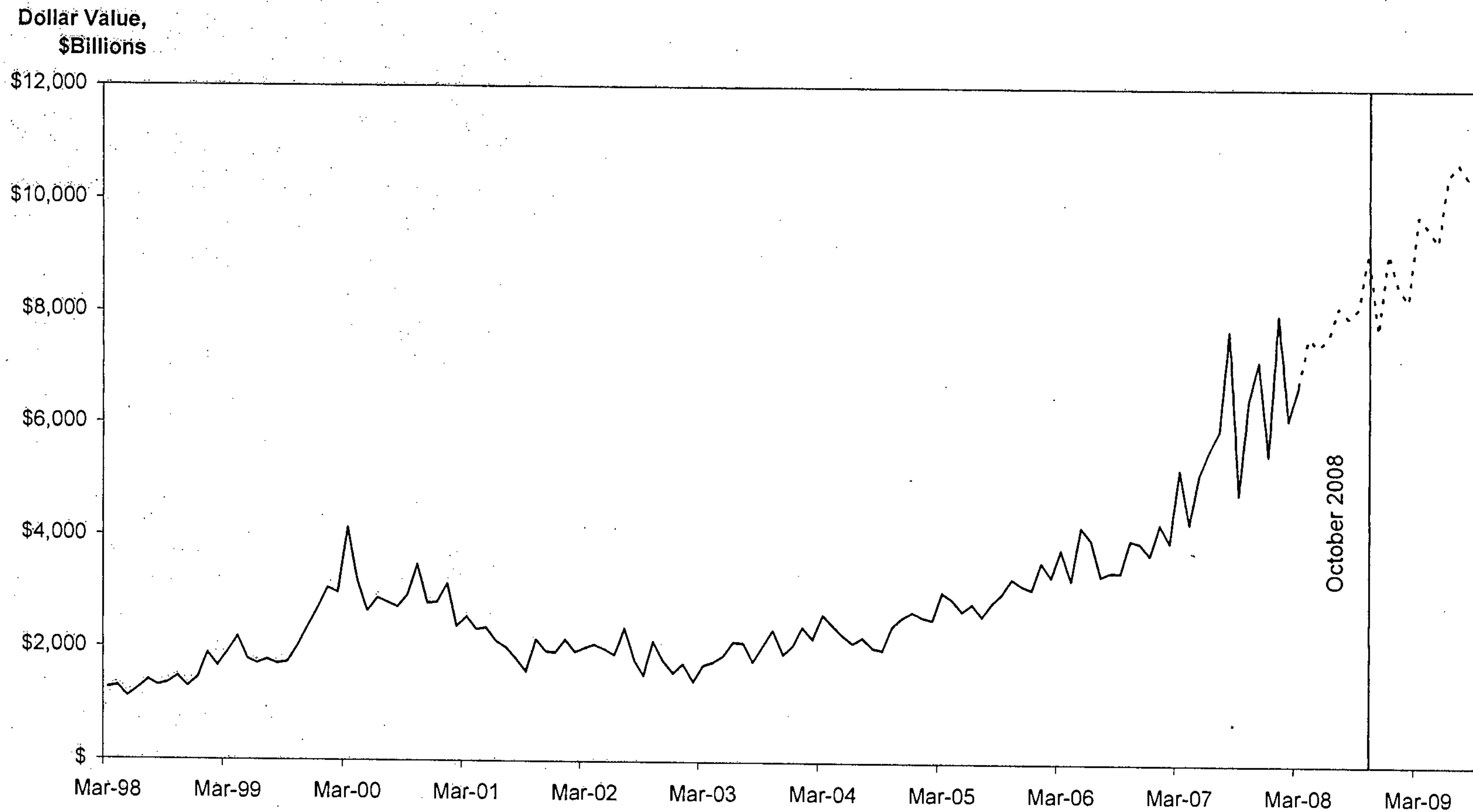
(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Mar-98	22	1,259,994,685,467	57,272,485,703	-		
Apr-98	21	1,298,494,359,253	61,833,064,726	0.077		
May-98	20	1,110,221,658,995	55,511,082,950	-0.108		
Jun-98	22	1,243,779,791,913	56,535,445,087	0.018		
Jul-98	22	1,399,011,433,748	63,591,428,807	0.118		
Aug-98	21	1,307,501,463,442	62,261,974,450	-0.021		
Sep-98	21	1,352,428,235,083	64,401,344,528	0.034		
Oct-98	22	1,460,835,397,598	66,401,608,982	0.031		
Nov-98	20	1,298,403,768,065	64,920,188,403	-0.023		
Dec-98	22	1,442,697,787,306	65,577,172,150	0.010		
Jan-99	19	1,884,555,055,910	99,187,108,206	0.414		
Feb-99	19	1,656,058,202,765	87,160,958,040	-0.129		
Mar-99	23	1,908,967,664,074	82,998,594,090	-0.049		
Apr-99	21	2,177,601,770,622	103,695,322,411	0.223		
May-99	20	1,784,400,906,987	89,220,045,349	-0.150		
Jun-99	22	1,697,339,227,503	77,151,783,068	-0.145		
Jul-99	21	1,767,035,098,986	84,144,528,523	0.087		
Aug-99	22	1,692,907,150,726	76,950,325,033	-0.089		
Sep-99	21	1,730,505,881,178	82,405,041,961	0.068		
Oct-99	21	2,017,474,765,542	96,070,226,931	0.153		
Nov-99	21	2,348,374,009,334	111,827,333,778	0.152		
Dec-99	22	2,686,788,531,991	122,126,751,454	0.088		
Jan-00	20	3,057,831,397,113	152,891,569,856	0.225		
Feb-00	20	2,973,119,888,063	148,655,994,403	-0.028		
Mar-00	23	4,135,152,366,234	179,789,233,315	0.190		
Apr-00	19	3,174,694,525,687	167,089,185,562	-0.073		
May-00	22	2,649,273,207,318	120,421,509,424	-0.328		
Jun-00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul-00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug-00	23	2,720,788,395,832	118,295,147,645	-0.170		
Sep-00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct-00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov-00	21	2,795,778,876,887	133,132,327,471	-0.174		
Dec-00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan-01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb-01	19	2,372,420,523,286	124,864,238,068	-0.181		
Mar-01	22	2,554,419,085,113	116,109,958,414	-0.073		
Apr-01	20	2,324,349,507,745	116,217,475,387	0.001		
May-01	22	2,353,179,388,303	106,962,699,468	-0.083		
Jun-01	21	2,111,922,113,236	100,567,719,678	-0.062		
Jul-01	21	2,004,384,034,554	95,446,858,788	-0.052		
Aug-01	23	1,803,565,337,795	78,415,884,252	-0.197		
Sep-01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct-01	23	2,147,238,873,044	93,358,211,871	-0.117		
Nov-01	21	1,939,427,217,518	92,353,677,025	-0.011		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		

Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		
Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		
Jun-04	21	2,112,826,072,876	100,610,765,375	-0.116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,839,174,160	129,091,958,708	0.060		
Feb-05	19	2,532,202,396,053	133,273,810,319	0.032		
Mar-05	22	3,030,474,095,010	137,748,822,500	0.033		
Apr-05	21	2,906,386,858,222	138,399,374,201	0.005		
May-05	21	2,697,406,551,792	128,447,931,038	-0.075		
Jun-05	22	2,825,792,932,509	128,445,133,296	0.000		
Jul-05	20	2,603,995,025,602	130,199,751,280	0.014		
Aug-05	23	2,846,109,434,770	123,743,888,468	-0.051		
Sep-05	21	3,009,608,583,531	143,314,694,454	0.147		
Oct-05	21	3,279,930,784,463	156,187,180,213	0.086		
Nov-05	21	3,163,288,362,669	150,632,779,175	-0.036		
Dec-05	21	3,090,218,506,716	147,153,262,225	-0.023		
Jan-06	20	3,573,306,111,973	178,665,305,599	0.194		
Feb-06	19	3,313,973,129,190	174,419,638,378	-0.024		
Mar-06	23	3,807,374,752,084	165,538,032,699	-0.052		
Apr-06	19	3,257,448,631,999	171,444,664,842	0.035		
May-06	22	4,206,452,683,345	191,202,394,697	0.109		
Jun-06	22	3,993,966,132,543	181,543,915,116	-0.052		
Jul-06	20	3,339,657,248,277	166,982,862,414	-0.084		
Aug-06	23	3,410,343,285,403	148,275,795,018	-0.119		
Sep-06	20	3,407,481,301,776	170,374,065,089	0.139		
Oct-06	22	3,980,061,341,623	180,911,879,165	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,264,337,570,190	213,216,878,510	0.138		
Feb-07	19	3,947,307,855,865	207,753,045,046	-0.026		

Mar-07	22	5,245,976,330,691	238,453,469,577	0.138		
Apr-07	20	4,274,660,745,896	213,733,037,295	-0.109		
May-07	22	5,173,409,122,483	235,154,960,113	0.096		
Jun-07	21	5,589,955,070,604	266,188,336,695	0.124		
Jul-07	21	5,941,510,339,617	282,929,063,791	0.061		
Aug-07	23	7,715,893,065,459	335,473,611,542	0.170		
Sep-07	19	4,806,887,798,516	252,994,094,659	-0.282		
Oct-07	23	6,501,037,858,934	282,653,819,954	0.111		
Nov-07	21	7,175,404,886,442	341,685,946,973	0.190		
Dec-07	20	5,499,256,804,407	274,962,840,220	-0.217		
Jan-08	21	7,996,757,181,265	380,797,961,013	0.326		
Feb-08	20	6,139,476,764,099	306,973,838,205	-0.216		
Mar-08	20	6,767,901,177,467	338,395,058,873	0.097		
Apr-08	22				346,177,695,873	7,615,909,309,196
May-08	21				354,139,323,188	7,436,925,786,952
Jun-08	21				362,284,057,360	7,607,965,204,556
Jul-08	22				370,616,109,602	8,153,554,411,244
Aug-08	21				379,139,787,982	7,961,935,547,615
Sep-08	21				387,859,499,645	8,145,049,492,554
Oct-08	23				396,779,753,099	9,125,934,321,266
Nov-08	19				405,905,160,536	7,712,198,050,182
Dec-08	22				415,240,440,227	9,135,289,684,986
Jan-09	20				424,790,418,954	8,495,808,379,080
Feb-09	19				434,560,034,511	8,256,640,655,702
Mar-09	22				444,554,338,252	9,780,195,441,544
Apr-09	21				454,778,497,708	9,550,348,451,868
May-09	20				465,237,799,255	9,304,755,985,096
Jun-09	22				475,937,650,848	10,470,628,318,662
Jul-09	22				486,883,584,820	10,711,438,866,042
Aug-09	21				498,081,260,738	10,459,706,475,501
Sep-09	21				509,536,468,333	10,700,265,834,990

Figure B.

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



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

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 5, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13034

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Health Professionals, Inc. ("Health Professionals") (CIK No. 0000879257) is a Delaware corporation located in Fort Lauderdale, Florida with a class of equity securities registered pursuant to Exchange Act Section 12(g). Health Professionals is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 1997, which reported a net loss of $668,000 for the prior three months.

B. DELINQUENT PERIODIC FILINGS

1. Respondent is delinquent in its periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1), has repeatedly failed to meet its obligation to file timely periodic reports and has failed to receive a delinquency letter sent to it by the Division of Corporation Finance at its most recent address shown in its most recent filing with the Commission, because of its failure to keep an updated address on file with the Commission as required by Commission rules.

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

3. As a result of its failure to file required periodic reports, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

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

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

If the 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].

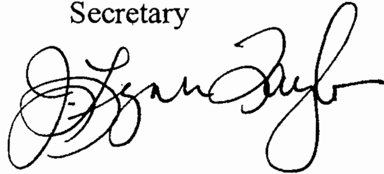
This Order shall be served forthwith upon the Respondent personally, by certified or registered mail, or by any other means permitted by the Commission's Rules of Practice.

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

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

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

Attachment

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57774/ May 5, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13035

In the Matter of **Paul S. Berliner** **Respondent.**	:	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Paul S. Berliner ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Berliner, 32 years old, is a resident of Brooklyn, New York.

2. From July 2004 through February 2008, Berliner was a registered representative associated with Schottenfeld Group, LLC, a broker-dealer registered with the Commission.

3. On April 29, 2008, a final judgment was entered by consent against Berliner, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 9(a)(4) and 10(b) of the Exchange Act, and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Paul S. Berliner, Civil Action Number 08-cv-3859, in the United States District Court for the Southern District of New York.

4. According to the complaint, on May 17, 2007, Alliance Data Systems Corp. ("ADS") announced that it entered into a definitive agreement to be acquired by The Blackstone Group ("Blackstone") at a price of $81.75 per share. The complaint alleged that, on November 29, 2007, Berliner drafted and disseminated a false rumor that ADS's board of directors was meeting to consider a revised proposal from Blackstone to acquire ADS at a significantly lower price of $70 per share. According to the complaint, Berliner disseminated this false rumor through instant messages to numerous individuals, including traders at brokerage firms and hedge funds. The complaint alleged that this false rumor spread rapidly across Wall Street, and various news services quickly picked up the "story." The complaint further alleged that heavy trading in ADS stock ensued, and within thirty minutes the false rumor had caused the price of ADS stock, which had been trading at approximately $77 per share, to plummet to an intraday low of $63.65 per share -- a 17% decline in the share price. The complaint alleged that Berliner profited from spreading this false rumor by short selling ADS stock at the same time he was disseminating the false rumor. The complaint further alleged that Berliner covered these short sales when the price of ADS stock began to decline. According to the complaint, Berliner made approximately $25,000 in illicit trading profits before the price of ADS stock recovered later in the day.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Berliner be, and hereby is barred from association with any broker or dealer.

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

By the Commission.

Nancy M. Morris
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 5, 2008

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

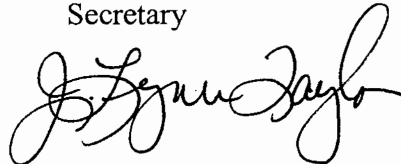
It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Health Professionals, Inc. because it has not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 1997.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Health Professionals, Inc. is suspended for the period from 9:30 a.m. EDT on May 5, 2008 through 11:59 p.m. EDT on May 16, 2008.

By the Commission.

Nancy M. Morris
Secretary



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SECURITIES AND EXCHANGE COMMISSION
17 CFR PARTS 230, 232, 239, 240, and 249

[RELEASE NOS. 33-8917; 34-57781; FILE NO. S7-10-08]

RIN 3235-AK10

REVISIONS TO THE CROSS-BORDER TENDER OFFER, EXCHANGE OFFER, AND BUSINESS COMBINATION RULES AND BENEFICIAL OWNERSHIP REPORTING RULES FOR CERTAIN FOREIGN INSTITUTIONS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: After eight years of experience with the current cross-border exemptions adopted in 1999, the Commission is proposing changes to expand and enhance the utility of these exemptions for business combination transactions. Our goal continues to be to encourage offerors and issuers in cross-border business combinations, and rights offerings by foreign private issuers, to permit U.S. security holders to participate in these transactions in the same manner as other holders. Many of the rule changes we propose today would codify existing interpretive positions and exemptive orders in the cross-border area. In several instances, we request comment about whether the rule changes we propose also should apply to tender offers for U.S. companies. In this release, we also address certain interpretive issues of concern for U.S. and other offerors engaged in cross-border business combinations. We hope that this guidance will prove useful in structuring and facilitating these transactions in a manner consistent with U.S. investor protection.

DATES: Comments should be received on or before [insert date 45 days after Federal Register publication].

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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 S7-10-08 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, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-10-08. 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 also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Christina Chalk, Senior Special Counsel, or Tamara Brightwell, Senior Special Counsel, at (202) 551-3440, in the Division of Corporation Finance, and Elizabeth Sandoe, Branch Chief, at (202) 551-5720, in the Division of Trading and Markets (for questions relating to the proposed changes to Rule 14e-5), U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We propose to amend Rules 162,[1] 800[2] and 802[3] under the Securities Act of 1933[4] and Rule 101[5] of Regulation S-T.[6] We also propose to amend Rules 13d-1,[7] 13e-3,[8] 13e-4,[9] 14d-1,[10] and 14e-5[11] under the Securities

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[1] 17 CFR 230.162.

[2] 17 CFR 230.800.

[3] 17 CFR 230.802.

[4] 15 U.S.C. 77a et seq.

[5] 17 CFR 232.101.

[6] 17 CFR 232.10 et seq.

[7] 17 CFR 240.13d-1.

[8] 17 CFR 240.13e-3.

[9] 17 CFR 240.13e-4.

[10] 17 CFR 240.14d-1.

[11] 17 CFR 240.14e-5.

Exchange Act of 1934.[12] We also propose changes to Form S-4,[13] Form F-4,[14] Form F-X,[15] Form CB,[16] Schedule 13G[17] and Schedule TO.[18]

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  2. Expand Tier II relief for dual or multiple offers

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[12] 15 U.S.C. 78a et seq.

[13] 17 CFR 239.25.

[14] 17 CFR 239.34.

[15] 17 CFR 239.42.

[16] 17 CFR 239.800.

[17] 17 CFR 240.13d-102.

[18] 17 CFR 240.14d-100.

            a. Offeror may make more than one non-U.S. offer
            b. U.S. offer may include non-U.S. persons and foreign offer(s) may include U.S. persons
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I. BACKGROUND

A. Introduction

Securities markets today are characterized by increasing globalization. Advances in information technology, the increased use of ADR[19] facilities giving U.S. investors an ownership interest in the securities of foreign companies, and other factors have increased significantly the number of U.S. and foreign companies engaged in cross-border business combination transactions.[20] Computerization and the advent of the Internet age have fueled a revolution in investor participation in global capital markets. With increasing globalization of worldwide securities markets, U.S. investors frequently purchase securities issued by foreign companies, including foreign private issuers.

The Commission has undertaken several recent rulemaking initiatives that impact foreign private issuer reporting and registration requirements. For example, we recently revised our rules to make the U.S. capital markets more attractive to foreign private issuers by allowing the use of financial statements prepared in accordance with International Financial Reporting Standards (or IFRS) as issued by the International Accounting Standards Board (or IASB), without a reconciliation to U.S. GAAP.[21] In addition, we amended the deregistration rules for exiting the U.S. regulatory system when the level of U.S. interest in a foreign private issuer's securities has decreased, such that

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19 "ADRs" refer to American Depositary Receipts. We use this term synonymously with American Depositary Shares, or ADSs.

20 See Jessica Hall, Cross-Border Mergers Defy U.S. Slump, REUTERS (October 18, 2007)(noting that cross-border deals reached record highs through mid-October 2007, and were up 82 percent over levels for the same period in 2006, according to figures compiled by the research firm Dealogic).

continued registration is no longer justified.[22] We also have proposed a change to the manner of determining the availability of the Rule 12g3-2(b) exemption from Exchange Act registration.[23] Further, we have proposed rule revisions applicable to foreign issuers, intended to improve the accessibility of the U.S. public capital markets and enhance the information available to investors.[24]

We believe these changes benefit investors and issuers. U.S. investors benefit from additional investment opportunities in securities of foreign companies, while issuers benefit from the potential for increased investor interest and a reduction in the cost of regulatory compliance. Consistent with these recent efforts to enhance our regulatory system applicable to foreign private issuers, we are proposing enhancements to our rules governing cross-border business combination transactions.

The rule revisions we propose today are based on our experiences in the cross-border area during the eight years since the current cross-border exemptions were adopted. The revisions are intended to address the areas of conflict or inconsistency with foreign regulations and practice that acquirors frequently encounter in cross-border

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21 Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP,Releas e No. 33-8879 (December 21, 2007) [73 FR 986].

22 Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Release No. 34-55540 (March 27, 2007) [72 FR 16934] ("Deregistration Release").

23 Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Release No. 34-57350 (February 19, 2008) [73 FR 10102] ("Rule 12g3-2(b) Release").

24 Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008) [73 FR 13404].

business combination transactions.[25] Whether non-U.S. issuers list their securities on a U.S. market or U.S. investors access overseas trading markets to purchase their securities, cross-border business combination transactions frequently present conflicts between U.S. and foreign regulatory systems.[26] The cross-border exemptions are premised on the status of the target company in a business combination, or the issuer in a rights offering, as a foreign private issuer as defined in our rules.

We believe the revisions we propose today represent an appropriate balance between the need to protect U.S. investors through application of the protections afforded by U.S. law, and the desirability of facilitating and enabling transactions that may benefit all security holders, including those in the United States. We also believe expanding the availability of the cross-border exemptions will serve the public interest by encouraging bidders to include U.S. holders in cross-border business combination transactions from which they otherwise might be excluded, thereby extending the benefits of those transactions to U.S. investors.

[25] The proposed revisions are, with a few exceptions, limited to cross-border business combination transactions. "Cross-border" refers to business combinations in which the target company is a "foreign private issuer" as defined in Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)], and rights offerings where the issuer is a foreign private issuer, as so defined. In the past under very limited circumstances, offerors have obtained no-action and exemptive relief for business combinations in which the target company was a foreign issuer but did not meet the definition of foreign private issuer in Rule 3b-4. Such relief continues to be considered only in special circumstances and will be as narrowly tailored as practicable.

[26] "Business combination" is defined in Securities Act Rule 800(a) as any "statutory amalgamation, merger, arrangement or reorganization requiring the vote of security holders of one or more participating companies. It also includes a statutory short form merger that does not require a vote of security holders." In this release, we use the term more broadly to include those kinds of transactions, as well as tender and exchange offers. See Securities Act Rule 165(f)(1) [17 CFR 230.165(f)(1)] (defining the term more broadly, to include the types of transactions listed in Rule 145(a) [17 CFR 230.145(a)], as well as exchange offers).

1. Treatment of U.S. target security holders before the adoption of the cross-border exemptions

Before the cross-border exemptions became effective in January 2000, U.S. holders[27] of a foreign issuer or foreign target company frequently were excluded from cross-border business combination transactions or rights offerings because of actual or perceived conflicts between U.S. and foreign law. Where U.S. security holders held a relatively small percentage of a foreign target's securities, their participation was not necessary to the successful completion of the business combination transaction and acquirors frequently excluded them.[28] Even where the percentage of securities held in the United States was significant, acquirors and issuers in business combination transactions and rights offerings sometimes avoided extending the offer into the United States because of perceived litigation risks or conflicts in rules or practice, or the desire not to engage in the process of preparing and filing a Securities Act registration statement.[29] Exclusion deprived U.S. investors of some or all of the benefits of such cross-border transactions.

2. Overview of the cross-border exemptions

In an effort to facilitate the inclusion of U.S. security holders in primarily foreign

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27 See, e.g., Instruction 2 to Exchange Act Rules 14d-1(c) and 14d-1(d) (defining "U.S. holder" as "any security holder resident in the United States").

28 See Cross-Border Tender Offers, Business Combinations and Rights Offerings, Release No. 33-7611 (November 13, 1998) [63 FR 69136] ("1998 Cross-Border Proposing Release"), Section II.A. The U.K. Takeover Panel (the entity that regulates tender offers in the United Kingdom) provided us with information it compiled in 1997 based on a random sample of 31 tender offers (out of 171 possible mergers or tender offers). When the U.S. ownership of the target was less than 15 percent (30 offers), the bidders excluded U.S. persons in all of the offers. When the U.S. ownership was more significant, such as 38 percent (one offer), the bidders included U.S. persons. In the 30 offers that excluded U.S. persons, the ownership percentage was as follows: in 27 offers, U.S. persons held less than 5 percent; in the remaining three offers, U.S. persons held 7 percent, 8 percent and 10-15 percent, respectively.

29 Id.

transactions, we adopted the cross-border exemptions on October 26, 1999.[30] These exemptions represented the culmination of efforts since 1991, when we issued two proposing releases addressing cross-border issues.[31] Between 1991 and 1999, the staff gained valuable experience addressing numerous individual requests for no-action and exemptive relief in the cross-border area.[32] The cross-border exemptions addressed areas of frequent regulatory conflict or differences in practice encountered by the staff during those years.

Generally speaking, the cross-border exemptions are structured as a two-tier system based broadly on the level of U.S. interest in a transaction, measured by the percentage of target securities of a foreign private issuer held by U.S. investors.[33] Where no more than ten percent of the subject securities are held in the United States (Tier I and

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30 Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 33-7759, 34-42054 (October 22, 1999) [64 FR 61382] ("Cross-Border Adopting Release"). In this release, we refer to the cross-border exemptions adopted in the Cross-Border Adopting Release as the "cross-border exemptions." The cross-border exemptions may be found in Securities Act Rules 800 - 802 [17 CFR 230.800 - 802] and Exchange Act Rules 13e-3(g)(6) [17 CFR 240.13e-3(g)(6)], 13e-4(h)(8) [17 CFR 240.13e-4(h)(8)], 13e-4(i) [17 CFR 240.13e-4(i)], 14d-1(c) [17 CFR 240.14d-1(c)], 14d-1(d) [17 CFR 240.14d-1(d)], and 14e-2(d) [17 CFR 240.14e-2(d)].

31 See International Tender and Exchange Offers, Release No. 33-6897 (June 5, 1991) [56 FR 27582] and Cross-Border Rights Offers; Amendments to Form F-3, Release No. 33-6896 (June 4, 1991) [56 FR 27564]. Additionally, we addressed a number of issues presented in the cross-border context in a concept release in 1990. See Concept Release Multinational Tender and Exchange Offers, Release No. 33-6866 (June 6, 1990) [55 FR 23751].

32 Where we refer in this release to "relief," we mean exemptive or no-action relief provided by letter in the context of an individual transaction, unless otherwise indicated. See footnote 49 below referring to the staff's delegated authority to provide exemptive relief from U.S. rule provisions for specific cross-border transactions. Where we refer to "interpretive guidance," we mean oral positions taken by the staff or written interpretations promulgated by the Division of Corporation Finance in the Manual of Publicly Available Telephone Interpretations available on our Web site. We refer to "Commission guidance" or "Commission interpretive guidance" to mean positions expressed by the Commission in releases.

33 Although the target (or issuer in a rights offering) must be a foreign private issuer, the acquiror relying on the cross-border exemptions need not be a foreign private issuer and, in fact, may be a U.S. company.

Rules 801 and 802), a qualifying cross-border transaction will be exempt from most U.S. tender offer rules[34] and from the registration requirements of Section 5 of the Securities Act of 1933.[35] Tier I provides a broad exemption from the filing, dissemination and procedural requirements of the U.S. tender offer rules and the heightened disclosure requirements applicable to going private transactions as defined in Rule 13e-3.[36] Tier I also exempts the subject company of a tender offer from the obligation to express and support a position with respect to that tender offer.[37] At the same level of U.S. ownership, Rules 801 and 802 also provide relief from the registration requirements of Securities Act Section 5 for securities issued in rights offerings and business combination transactions.

Issuers relying on Rule 801, offerors relying on Rule 802, and third-party bidders and issuers relying on the Tier I cross-border exemption, must furnish a Form CB to the Commission.[38] Form CB is a cover sheet for an English translation of the disclosure document used in the foreign home jurisdiction and disseminated to U.S. target security holders.[39] This form must be submitted to the Commission by the next business day after the disclosure document attached and used in the foreign home jurisdiction is published

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[34] The U.S. anti-fraud and anti-manipulation rules and civil liability provisions continue to apply to these transactions. See Cross-Border Adopting Release, Section I.A.

[35] 15 U.S.C. 77e.

[36] Exchange Act Rules 13e-3(g)(6), 13e-4(h)(8) and 14d-1(c).

[37] Exchange Act Rule 14e-2(d).

[38] Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i), and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii).

[39] Item 1 of Form CB [17 CFR 239.800].

or otherwise disseminated in accordance with home country rules.[40] The materials submitted under cover of Form CB are not deemed filed with the Commission, and the filer is not subject to the liability provisions of Section 18 of the Exchange Act.[41]

A bidder relying on the Tier I exemption must submit a Form CB only if the tender offer would have been subject to Regulation 14D[42] or Rule 13e-4, but for the Tier I exemption. No filing requirement exists for a tender offer subject only to Exchange Act Section 14(e) and Regulation 14E; accordingly, furnishing a Form CB is not necessary.[43]

Where U.S. holders own more than ten percent but no more than 40 percent of the target securities (Tier II), the cross-border exemptions provide targeted relief from some U.S. tender offer rules to address certain recurring areas of regulatory conflict. The Tier II exemptions encompass narrowly-tailored relief from certain U.S. tender offer rules, such as the prompt payment, extension and notice of extension requirements in Regulation 14E. The Tier II exemptions do not provide relief from the registration requirements of Securities Act Section 5, nor do they include an exemption from the

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40 Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 14d-1(c)(3)(iii) and 13e-4(h)(8)(iii). If the bidder is a foreign company, it must also file a Form F-X with the Commission appointing an agent for service of process in the United States. See, e.g., Exchange Act Rule 14d-1(c)(3)(iii).

41 15 U.S.C. 78r. See also, the Cross-Border Adopting Release, Section II.A.2. However, an acquiror or other person submitting Form CB is subject to U.S. anti-fraud provisions. See footnote 34 above.

42 Exchange Act Rules 14d-1 through 14d-11.

43 See Cross-Border Adopting Release, Section II.A.2. Regulation 14E applies to all tender offers, including those not subject to Section 13(e) or 14(d) of the Exchange Act. These include tender offers for non-equity securities and securities that are not registered under Section 12 of the Exchange Act [15 U.S.C. 78l], as well as partial offers for less than all of the subject class, where the bidder will not own, based on purchases in the tender offer and ownership in the target before the offer commences, more than five percent of the subject class of equity securities after the tender offer.

additional disclosure requirements applicable to going private transactions by issuers or affiliates.

The scope of the Tier I and Tier II cross-border exemptions and the exemptions from the Securities Act registration requirements provided in Rules 801 and 802 are based broadly on the level of U.S. interest in a given transaction, as illustrated by the percentage of shares held by U.S. persons. In addition to these U.S. ownership thresholds, the cross-border exemptions are conditioned on other requirements, such as the principle that U.S. target security holders be permitted to participate in the offer on terms at least as favorable as those afforded other target holders.[44] This approach differs from our approach in adopting revisions to the deregistration rules applicable to foreign private issuers in 2007[45] and more recently, in our proposed revisions to Rule 12g3-2(b) recommending the use of an average daily trading volume test ("ADTV").[46]

B. Summary of rule proposals and interpretive guidance

We believe the existing cross-border exemptions have facilitated the inclusion of U.S. security holders in foreign transactions in a manner consistent with our investor

44 Securities Act Rules 801(a)(3) and 802(a)(2) [17 CFR 230.801(a)(3) and 230.802(a)(2)]; Exchange Act Rules 13e-4(h)(8)(ii) and (i)(2)(ii); and 14d-1(c)(2) and (d)(2)(ii).

45 See the Deregistration Release.

46 See the Rule 12g3-2(b) Release and the discussion in Section II.A.4 below.

protection mandate.[47] We recognize that in some instances, however, the exemptions are not operating as optimally as intended, or do not address continuing and recurring conflicts of law and practice not anticipated when we adopted them.[48] As a result, companies repeatedly call upon the Commission's staff to address particular areas of conflict in the context of individual cross-border transactions.[49]

The rule revisions we propose today address recurring issues and unintended consequences that have impeded the usefulness of the cross-border exemptions. We believe the proposed changes will encourage more offers to be extended into the United States. Generally speaking, the proposed revisions represent an expansion and refinement of the current exemptions, and in some areas, would codify relief previously granted only on an individual basis. Our proposed codification of various staff interpretive positions would make such relief available as a matter of right, thereby

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[47] Another area in which we have modified our rules in the foreign private issuer context is the Multijurisdictional Disclosure System ("MJDS") with Canada. See Exchange Act Rule 14d-1(b). That system allows a bidder in a cross-border tender offer to conduct its offer in accordance with Canadian rules and/or the rules of any applicable Canadian province instead of U.S. tender offer requirements, where the conditions in the rule are met. These include the requirement that the target company in the tender offer be a foreign private issuer and not an investment company, and that U.S. holders own less than 40 percent of the subject securities. The bidder must file its offer materials, prepared in accordance with Canadian requirements, on Form 14D-1F [17 CFR 240.14d-102] with the Commission. See Rule 14d-1(b)(1). MJDS also specifies certain forms to be used by Canadian companies issuing securities to U.S. persons. See, e.g., Forms F-8 [17 CFR 239.38], F-9 [17 CFR 239.39], F-10 [17 CFR 239.40], and F-80 [17 CFR 239.41]. Except for limited solicitations of comment below, this release does not propose changes to MJDS.

[48] For a general discussion of the cross-border exemptions and a broad overview of how they operate, see Steven Davidoff & Brett Carron, "Getting U.S. Security Holders to the Party: The SEC's Cross-Border Release Five Years On," 26.3 U. Pa. J. Int'l Econ. L. 455 (2005); and John Basnage, William Curtin III & Jeffrey Rubin, "Cross-Border Tender Offers and Other Business Combination Transactions and the U.S. Federal Securities Laws: An Overview," 61.3 Business Lawyer 1071 (2006).

[49] Pursuant to Rule 30-1 of the SEC's Rules of General Organization [17 CFR 200.30-1], the staff has delegated authority to exempt individual bidders and issuers from application of our rules. No-action and exemptive letters issued by the staff in connection with cross-border transactions may be found on our Web site at http://www.sec.gov/divisions/corpfin/cf-noaction.shtml and http://www.sec.gov/divisions/marketreg/mr-noaction.shtml#rule14e5.

reducing the burdens and costs for bidders and issuers of extending cross-border offers to U.S. holders when conducting cross-border transactions.

In some instances, the changes we propose would address practical problems that have limited the ability of bidders and issuers to rely on the exemptions. For example, we hope the proposed changes relating to the calculation of U.S. ownership of the target foreign private issuer will provide greater certainty and ease of use for those seeking to rely on the exemptions. In proposing these rule revisions, we hope to better address the burdens on bidders and issuers who must comply with two or more regulatory systems in the context of cross-border transactions.[50] As a result, we hope the revisions we propose today will make bidders more likely to extend offers to U.S. holders.

In this release, we also provide guidance on some of the interpretive issues that have arisen during the years since the cross-border exemptions were adopted. In some instances, we propose to codify existing staff interpretive positions. We also discuss our views on some of the interpretive matters addressed in the 1998 Cross-Border Proposing Release and the Cross-Border Adopting Release. The rule changes we propose today include:

- Refinement of the tests for calculating U.S. ownership of the target company for purposes of determining eligibility to rely on the cross-border exemptions in both negotiated and hostile transactions, including changes to:

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50 Although the focus of the rule changes we propose is cross-border business combinations, in some instances, we solicit comment on whether certain of these changes should also apply to business combinations where the target company is a U.S. issuer. We may adopt these changes at the time we adopt changes to our cross-border business combination rules. For example, we ask for comments on whether domestic exchange offers not subject to Rule 13e-4 or Regulation 14D should be permitted to commence early. We also solicit comment on whether the rule changes we propose to facilitate "mix and match" tender offers and the relaxation of the our rules relating to subsequent offering periods also should apply to tender offers for domestic companies.

  - Use the date of public announcement of the business combination as the reference point for calculating U.S. ownership;
  - Permit the offeror to calculate U.S. ownership as of a date within a 60-day range before announcement;
  - Specify when the offeror has reason to know certain information about U.S. ownership that may affect its ability to rely on the presumption of eligibility in non-negotiated tender offers;
- Expanding relief under Tier I for affiliated transactions subject to Rule 13e-3 for transaction structures not covered under our current cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash;
- Extending the specific relief afforded under Tier II to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act;
- Expanding the relief afforded under Tier II in several ways to eliminate recurring conflicts between U.S. and foreign law and practice, including:
  - Allowing more than one offer to be made abroad in conjunction with a U.S. offer;
  - Permitting bidders to include foreign security holders in the U.S. offer and U.S. holders in the foreign offer(s);
  - Allowing bidders to suspend back-end withdrawal rights while tendered securities are counted;
  - Allowing subsequent offering periods to extend beyond 20 U.S. business days;

- Allowing securities tendered during the subsequent offering period to be purchased within 14 business days from the date of tender;
- Allowing bidders to pay interest on securities tendered during a subsequent offering period;
- Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods;

- Codifying existing exemptive orders with respect to the application of Rule 14e-5 for Tier II tender offers;
- Expanding the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act;
- Requiring that all Form CBs and the Form F-Xs that accompany them be filed electronically;
- Modifying the cover pages of certain tender offer schedules and registration statements to list any cross-border exemptions relied upon in conducting the relevant transactions; and
- Permitting foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, without individual no-action relief.

In addition to these proposed rule changes, we provide guidance or solicit commenters' views on the following issues:

- The ability of bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date;
- The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights;

- The application of the all-holders provisions of our tender offer rules to foreign target security holders;
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers; and
- The ability of bidders to use the vendor placement procedure for exchange offers subject to Section 13(e) or 14(d) of the Exchange Act.

II. DISCUSSION

A. Eligibility threshold – determining U.S. ownership

Business combination transactions are extraordinary events for target companies and their security holders. When U.S. persons hold a significant percentage of a target's securities in a cross-border business combination transaction, we believe U.S. tender offer and other rules should provide certain basic protections in transactions that will significantly impact their ownership interest in that target company.[51] When U.S. persons do not hold a significant stake in the subject target class, we believe that by allowing the acquiror to conduct the transaction in accordance with the applicable foreign law, while including U.S. persons and treating them at least as favorably as all other target holders, U.S. persons are better protected than they would be if the acquiror chose

[51] We believe these protections are even more critical in cross-border tender offers, where home country law may not allow acquirors to eliminate minority security holders under the same circumstances as in the United States. For example, in some foreign jurisdictions, the ability of bidders to "squeeze out" target security holders remaining after a tender offer may be more limited than in the United States, where this generally be accomplished whenever the bidder purchases a majority of target shares. See discussion in footnote 155 below. Therefore, a decision whether to tender into an offer and the procedural protections associated with that offer may be even more critical, because target security holders who remain after the offer may not be cashed out in a back-end merger, as would be typical in the United States.

to exclude them from the transaction so that the transaction would not be subject to U.S. regulations.

When we adopted the cross-border exemptions, we established a threshold eligibility test for use of the exemptions based on the percentage of target shares held by U.S. persons.[52] The current test, based on the level of U.S. ownership in the target company, has worked well conceptually. However, we have become aware of certain difficulties that can make application of our threshold eligibility test problematic in practice, including issues that can arise when conducting both the look-through analysis for negotiated transactions and the alternate test for non-negotiated deals, as discussed below. We believe the recommended changes will enhance the utility of the cross-border exemptions because they will make it easier for bidders and issuers to determine whether they are eligible to rely on them.

1. Methods for determining U.S. ownership under the existing cross-border exemptions

a. Negotiated transactions

As discussed above, under our current rules, eligibility to rely on the cross-border exemptions is determined in part by the percentage of U.S. beneficial holders of the

[52] For rights offerings, eligibility to rely on Rule 801 is determined by the percentage of subject securities of the issuer held by U.S. persons. See Securities Act Rule 800(h).

relevant class of target securities.[53] U.S. ownership of the target company is determined by reference to the target's non-affiliated float[54] and holders of greater than ten percent of the subject class are excluded from the calculation of U.S. ownership.[55] Any securities held by the acquiror in the business combination transaction similarly are excluded from the calculation.[56]

The rules specify the manner in which a bidder in a negotiated transaction must determine which target securities are held by persons resident in the United States.[57] They require the acquiror to "look through" securities held of record by nominees in specified jurisdictions to identify those held for the accounts of persons located in the

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53 Note that in response to inquiries from U.S. bidders regarding the availability of Securities Act Rules 801 and 802 when there are no U.S. holders in the issuer (in a rights offering) or subject company (in an exchange offer or other business combination), or when an offer is not extended to U.S. holders, the Division of Corporation Finance has taken the position that the cross-border exemptions do not apply unless there is at least one U.S. security holder of the subject class of securities. See Section II.C. Question 1 in the Third Supplement to the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 2001), at http://www.sec.gov/interps/telephone/phonesupplement3.htm. This is consistent with the intent of the exemptions: to facilitate the inclusion of U.S. security holders of foreign private issuers in business combinations and rights offerings.

54 We use "float" to refer to the aggregate market value of the subject securities held by non-affiliates. See generally, the definition of "Small Business Issuer" in Securities Act Rule 405 [17 CFR 230.405] and the Note to that provision. We do not include in that definition securities held by persons or entities that individually own more than ten percent of the subject securities.

55 See Instruction 2.ii. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and 14d-1(d). See also Securities Act Rule 800(h)(2).

56 Id.

57 See Instruction 2 to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d); Securities Act Rule 800(h).

United States.[58] If after "reasonable inquiry," the acquiror is unable to obtain information about the location of the security holders for whom a nominee holds, the rules allow the acquiror to assume that the customers are residents of the jurisdiction in which the nominee has its principal place of business.[59] The relevant date for determining U.S. ownership is the 30th day before a benchmark date that varies with the type of transaction for which the exemption is sought.[60]

b. Non-negotiated transactions

In adopting the eligibility standard for negotiated transactions described in the preceding section, we recognized that the required look-through analysis would be more difficult for third-party offerors in non-negotiated transactions because they would not have the cooperation of the issuer.[61] In particular, obtaining information from nominees who hold for the account of others is difficult for third-party acquirors and may have the

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58 See, e.g., Instruction 2.iii. to Exchange Act Rules 14d-1(c) and 14d-1(d) (instructing the bidder to limit its inquiry as to securities held in nominee form to nominees located in the United States, the subject company's jurisdiction of incorporation and the jurisdiction that is the primary trading market for the subject securities, if different from the target's jurisdiction of incorporation). We recently revised the rule pertaining to termination of registration to include a definition of "primary trading market" that may include trading in more than one foreign market. See Exchange Act Rule 12h-6(f)(5) [17 CFR 240.12h-6(f)(5)]. This does not change the meaning of "primary trading market" as used in the cross-border exemptions and in the instruction to the definition of foreign private issuer in Exchange Act Rule 3b-4 and Securities Act Rule 405 [17 CFR 230.405]. An acquiror's or issuer's obligation to look through nominees in calculating U.S. ownership continues to be limited to the jurisdiction of the single, principal foreign trading market for the target's securities, if different from the target's jurisdiction of incorporation.

59 See Securities Act Rule 800(h)(3) and Instruction 2.iv. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d).

60 See Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d) (specifying that U.S. ownership must be calculated as of the 30th day before commencement of a tender offer). For the Securities Act Rule 801 and 802 exemptions, see Rule 800(h) (stating that U.S. ownership must be calculated as of the record date for a rights offering or as of the 30th day before the commencement of an exchange offer or the solicitation for a business combination other than a tender offer).

61 See discussion in the Cross-Border Adopting Release, Section II.F.3.

effect of alerting the market to a contemplated offer before the acquiror wishes to make its intentions known. For that reason, the cross-border exemptions include a presumption available for non-negotiated or "hostile" transactions.[62] The "hostile presumption" allows a third-party bidder in a non-negotiated tender or exchange offer to assume that U.S. ownership in the target company is no more than ten percent or 40 percent, the thresholds for Tier I and Rule 802, and Tier II respectively, so long as average daily trading volume in the United States does not exceed ten percent or 40 percent of the average daily trading volume worldwide over a twelve-month period ending 30 days before commencement, and the bidder has no reason to know that actual U.S. ownership is inconsistent with that figure (either based on the issuer's informational filings with the Commission or foreign regulators or based on the bidder's actual or imputed knowledge from other sources).[63]

2. Current eligibility test for negotiated transactions

a. Concerns

Although we believe the current tests for determining eligibility to rely on the cross-border exemptions generally have worked well, changes in several areas would be

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[62] We distinguish a "hostile" tender offer from one made pursuant to an agreement with the target company, which we refer to as a negotiated or recommended transaction.

[63] See, e.g., Instruction 3.i.-iv. to Exchange Act Rules 14d-1(c) and 14d-1(d) (stating that the presumption is available unless the aggregate trading volume in the U.S. exceeds certain levels, or the bidder knows or should know that actual levels of U.S ownership exceed the ceiling for the applicable exemption). The instruction, as currently written, refers to the Nasdaq market and the trading volume of securities on the over-the-counter (OTC) market as reported to the NASD, but since the adoption of Exchange Act Rules 14d-1(c) and 14d-1(d) and the corresponding instruction, the Nasdaq market has become an exchange, the NASDAQ OMX Group, Inc. Additionally, the trading volume of securities on the OTC market is now reported to the Financial Industry Regulatory Authority, Inc., or FINRA, which was created through the consolidation of the NASD and the member regulation, enforcement and arbitration functions of the NYSE. We therefore propose a technical change to the rules to reflect these changes.

appropriate to address timing and informational restrictions that have impeded the application of the current exemptions. Many of these problems relate to the threshold eligibility determination for negotiated transactions.

In particular, the requirement that U.S. ownership be calculated as of the 30th day before the commencement of a tender offer or exchange offer, or before the solicitation for other kinds of business combination transactions[64] presents practical difficulties for acquirors in certain jurisdictions. In some countries, the look-through analysis we require for negotiated transactions takes longer than 30 days to perform.[65] Numerous acquirors have advised us that in some jurisdictions, it is not possible to calculate U.S. ownership as of a set date in the past. In others, information about the location of target security holders is only published at fixed intervals.[66] Additionally, the exact date of commencement is not within the control of the acquiror in some jurisdictions.[67] In recognition of these problems, issuers have sought guidance from the staff regarding the date of calculating U.S. ownership for purposes of determining eligibility to rely on the cross-border exemptions. The staff has stated that, where the 30th day before

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64 See Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and 13e-4(i), and Instruction 2.i. to Rules 14d-1(c) and 14d-1(d).

65 See, e.g., Serono S.A. (September 12, 2002)("Serono S.A.")(stating that approximately six to eight weeks is necessary to complete a look-through analysis to obtain information about the level of U.S. beneficial ownership of a French company).

66 See Section II.E. Question 8 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at http://www.sec.gov/interps/telephone/phonesupplement3.htm.

67 In some foreign jurisdictions, for example, a bidder is obligated to commence an offer within a certain number of days of receiving home country regulatory approval of its offer materials. As noted above, bidders cannot always obtain information about U.S. ownership as of a date in the past; rather, they can request that information only as of a current date going forward 30 days to the anticipated date of commencement. When the date of commencement is uncertain, it becomes difficult for offerors to comply with our rules.

commencement is impracticable for reasons outside of the acquiror's control the acquiror may use the date within the 30-day period before commencement that is as close as possible to the 30th day.[68] However, the staff continues to receive inquiries from acquirors who cannot definitively use a date within the 30 days before commencement because of logistical problems in the time needed to conduct the mandated look-through analysis, or because of the regulatory review process.[69] In the case of an exchange offer where the acquiror will issue securities in exchange for target securities, more than 30 days may be needed to prepare offering materials and complete the regulatory review process.

The reference date for assessing U.S. ownership under the cross-border exemptions also creates logistical problems in certain cases. The current exemptions key the determination of U.S. ownership to the date of commencement of the tender offer or the commencement of the solicitation for other types of business combinations, or to the record date for a rights offering.[70] If the announcement of the transaction predates the commencement by more than 30 days, an acquiror will not know with certainty when it announces a transaction whether it will be eligible to rely on the cross-border exemptions at all, or whether it will be eligible for Tier I/Rule 802 or Tier II. The staff has been

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68 See Section II.E. Question 7 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at http://www.sec.gov/interps/telephone/phonesupplement3.htm.

69 For example, shares of listed French companies are not certificated and the majority of such shares are held in bearer form, meaning that the only ownership records for such shares are maintained by Euroclear France, the French clearing system. It generally takes more than 30 days to request and analyze the position listing known as a "TPI report." See, e.g., Alcan, Inc. (October 7, 2003)("Alcan") and Equant N.V. (April 18, 2005)("Equant N.V.") and footnote 65 above.

70 See Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and Instruction 2 to Exchange Act Rules 14d-1(c) and (d).

advised that this is problematic in some foreign jurisdictions because by law, the announcement must provide detailed information about the transaction, including information about how U.S. target security holders will be treated.[71] Even where such information is not legally required at the time of announcement, issuers may wish to inform target security holders and the market at large of this information.

In addition, keying the look-through analysis to commencement creates a discrepancy for purposes of the exemption from Rule 14e-5. Rule 14e-5 generally prohibits purchases of target securities outside of a tender offer from the date of announcement of that offer through its expiration.[72] Tender offers conducted in reliance on the Tier I exemption are exempt from the application of Rule 14e-5.[73] However, because Rule 14e-5 applies from the date of announcement of the tender offer, a bidder will not necessarily know at the time of announcement whether it will qualify for the cross-border exemptions as of the 30th date before commencement.

Finally, from time to time the suggestion is made that excluding holders of greater than ten percent of the subject securities disproportionately elevates the levels of U.S. ownership in target companies. In the 1998 Cross-Border Proposing Release, we proposed to exclude from the calculation of U.S. ownership securities owned by non-U.S. target holders who individually held more than ten percent of the subject class, on the

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[71] The staff has been contacted by counsel for bidders in certain European countries with concerns about calculating U.S. ownership as of the date specified under current rules, where an announcement of the transaction must be made more than 30 days before commencement and under home country regulation the announcement must include detailed information about the treatment of U.S. target holders.

[72] Exchange Act Rule 14e-5 [17 CFR 240.14e-5]. We propose to extend this exemption to encompass Tier II-eligible tender offers.

[73] Exchange Act Rule 14e-5(b)(10)(i).

grounds that such large investors were affiliates and the securities they held were not part of the target's public float.[74] When the exemptions were adopted, they excluded securities held by both U.S. and non-U.S. persons holding greater than ten percent of the target company's securities because of commenters' concerns that excluding only large non-U.S. holders, as originally proposed, would skew the U.S. ownership percentages upward.[75] We continue to receive feedback from various constituencies, however, that exclusion of large holders results in reduced eligibility to rely on the cross-border exemptions. We would be interested in commenters' views on this requirement under our current rules and whether it should be modified or eliminated.

Request for Comment

- Should we continue to exclude from the calculation of U.S. ownership target securities held by the acquiror in the contemplated transaction?
- Should we eliminate the requirement to exclude subject securities held by greater than ten percent holders in calculating U.S. ownership of the target company? Would U.S. interest in a transaction more appropriately be measured by considering all of the outstanding securities, without excluding large holders? Would changing the rule in this manner result in extending the exemptions to circumstances where U.S. investors could be adversely affected?
- Should we eliminate greater than ten percent holders only where such holders are otherwise affiliated with the issuer?

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[74] See 1998 Cross-Border Proposing Release, Section II.H.2.

[75] See Cross-Border Adopting Release, Section II.F.2.

- Are there problems in determining who is a greater than ten percent holder that should be addressed in revised rules?
- If the requirement to exclude large holders is retained, is a greater than ten percent holding the appropriate level for exclusion? Should the percentage be higher, such as 15 or 20 percent?
- Is there any reason to eliminate the exclusion of greater than ten percent holders only for non-U.S. holders and not for U.S. holders, or vice-versa? What would the impact of such change be on the number of companies eligible for Tier I or Tier II?
- Should we maintain the same tests, with the revisions proposed, but raise the maximum U.S. ownership level for Tier I and Rules 801 and 802 to 15 percent? What effect would this have on the number of cross-border transactions eligible to be conducted under these exemptions? Would expanding the availability of Tier I and Rules 801 and 802 be in the interests of U.S. investors?

b. Proposed changes to the eligibility standard for negotiated transactions

We believe that by revising the eligibility tests for negotiated cross-border business combination transactions as proposed, we would eliminate many of the issues that have arisen. As discussed above, the first problem with the current test is the requirement that U.S. ownership be calculated as of a single, specified date. Accordingly, we propose that acquirors be permitted to calculate U.S. ownership within a

specified 60-day range rather than using a single date.[76] This approach is consistent with the position taken by the staff interpretively in considering timing issues in the cross-border context.[77] It also would provide greater flexibility where the timing of a transaction is driven by market forces or a regulatory process that is, to some extent, outside the control of the acquiror.

While we propose to provide greater flexibility as to the date on which U.S. ownership in the target company may be assessed, we remain concerned about the possibility that a date for calculation would intentionally be chosen to present less than a representative picture of the target security holder base. The instructions to the cross-border exemptions make it clear that the exemptions are not available for any transaction or series of transactions that technically comply with our rules but are, in fact, part of a plan or scheme to evade them in practice.[78]

As discussed above, another logistical problem with the cross-border exemptions centers on the use of commencement as the triggering event for the calculation of U.S. ownership. We now propose to require that U.S. ownership be calculated within a 60-day period before the public announcement of the cross-border tender offer or business combination transaction.[79] For these purposes, public announcement generally means the

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[76] As discussed below, we also propose to change the reference point for calculation of U.S. ownership from commencement to announcement. We are not currently proposing a change to the requirement to calculate as of the record date for rights offerings. See Rule 800(h)(1).

[77] See, e.g., Section II.E. Questions 6, 7 and 8 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at http://www.sec.gov/interps/telephone/phonesupplement3.htm.

[78] See General Note 2 to Securities Act Rules 800, 801 and 802, Instruction 4 to Exchange Act Rules 13e-4(h)(8) and 13e-4(i), and Instruction 5 to Exchange Act Rules 14d-1(c) and 14d-1(d).

[79] See proposed revisions to Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and Instruction 2.i. to Exchange Act Rules 14d-1(c) and (d).

same as in Instruction 5 to Rule 14d-2(b)(2).[80] By using announcement instead of commencement as the triggering event for purposes of the calculation, we hope to enable acquirors planning cross-border transactions to determine at an earlier point how they will treat U.S. holders.

This change also would allow the application of the exemptions to be based on the characteristics of the target security holder base before it is influenced by the announcement of the transaction.[81] Further, it would permit acquirors to meet home country requirements, which may mandate that the acquiror include information about the treatment of U.S. holders in the announcement of the transaction. In addition, it would encourage bidders to provide the markets and target security holders with valuable information at an earlier stage in the transaction process, including alerting investors who may acquire the target company's securities after the announcement whether they will have the full protections of Regulations 14D and 14E.

Where U.S. ownership levels do not permit the acquiror to rely on the Tier I exemption or Rule 802, calculating the level before announcement would provide more time to plan and put together the necessary offering materials. For those who plan to rely on the Tier II exemption, the proposed change would afford more time to determine and seek any necessary exemptive or no-action relief. In addition, because announcement

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80 Instruction 5 to Exchange Act Rule 14d-2(b)(2) [17 CFR 240.14d-2(b)(2)] states that "'public announcement' is any oral or written communication by the bidder, or any person authorized to act on the bidder's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer."

81 See Section II.E. Question 6 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at http://www.sec.gov/interps/telephone/phonesupplement3.htm (discussing the rationale for why the staff has permitted announcement to be used as the reference point for calculating U.S. ownership in "pre-conditional offers" conducted under U.K. or Irish law).

also is the triggering event for application of Rule 14e-5, this change would further harmonize Tier I and Tier II relief as it relates to that provision. However, we are aware that for some business combination transactions, several weeks or months may elapse between the time of announcement and commencement of the transaction, because of home country regulatory review or other reasons. The target security holder base, including the percentage of those securities held by U.S. persons, may change significantly between announcement and commencement. We do not propose to change the relevant date for calculation of U.S. ownership for rights offerings. Issuers will continue to calculate U.S. ownership as of the record date for a rights offering.[82] Because issuers control the record date for rights offerings and generally have greater access to information about their own security holders, the test for calculating U.S ownership for rights offerings has not been the subject of requests for relief. Therefore, we do not propose to change that test today.

The existing cross-border exemptions provide that where one acquiror is eligible to rely on a particular cross-border exemption based on the level of U.S. ownership in the target, a second acquiror who makes an offer for the same target company may rely on the same exemption.[83] We do not propose to change this result with the rule modifications we propose today. We believe it provides an important safeguard to place competing transactions on an equal footing with respect to calculation of U.S. ownership and eligibility to rely on applicable cross-border exemptions.

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[82] See Securities Act Rule 800(h)(1).

[83] See, e.g., Exchange Act Rule 14d-1(d)(1)(ii). The second bidder may choose not to rely on the same exemption as the first bidder. See also Cross-Border Adopting Release, Section II.F.1.

Request for Comment

- Should we revise the date as of which U.S. ownership is calculated for purposes of determining eligibility to rely on the cross-border exemptions for business combination transactions, as proposed?
  - Should we revise the rules to provide for a range of dates as proposed, or should we continue to specify a date certain for the calculation? If we continue to specify a date certain, should we specify a date earlier than the 30th day before commencement? For example, should we specify the 30th day before announcement?
- Is a range of 60 days before announcement sufficient time to allow bidders and issuers maximum flexibility while avoiding the potential for manipulation of the calculation of U.S. ownership? Or would 75 or 90 days be more appropriate?
- Is announcement the appropriate reference point for determining eligibility to rely on the cross-border exemptions? Or should we retain commencement as the reference point? Are there other alternative reference points we should consider?
- Should we keep commencement as a reference point, but use a range, such as within 60 days before commencement?
- Is it appropriate to use announcement as the reference point, even where a significant period of time may elapse between announcement and commencement, and the makeup of the target security holder base may change in response to announcement or because of the lapse of time? Should

we establish a limit on the period of time which may elapse between the reference point for calculation of U.S. ownership and the commencement of the business combination transaction?

- Should we change the date as of which U.S. ownership is calculated for rights offerings in the same or in a similar manner? If so, please explain what issues may arise under the current test and what changes should be made.
- If we adopt the proposed rule changes allowing bidders and offerors to choose a date within a range for purposes of the calculation of U.S. ownership, should we provide guidance on what dates may not be chosen because of an event or events significantly affecting the target security holder base? For example, if an event occurs that the bidder or offeror knows significantly impacted the U.S. ownership of the target securities within the relevant sixty-day range, but the bidder or offeror did not cause or contribute to such event, should the bidder or offeror be prohibited from using that date as the reference point for the calculation of U.S. ownership?

3. The current test for non-negotiated or hostile tender offers

a. Concerns

Where a third-party tender offer is not made pursuant to an agreement between the bidder and the target company, the current cross-border exemptions allow a bidder to presume eligibility to rely on the exemptions based on a test outlined in our rules, which focuses on information readily available to the bidder.[84] The hostile presumption was adopted in recognition of the difficulties third parties face in obtaining information about

[84] See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d-1(c) and 14d-1(d).

U.S. ownership without the cooperation of the target company.[85] Because issuers have greater access to information about their own security holders, the hostile presumption is not available for issuer tender offers.

The eligibility standard for hostile transactions is based in part on the trading volume of the target's securities in the United States, as compared to worldwide trading volume, over a 12-month period.[86] However, the presumption of U.S. ownership derived under the trading volume element of the test is qualified by information about U.S. ownership reported in the target's most recent annual report filed with the Commission or its home country regulators.[87] In addition, the bidder cannot rely on the hostile presumption if it knows or has reason to know that the actual level of U.S. ownership of the subject securities exceeds the relevant thresholds for Tier I and Tier II.[88] Knowledge or "reason to know" may come from sources other than reports filed with the Commission or the target's home country regulator and disqualifies the bidder from being able to rely on the cross-border exemptions.

These elements of the hostile presumption have resulted in certain issues in practice. First, acquirors appear to be uncertain about what constitutes "reason to know" with respect to the level of U.S. ownership of the target, other than information reported

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85 See Cross-Border Adopting Release, Section II.F.3.

86 Securities Act Rule 802(c)(2) and Instruction 3.ii. to Exchange Act Rules 14d-1(c) and 14d-1(d). Trading volume in the hostile presumption is not calculated in the same way as the average daily trading volume used for purposes of deregistration and the threshold proposed for Rule 12g3-2(b). The trading volume in the hostile presumption is calculated using a 12-calendar-month period ending 30 days before commencement of the offer, although we propose to change this calculation to a 12-calendar-month period ending no later than 60 days before announcement of the offer, as discussed below.

87 Securities Act Rule 802(c)(3) and Instruction 3.iii. to Exchange Act Rules 14d-1(c) and 14d-1(d).

88 Securities Act Rule 802(c)(4) and Instruction 3.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

in filings with the Commission or the home country regulators. Acquirors have expressed uncertainty about whether they have any obligation, and if so, the extent of their obligation to seek out information about U.S. ownership levels. Questions also arise as to the timing of that knowledge. For example, because average daily trading volume is calculated as of the 12-calendar-month period ending 30 days before commencement,[89] acquirors often are unsure of whether their actual or imputed knowledge of U.S. ownership similarly should be as of that date.

It also is possible that targets may use the reporting and knowledge elements of the hostile presumption defensively. For example, targets that learn of a possible hostile offer could file reports preemptively with the Commission stating a percentage of U.S. ownership that precludes the hostile bidder's reliance on certain exemptions, or they may contact the bidder's counsel directly to assert levels of U.S. ownership that disqualify the bidder from relying on Tier I and Rule 802 in particular.[90] In the latter case, bidders have asked whether such an assertion as to U.S. ownership must be substantiated (and if so, how) in order to preclude reliance on the hostile presumption. Even when a target has filed a periodic report with the Commission indicating a certain percentage of U.S. ownership as a defensive measure, we have seen targets reduce those ownership figures when the transaction becomes recommended. These types of situations create a level of uncertainty for unsolicited bidders that may make it difficult to apply the presumption of U.S. ownership in unsolicited offers.

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89 Securities Act Rule 802(c)(2) and Instruction 3.ii. to Exchange Act Rules 14d-1(c) and 14d-1(d).

90 It also is possible that a target may attempt to provide information preemptively before announcement of a hostile bid, but we believe this may happen less frequently when the determination of U.S. ownership is made as of a date before announcement, because the negotiations may begin in a friendly manner.

b. Proposed changes to the presumption for non-negotiated transactions

Today we propose changes to the hostile presumption for determining eligibility to rely on the cross-border exemptions. First, we propose to clarify the "reason to know" element of that test.[91] In the years since the adoption of the cross-border exemptions, bidders frequently have asked what constitutes "reason to know" information about U.S. ownership for purposes of the hostile presumption. We propose to amend our rules to specify that an acquiror has reason to know information that is publicly available. This would include information appearing in reports compiled by independent information service providers that generally are available to the public. However, neither our current rules nor the changes we propose today affirmatively would require an acquiror seeking to rely on the hostile presumption to engage such a third-party service at its own expense.

The proposed rule also would make it clear that acquirors are presumed to know information about beneficial ownership reflected in filings by third parties with the Commission, such as beneficial ownership reports on Schedule 13D, 13F[92] or 13G. Similarly, acquirors are presumed to know about similar reports filed by third parties in the target's home country and in the country of its primary trading market, if different. Acquirors may not ignore credible information about target securities held by U.S. persons from non-public sources, such as from investment bankers or other market participants, including the target company, from whom they receive information. As discussed below, however, such information would have to be available before announcement to disqualify the acquiror from relying on the hostile presumption.

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91 Securities Act Rule 802(c)(4) and Instruction 3.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

92 17 CFR 249.325.

We also propose to specify the time periods applicable to the hostile presumption. For purposes of the element of that test relating to the average daily trading volume calculation, we propose to modify the instruction to our rules to mandate a calculation over a twelve-calendar month period ending no later than 60 days before announcement.[93] This time period for calculation is the same as the period we are proposing for negotiated transactions. We believe it is appropriate that the time periods for measuring levels of U.S. ownership be comparable for both hostile and negotiated transactions.

We also propose to add a timing element to the other components of the hostile presumption test. These changes to the instructions and to the rules would provide that the acquiror's knowledge or "reason to know" refers to knowledge as of the date of announcement. As proposed, our rules would allow an acquiror to ignore conflicting information received after announcement.[94] These changes are intended to address our concern that some target companies may be manipulating their disclosure of U.S. ownership with respect to unsolicited offers. They also would eliminate uncertainties created by changes in the target's security holder base that may be caused by the announcement of the offer.

Request for Comment

- Is it helpful to specify in the rule, as proposed, examples of information that the acquiror has reason to know, or should the rule remain more general?

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93 See proposed revisions to Securities Act Rule 802(c)(2) and Instruction 2.ii. to Exchange Act Rules 14d-1(c) and (d).

94 See proposed Securities Act Rule 802(c)(3) and (4) and Instructions 3.iii. and iv. to Exchange Act Rules 14d-1(c) and (d).

- Would the clarifications we propose to the reason to know element of the test prevent the abuse of U.S. ownership information by targets? Are there currently sufficient safeguards to prevent misuse of this information?
- For purposes of the hostile presumption, should we change the date for comparison of the average daily trading volume of the target securities to a twelve-month period ending no later than 60 days before announcement, as proposed?
  - Should we limit the knowledge or reason to know element of the test to the same time, as proposed, so that acquirors will not be disqualified from relying on the presumption if they learn of conflicting U.S. ownership information after the date of announcement? Or should we require acquirors to take into account any information they learn at any time before commencement?
  - Would the proposed cut-off date for the actual knowledge test be disadvantageous for U.S. investors in the target company?
  - Where the target asserts levels of U.S. ownership that are inconsistent with reliance on an applicable presumption in the context of a hostile transaction, should the rules provide any guidance on the extent to which such assertions must be substantiated? Should we allow acquirors to ignore such assertions by the target, absent adequate substantiation or in the face of conflicting information known to the acquiror?

- o If the rule changes are adopted as proposed, should we make corresponding changes to the date of comparison in the "actual knowledge" element of the test for the MJDS with Canada?[95]

- Should we decline to make any changes in the reason to know element of the hostile presumption, leaving acquirors to assess the facts and circumstances in a specific situation on a case-by-case basis?

4. Possible new eligibility standards for negotiated and hostile transactions

Instead of adopting the proposed changes to our current eligibility standards for hostile and negotiated cross-border business combinations discussed above, we could adopt a different approach based on different measures of U.S. investor interest in target securities. For example, for negotiated transactions, we could consider a test based on twelve-month ADTV in the United States as compared to worldwide trading volume over the same period. Alternatively, we could consider a test based on the percentage of shares that are held in the form of ADRs. It is possible that there are other, more suitable tests that we have yet to identify. We could adopt an alternate test for business combination transactions only, or we could adopt it for both business combinations and rights offerings.

As discussed above, the existing hostile presumption available for non-negotiated business combination transactions contains an element based on a comparison of U.S. and worldwide ADTV,[96] and we have recently used this test as a reference in other

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[95] See Exchange Act Rule 14d-1(b).

[96] See Securities Act Rule 802(c) and Instructions 3.i.-iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

areas.[97] Based on an analysis performed by the staff comparing U.S. beneficial ownership figures yielded by the look-through analysis mandated by our current rules to the figures that would result by using an ADTV-based measure, it appears that trading volume may not reflect beneficial holdings of U.S. investors in a target company. To perform this analysis, the staff considered negotiated business combination transactions conducted under the existing cross-border exemptions using the current look-through analysis and compared the resulting percentages of U.S. beneficial ownership with the figures that would have resulted using the ratio of U.S. to worldwide ADTV. Based upon the transactions considered, the analysis suggests that the correlation between the ADTV-based measure and the percentage of target securities beneficially held by U.S. persons is low.

Using such a test may result in target companies with significant U.S. ownership qualifying for the Tier I and Rules 801 and 802 exemptions. Where a bidder, including a U.S. company, is eligible to rely on the Tier I cross-border exemptions, it may issue securities without registration under Securities Act Rule 802. We are concerned that use of an ADTV test for eligibility to rely on the cross-border exemptions would allow bidders, including U.S. bidders, to issue significant amounts of bidder securities to U.S. holders, without the protections of registration. For cash tender offers and other kinds of business combination transactions, we do not believe the requirements of the U.S. tender offer and other rules applicable to business combinations are onerous. Unlike continuing Exchange Act registration and reporting requirements, these rules apply to a single,

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[97] See footnotes 45 and 46 above.

discrete transaction and, in many instances, are specifically tailored to address potential conflicts with foreign law and practice.

We are concerned that extraordinary events in the life of a corporation, such as tender or exchange offers or other kinds of business combination transactions, may pose unique opportunities and risks to security holders that are not present in the context of deregistration, where we have adopted an ADTV test for measuring U.S. interest in a transaction, or exemption from Exchange Act Section 12(g) registration under Rule 12g3-2(b), where we have proposed an ADTV test. In a tender or exchange offer, where the bidder may present its offer directly to target security holders even where the target company itself does not support the offer, the disclosure and procedural protections of our rules provide critical safeguards for U.S. investors. Unlike capital-raising transactions, the interests of all target security holders, including U.S. holders, are affected by business combinations, whether or not they are permitted to participate in them. As noted above, the requirement to comply with U.S. rules for a business combination transaction is generally less burdensome than the continuous reporting requirements under the Exchange Act. For these reasons, we have historically viewed a test based on U.S. beneficial ownership of target securities as the approach that best aligns U.S. investor interests with application of our rules. Therefore, we are not proposing the use of an ADTV test to determine eligibility to rely on the cross-border exemptions.

Similarly, we are not currently proposing a test based solely on a measure of the percentage of target securities held in ADR form. When the current cross-border exemptions were proposed, we considered an eligibility standard that presumed that

target securities held in ADR form were beneficially held by U.S. persons.[98] Commenters were critical of any presumption that securities held in ADR form were held only by U.S. persons.[99] An ADR-based test need not rest on a presumption that securities held in ADR form are held by U.S. persons; rather, ADRs could, in general, be considered a proxy for U.S. beneficial ownership, or for a component (e.g., direct retail) of U.S. beneficial ownership. Since some foreign target securities are traded in direct share form in the United States, any test based on securities held in ADR form would be inapplicable to those companies.

We believe that information about the percentage of target shares held in ADR form is not currently readily accessible to third-party bidders in non-negotiated offers. The information might become available through the introduction of registrant disclosure requirements, however. In the case of such disclosure, an ADR-based test could provide a solution for both hostile and negotiated transactions. A weakness of the ADR-based measure is that, as discussed above, because some foreign target securities are traded in direct share form in the United States, any test based on securities held in ADR form would be inapplicable to those companies. We also would need to consider the relevant time period for which we would look at the percentage of target securities held in ADR form if such a test were to be considered, and whether ADRs held by the acquiror and large holders would continue to be excluded from the calculation of U.S. ownership under such a test. If we did not exclude ADRs held by the bidder, the bidder could potentially influence the percentage of such securities held by U.S. persons by changing

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98 See 1998 Cross-Border Proposing Release, Section II.H.1.

99 See Cross-Border Adopting Release, Section II.F.1.

the form of its securities held from ADRs into the underlying securities. We are interested in obtaining comments as to whether an ADTV test or a test based on target securities held in ADR form would be appropriate.

Request for Comment

- Is our continued focus on the percentage of target securities beneficially held by U.S. persons as the relevant test for measuring U.S. interest appropriate and in the best interests of U.S. investors?
  - If we change the rules as proposed, would this alleviate sufficiently the practical difficulties with the calculation of U.S. ownership, so that our rules will be more workable and will better encourage and facilitate the inclusion of U.S. security holders in cross-border transactions? Or would there still be a reason to move from the current focus on the percentage of securities held by U.S. investors to another standard?
  - Are there other practical difficulties involving the beneficial ownership standard that we have not addressed and that it would be helpful to address?
- Should we propose a different test for Tier I and Tier II eligibility, based on U.S. ADTV compared to worldwide ADTV over a twelve-month period?
  - Using U.S. ADTV compared to worldwide ADTV would likely result in many more transactions being eligible for Tier I, and some additional transactions being eligible for Tier II if we maintain the existing ten percent and 40 percent thresholds. Should the thresholds be adjusted so that the transactions eligible for the cross-border

exemptions are equivalent, in terms of number of transactions eligible, before and after changing the eligibility test? If ADTV levels in the United States are very low even where beneficial ownership is high, should we adjust the thresholds to account for this situation? For example, should we lower the Tier I threshold to five percent? One percent? Less than one percent? If we do this, should we also adjust the thresholds in the hostile presumption correspondingly? What would be the appropriate adjustments for Tier II?

- Are there reasons for or against adopting an ADTV test? For example, would an ADTV test be an adequate measure for gauging U.S. retail versus institutional ownership of the target securities?
- Should we qualify the ADTV test based on other factors, such as an acquiror's actual knowledge or U.S. ownership as reported by the target?
- If we adopt an ADTV test, should we adopt the concept of "primary trading market" as defined in Exchange Act Rule 12h-6(f)(5)?[100] That is, should we establish the requirement that the issuer maintain a listing for the subject securities on one or no more than two exchanges in a foreign jurisdiction that, alone or together, constitute 55 percent of the trading in the subject securities over a specified period as a comparison point for U.S. trading volume? Should we adopt the concept that the "primary trading market" for the subject securities

[100] See footnote 58 above.

may encompass one or no more than two foreign markets, and if more than one market, the requirement that the aggregate trading volume in one of those two foreign markets must be greater than the trading volume in the U.S., as specified in Rule 12h-6(f)(5)?

- Should we propose a different test for Tier I and Tier II eligibility, based on the percentage of shares held in ADR form?
  - Is the percentage of shares held in ADR form an effective proxy for U.S. investor ownership? For U.S. institutional ownership? For U.S. direct retail investor ownership?
  - Are there reasons why U.S. persons may choose to hold target securities in direct share form instead of holding ADRs?
  - Under a test based on the percentage of shares held in ADR form, should Tier I and Tier II eligibility thresholds remain constant at their current values (10 percent and 40 percent), or should they change? What criteria should we use, and what evidence should we consult in establishing eligibility thresholds for Tier I and Tier II?
  - If we adopt such a test, as of what date should we measure the securities held in ADR form? Should we exclude from the calculation ADRs held by certain persons, such as the bidder, as we do under our current test for some kinds of business combination transactions?
  - How should we handle securities of foreign private issuers that trade in direct share form?

- If we adopt a test based on the percentage of shares held in ADR form, should we amend Form 20-F to require reporting of sponsored ADRs outstanding, so that targets, acquirors and their investors understand eligibility status? How costly or difficult would it be for the issuer to obtain information about the number of sponsored ADRs outstanding? If this information were reported only once each year in the Form 20-F, would the information be current enough for use in cross-border transactions that might occur months later?
- Are there reasons for or against adopting a test based on the percentage of shares held in ADR form?

- ADTV- and ADR-based standards may effectively place companies with no U.S.-traded securities in Tier I. What implications would this have for investor protection?
  - If we move toward a different standard for determining U.S. interest, should this new standard apply only to companies with securities traded in the U.S., with the beneficial ownership standard continuing to apply to companies with no securities traded in the U.S.? Alternatively, for securities not traded in U.S. markets, do U.S. investors adequately understand the distinct risks of ownership?
- If we make any changes to the standard for determining Tier I and Tier II eligibility, should we also change the standard for the hostile presumption? Should we adopt this alternative standard for business combination

transactions only, or should we adopt it for both business combinations and rights offerings?

- If we change the standard, should we also change the standard for the tender offer rules in Rule 14d-1(b) under the MJDS with Canada?
- Should we propose a different eligibility test(s) for determining eligibility to rely on the cross-border exemptions? What general criteria are important in selecting a measure for U.S. investor interest, for the purposes of this rule? Several potential criteria are (i) the ease of public access to information related to the measure; (ii) the difficulty of manipulation of the measure; and (iii) the alignment of the measure with the percentage of target securities beneficially held by U.S. investors. Are these criteria appropriate? Are there others we should consider?

B. Proposed changes to Tier I exemptions

1. Expanded exemption from Rule 13e-3

Rule 13e-3 establishes specific filing and disclosure requirements for certain kinds of affiliated transactions, because of the conflicts of interest inherent in such situations.[101] Rule 13e-3 applies to these kinds of transactions by issuers or their

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[101] The kinds of transactions covered by Exchange Act Rule 13e-3 include tender offers, purchases of securities, mergers, reorganizations, reclassifications and sales of substantially all the assets of a company. See Rule 13e-3(a)(3)(i)(A) - (C). Rule 13e-3 requires that a Schedule 13E-3 be filed for these kinds of transactions. See Exchange Act Rule 13e-3(d)(1).

affiliates, where the transactions would have a "going private" effect.[102]

Cross-border transactions conducted by the issuer or its affiliates under Exchange Act Rules 13e-4(h)(8), 14d-1(c) and Securities Act Rule 802 are exempt from the requirements of Rule 13e-3.[103] The scope of the current Tier I exemption from Rule 13e-3 does not apply to some transaction structures commonly used abroad. These include schemes of arrangement,[104] cash mergers, compulsory acquisitions for cash,[105] and other types of transactions. We do not believe there is a reason for excluding these kinds of transactions from the exemption from Rule 13e-3, assuming they would otherwise qualify for Tier I. We believe the form of the transaction structure should not prevent an otherwise-eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3. We therefore propose to expand the scope of the Tier I exemption from Rule 13e-3 to remove any restriction on the category of transactions covered.

The heightened disclosure requirements of Rule 13e-3 may represent a significant disincentive for acquirors to include U.S. security holders in cross-border

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[102] Exchange Act Rule 13e-3(a)(3)(ii) lists the effects that will cause the rule to apply to a specified transaction: (A) causing any class of equity securities of an issuer which is subject to section 12(g) or section 15(d) of the Act to be held of record by less than 300 persons; or (B) causing any class of equity securities of the issuer which is listed on an exchange or quoted on an interdealer quotation system to no longer be so listed or quoted. For foreign private issuers engaged in transactions that would have a going private effect under our rules, we interpret Rule 13e-3 to apply where the transaction results in fewer than 300 security holders of record in the United States. See Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008).

[103] Exchange Act Rule 13e-3(g)(6).

[104] We use this term to refer to a court-approved business combination transaction. See, e.g., U.K. Companies Act, Parts 26 and 27.

[105] By "compulsory acquisition," we mean a transaction where an acquiror purchases the specified minimum percentage of target securities set by applicable law or the governing instruments of the target company, thereby allowing it to acquire any remaining target securities it does not own without the consent of the holders. A compulsory acquisition may occur after a tender offer for all target securities. A compulsory acquisition of target securities remaining after a tender offer will sometimes be exempt from the application of Exchange Act Rule 13e-3 under existing rules. See Exchange Act Rule 13e-3(g)(1).

transactions that do not currently fit within the Rule 13e-3(g)(6) exemption, particularly where U.S. holders make up no more than ten percent of the target shareholder base. In several instances, the staff has granted individual no-action requests for transaction structures not covered within the scope of current Rule 13e-3(g)(6), but which otherwise met the conditions for reliance on that exemption.[106] The revised rule we propose today is consistent with the staff's approach in these no-action letters.

We believe exempting acquirors from the application of Rule 13e-3 in Tier I-eligible transactions is consistent with our goal of facilitating the inclusion of U.S. investors in primarily foreign transactions. Therefore, we propose to eliminate the restriction on the kinds of cross-border transactions that qualify for the Tier I exemption from Rule 13e-3. The proposed rule would include within the exemption any kind of transaction that would otherwise meet the conditions for Tier I or Rule 802 eligibility.[107] By omitting reference to specific kinds of transaction structures, we hope the revised exemption will focus on substance rather than form.

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[106] See, e.g., SUNDAY Communications Ltd. (November 1, 2006)(involving a scheme of arrangement); SUNDAY Communications Ltd. (November 7, 2005)(involving a privatization scheme); and Equant N.V. (involving a synthetic merger).

[107] In order to qualify for the Tier I exemption, an offer must meet the following requirements of Exchange Act Rules 13e-4(h)(8) and 14d-1(c): (i) the acquiree must be a foreign private issuer as defined in Rule 3b-4 of the Exchange Act; (ii) U.S. holders of the acquiree must hold ten percent or less of the securities subject to the offer; (iii) the acquiror must submit an English language translation of the offering materials to the SEC under cover of Form CB and, in the case of an acquiror who is a foreign private issuer, submit to service of process on Form F-X; (iv) U.S. holders must be treated on terms at least as favorable as those offered to any other security holders of the acquiree; and (v) U.S. holders of the acquiree must be provided the offering circular or other offering materials, in English, on a comparable basis as non-U.S. acquiree security holders. See also Securities Act Rule 802(a).

Request for Comment

- Should the proposed expansion of the Tier I exemption from Rule 13e-3 specify the particular types of affiliated transaction structures that will be exempt from Rule 13e-3, as the current rule does?
- If so, what kinds of transactions should be covered?
- Is it preferable to phrase the exemption more generally, as proposed, to avoid limiting the focus on the transaction structure? Are there any kinds of affiliated transactions that should not be included in the exemption?

2. Technical changes to Rule 802

We are proposing a technical change to Rule 802 to clarify the application of Rules 802(a)(2) and (3). When read in context, it is clear that the term "issuer" in those rules is intended to refer to the "offeror" in an exchange offer. We believe it is appropriate to revise those rules to use the term "offeror" instead. This is consistent with the reference to "offeror" in Rule 802(c)(4). These revisions are not intended to change the scope or operation of the existing rule.

In some foreign jurisdictions, local rule or practice dictates that the offeror and the target company jointly prepare a single offer document that is disseminated to target holders. In other jurisdictions, the offeror may prepare the offer materials but they are disseminated by the target company. Our rule change is not intended to change the obligation of the offeror to submit the Form CB with attached offer materials, even where the offer document is technically distributed by another party to the transaction on its behalf.

C. Proposed changes to Tier II exemptions

As discussed above, the Tier II cross-border exemptions currently provide targeted relief from specific U.S. tender offer rules, where U.S. persons hold more than ten percent but no more than 40 percent of the relevant class of target securities.[108] The Tier II exemptions address certain common procedural and practical problems associated with conducting offers in accordance with two or more different regulatory regimes. This relief is limited in scope, in recognition of the substantial U.S. interest in such transactions.

Unlike the Tier I exemptions and the Rule 801 and 802 exemptions, the Tier II exemptions do not exempt third-party bidders or issuers from applicable U.S. filing, disclosure, dissemination and procedural requirements for tender offers or going-private transactions subject to Rule 13e-3. In addition, no exemption is provided from the filing and disclosure requirements of Schedules TO and 13E-3. Accordingly, no Form CB is required for Tier II cross-border tender offers. Unlike Securities Act Rules 801 and 802, the Tier II exemptions do not provide relief from the registration requirements of Section 5 of the Securities Act.

Since the adoption of the cross-border exemptions, we have become aware of specific areas in which the Tier II exemptions do not function as smoothly as intended. We also have identified other instances of conflict between U.S. and foreign regulation or practice which we believe warrant expanded relief. The no-action and exemptive letters issued for Tier II cross-border transactions since the adoption of the exemptions reveal a number of common areas in which further regulatory relief may be appropriate. By

[108] Exchange Act Rules 13e-4(i) and 14d-1(d).

broadening the relief provided for Tier II-eligible transactions as we propose today, we hope to obviate the need for many of these individual requests for relief in the future. This expanded relief is specifically targeted and narrowly tailored, and as a result, we believe it maintains an appropriate balance between investor protection and the promotion of cross-border transactions, particularly in transactions involving target companies with significant levels of U.S. ownership.

Request for Comment

- In addition to the proposed revisions described below, are there other areas in which Tier II should be expanded to better address the needs of bidders and U.S. target security holders in cross-border tender offers?
- Are there areas in which the existing Tier II exemptions or the revisions we propose should be limited or modified?

1. Extend Tier II relief where target securities are not subject to Rule 13e-4 or Regulation 14D

The Tier II exemptions apply to transactions governed by Regulation 14D and Rule 13e-4 under the Exchange Act.[109] As currently written, it is unclear whether the Tier II exemptions are available when a tender offer is not subject to those rules, i.e.,

[109] Rule 13e-4 and Regulation 14D apply only to tender offers for equity securities. Regulation 14D applies only where the equity security that is the subject of the tender offer is registered under Section 12 of the Exchange Act, and where the bidder makes a partial offer for less than all of the outstanding securities of the subject class, where the bidder could own more than 5 percent of those securities when purchases in the tender offer are aggregated with its existing ownership of those securities. Rule 13e-4 applies to an issuer tender offer where the subject securities are not themselves registered under Section 12, but where the issuer has another class of securities that are so registered.

when the tender offer is governed by Regulation 14E[110] only. We believe the Tier II exemptions should be available if the conditions specified in our rules are satisfied, and therefore we propose to amend the rules accordingly to clarify that the Tier II exemptions are available regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D.

Since the adoption of the Tier II cross-border exemptions, the staff has periodically received inquiries from offerors in tender offers that would have qualified for the Tier II cross-border exemptions, but for the fact that the tender offer was not subject to Rule 13e-4 or Regulation 14D. The staff has taken the position that bidders otherwise meeting the conditions for reliance on the Tier II cross-border exemptions may rely on that relief in making tender offers for a subject class of securities not subject to Rule 13e-4 or Regulation 14D, to the extent applicable. Today we propose to codify this position by changing the language of the Tier II exemptions to specifically expand the scope of the exemptions to these kinds of offers.[111]

Some of the relief afforded under the Tier II exemptions will not be necessary in the case of offers not subject to Rule 13e-4 or Regulation 14D. For example, because our "all-holders" requirement[112] does not apply to such offers, the Tier II provision

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110 Exchange Act Rule 14d-1(a) defines the scope of Regulation 14E and currently includes within the scope of that regulation only Exchange Act Rules 14e-1 and 14e-2. Exchange Act Rule 14d-1(a) was not amended to reflect the increased scope of Regulation 14E, beginning with the adoption of Exchange Act Rule 14e-3 in 1980. See Tender Offers, Release No. 34-17120 (September 4, 1980) [45 FR 60410]. Today we propose a change to the definition of Regulation 14E in Rule 14d-1(a), to encompass Exchange Act Rules 14e-1 through 14e-8.

111 See proposed Exchange Act Rules 13e-4(i) and 14d-1(d).

112 See Exchange Act Rules 13e-4(f)(8) and 14d-10(a) [17 CFR 240.14d-10(a)].

permitting the use of the dual offer structure[113] may be unnecessary. However, where the relief provided in Tier II is needed, we see no reason to restrict its application only to tender offers subject to Rule 13e-4 or Regulation 14D.

Request for Comment

- Is the proposed expansion of the application of the Tier II exemptions to tender offers not subject to Rule 13e-4 or Regulation 14D appropriate?
- Should we condition the proposed extension of the relief provided under Tier II on any other factors besides general eligibility to rely on the Tier II exemptions?
- Are there other areas in which we should provide targeted relief (other than those currently proposed for Tier II offers) for tender offers not subject to Rule 13e-4 or Regulation 14D?

2. Expand Tier II relief for dual or multiple offers

a. Offeror may make more than one non-U.S. offer

U.S. tender offer rules require that when a bidder makes a tender offer that is subject to Section 13(e) or 14(d) of the Exchange Act, that tender offer must be open to all target security holders of that class.[114] The Tier II cross-border exemptions currently contain a provision permitting a bidder conducting a tender offer to separate that offer into two separate offers – one U.S. and one foreign – for the same class of securities.[115] This exemption for dual offers provides bidders with maximum flexibility to comply with

[113] Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

[114] Exchange Act Rules 13e-4(f)(8) and 14d-10(a)(1).

[115] Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

two sets of regulatory regimes and to accommodate frequent conflicts in tender offer practice between U.S. and foreign jurisdictions. By permitting the use of two separate but concurrent offers – one made in compliance with U.S. rules and the other conducted in accordance with foreign law or practice – the dual offer provision facilitates cross-border tender offers.

In practice, however, issues have arisen because of the language of the dual offer provision contained in the Tier II exemptions. First, the text of the exemption specifically permits only two offers for the target class of securities.[116] Bidders may be required to (or may wish to) make more than one offer outside of the United States. This may be the case, for example, where the primary trading market for the target's securities differs from the target's country of incorporation.[117]

We see no reason to limit a bidder to only two offers for target securities. Where a bidder is subject to more than one foreign regulatory scheme, greater potential for regulatory conflicts may exist. We note that companies have, upon request, received relief permitting multiple foreign offers.[118] We propose to eliminate the restriction on the number of non-U.S. offers a bidder may make in a cross-border tender offer by changing the references to "dual offers" to refer instead to "multiple offers."[119]

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116 Id.

117 See, e.g., Mittal Steel Company N.V. (June 22, 2006)("Mittal"). This letter states that it may be relied upon by any similarly-situated offeror or affiliate meeting the conditions outlined in the letter.

118 See, e.g., Alcan; Asia Satellite Telecommunications Holdings Limited (May 25, 2007); BCP Crystal Acquisition GmbH & Co (February 3, 2004)("BCP") and Mittal (providing relief for purchases outside of a U.S. offer for a tender offer that included more than one offer conducted outside of the United States).

119 See proposed Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

b. U.S. offer may include non-U.S. persons and foreign offer(s) may include U.S. persons

The existing Tier II dual offer exemption provides that the U.S. offer can be open only to security holders resident in the United States.[120] This limitation creates a problem because bidders frequently seek to include all holders of ADRs, not only U.S. holders, in the U.S. offer. In many instances, the target's home country regulations do not apply, by their terms, to ADRs.[121] Similarly, the existing Tier II dual offer provision mandates that the foreign offer be available only to non-U.S. holders.[122] The prohibition against permitting U.S. holders from participating in the foreign offer may conflict with the law of the target's home country if those rules do not permit the exclusion of any security holders, including those in the United States.[123]

Companies frequently are forced to seek individual relief from the staff to address these issues.[124] The staff often has granted relief to permit a U.S. offer in a dual offer structure to include all holders of ADRs, including foreign holders.[125] We propose to change our rules so that acquirors will no longer need to seek individual relief to structure their offers in this manner. We are not aware of a transaction for which acquirors have

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120 Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

121 See, e.g., Portugal Telecom, SGPS, S.A. (December 19, 2006)("Portugal Telecom")(noting that the provisions of the Portuguese Securities Code and the rules and regulations of the Portuguese Comissão de Mercado de Valores Mobiliários did not apply to the offer for ADSs of the target company listed on the New York Stock Exchange).

122 Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

123 See, e.g., Gas Natural SDG, S.A. (March 6, 2006)(involving Spanish law).

124 See Harmony Gold Mining Company Limited (November 19, 2004)("Harmony Gold 2004"); Discount Investment Corporation Ltd. (June 14, 2004); Alcan; Serono S.A.; and Southern Cross (March 5, 2002).

sought to extend the U.S. offer to foreign target holders who do not hold in ADR form. Therefore, we are not proposing to allow these holders to participate in U.S. offers.

We also propose to change our rules to allow U.S. holders to participate in non-U.S. offers where required under foreign law and where U.S. holders are provided with adequate disclosure about the implications of participating in the foreign offer. When relief has been granted to permit the inclusion of U.S. persons in a non-U.S. offer, it has been conditioned on appropriate disclosure in the offer materials concerning the risks for U.S. holders of participating in the foreign offer.[126] Relief also has been conditioned on the existence of an express legal requirement in the foreign target company's home jurisdiction to include U.S. target holders.[127]

Today we propose to change our rules to address these issues by revising the equal treatment provisions in Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) to allow a U.S. offer to be made to U.S. target holders and all holders of American Depositary Receipts representing interests in the subject securities. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the subject securities. We note that the proposed changes are not intended to enable an offer to be made only to holders of ADRs or only to holders of the underlying securities, where the target shares are registered under Section 12 or where Rule 13e-4 otherwise applies. We

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125 See e.g., Royal Bank of Scotland Group plc (July 23, 2007)("Royal Bank"); E.ON Aktiengesellschaft (December 6, 2006)("E.ON"); Koninklijke Ahold N.V. (September 10, 2002).

126 See, e.g., Endesa, S.A. (July 3, 2007)("Endesa").

127 Id.

view ADRs and the underlying securities as a single class for purposes of our tender offer and beneficial ownership reporting rules.[128]

In addition, revised Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) would provide that one or more foreign offers may be conducted in conjunction with a U.S offer for the same subject securities. U.S. persons may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. persons from the foreign offer(s) and where the offer materials distributed to U.S. persons fully and adequately disclose the risks of participating in the foreign offer(s).

c. Proration and the use of the dual or multiple offer structure

When a bidder makes a partial tender offer[129] subject to Section 13(e) or 14(d) of the Exchange Act, our rules require tendered securities to be purchased on a pro rata basis if the offer is oversubscribed.[130] This is to assure equal treatment of security holders who have tendered their securities.

We are not proposing a change to this requirement. We are clarifying that bidders relying on the dual offer provision in the Tier II exemptions to conduct separate U.S. and non-U.S. offers for less than all of a class of target securities must use a single proration

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[128] See American Depositary Receipts, Release No. 33-6894 (May 23, 1991) [56 FR 24420], Section II.D.2 (explaining that, for purposes of determining beneficial ownership reporting requirements under Section 13 of the Exchange Act, ADRs and the underlying securities are to be considered a single class). The staff takes the same view that they are one class for purposes of the tender offer rules.

[129] A "partial tender offer" is a tender offer where the bidder is offering to purchase less than all of the outstanding securities of that the subject class.

[130] See Section 14(d)(6) of the Exchange Act [15 U.S.C. 78n(d)(6)], and Rules 13e-4(f)(3) and 14d-8 [17 CFR 240.14d-8].

"pool," in accordance with the existing requirements of our rules.[131] This is not a change in how the staff has interpreted existing proration rules; however, it has come to our attention that in the past, certain bidders may have separately pro rated tenders made into the U.S. and foreign offers.[132] In this release, we clarify that where a bidder makes a partial tender offer for less than all outstanding target securities of a given class, and relies on the provision in Tier II allowing the use of a dual or multiple (as proposed) offer structure, the securities tendered into the U.S. and non-U.S. offers must be pro rated on an aggregate basis in order to comply with proration rules. Otherwise, if different proration factors were used, U.S. security holders could be disadvantaged as compared to target holders tendering into a foreign offer.

Request for Comment

- Should we permit the use of multiple offers outside of the United States for Tier-II eligible tender offers?
- Should we allow all non-U.S. holders to be included in a U.S. offer, or only non-U.S. holders of ADRs, as proposed?
- Should we allow U.S. holders to be included in the foreign offer(s) open to target security holders outside of the United States?
    - Should we permit this, as proposed, only when applicable foreign law does not allow exclusion of U.S. holders from the foreign offer, even where a concurrent U.S. offer is available to them?
    - Is the requirement that the implications of participating in the foreign

131 Id.

132 See AES Corporation (October 22, 2001)(advising against this practice in the context of a partial cross-border tender offer).

offer(s) be disclosed in the U.S. offering materials adequate to protect U.S. investors?

  - o Should we impose additional conditions on the ability of offerors to include U.S. target holders in the foreign offer(s)?

- Are there situations where bidders in cross-border tender offers should be permitted to separately pro rate securities tendered into U.S. and foreign offers?

3. Termination of withdrawal rights while tendered securities are counted

We are proposing rule revisions to eliminate issues relating to the "back-end" withdrawal rights required under Section 14(d)(5) of the Exchange Act and Rule 13e-4(f)(2)(ii) for tender offers conducted under the Tier II cross-border exemptions. Under today's proposed changes, new provisions would be added to the Tier II exemptions permitting the suspension of back-end withdrawal rights during the time after the initial offering period, when tendered securities are being counted and before they are accepted for payment.[133] Both of the back-end withdrawal rights provisions require bidders to provide withdrawal rights after a set date, measured from

133 See proposed Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(viii).

the commencement of a tender offer.[134] Thus, even where a tender offer has technically closed and tenders are no longer being accepted, back-end withdrawal rights may exist until the offeror accepts tendered shares for payment.[135]

Section 14(d)(5) of the Exchange Act grants us the authority to modify the back-end withdrawal rights afforded under that provision.[136] We exercised this authority in adopting Rule 14d-11, which permits the use of a "subsequent offering period" during which securities may be tendered but not withdrawn.[137] Practical considerations influenced our willingness to modify the withdrawal rights provisions of Section 14(d)(5) for subsequent offering periods. Permitting withdrawal rights during a subsequent offering period, when tendered shares are required to be purchased on a "rolling" or as tendered basis,[138] would interfere with the payment process.

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[134] Section 14(d)(5) of the Exchange Act [15 U.S.C 78n(d)(5)] states that "[s]ecurities deposited pursuant to a tender offer ... may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer ... are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer ..., except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors." Exchange Act Rule 13e-4(f)(2)(ii) includes a similar mandate for issuer tender offers: "The issuer or affiliate making the issuer tender offer shall permit securities tendered pursuant to the issuer tender offer to be withdrawn... if not yet accepted for payment, after the expiration of forty business days from the commencement of the issuer tender offer." Where the tender offer is subject to Rule 13e-4 and Regulation 14D, bidders also must provide withdrawal rights during the "initial offering period." We do not propose to modify this requirement.

[135] Whether back-end withdrawal rights arise also will depend on the length of the tender offer period; if the initial offering period and the payment process are completed before such rights arise, back-end withdrawal rights will not be triggered.

[136] See footnote 134 above.

[137] Exchange Act Rule 14d-7(a)(2) [17 CFR 240.14d-7(a)(2)].

[138] Exchange Act Rule 14d-11(c) [17 CFR 240.14d-11(c)].

The Tier II cross-border exemptions provide that a bidder need not extend withdrawal rights from the close of the initial offering period and before the commencement of the subsequent offering period, where the bidder announces the results of the initial offering period and pays for tendered securities in accordance with home country law or practice, so long as the subsequent offering period begins immediately thereafter.[139] Due to similar practical considerations, we propose to extend this suspension of the back-end withdrawal rights provisions for all tender offers conducted under Tier II during the counting of tendered securities. This would allow withdrawal rights to be terminated at the end of an offer and during the counting process for bidders that do not provide a subsequent offering period.[140]

Differences in the tender, acceptance and payment procedures between U.S. and foreign offers necessitate this relief. In a U.S. offer, tendering security holders generally tender their shares to a single exchange agent employed by the bidder.[141] Thus, bidders generally are in a position to know at any point in the offering period the number of securities tendered. Because bidders know how many target securities have been tendered into the offer at the expiration, acceptance of tendered securities in a U.S. offer

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139 Exchange Act Rule 14d-1(d)(2)(v).

140 For example, the subsequent offering period structure is available for third-party offerors subject to Regulation 14D, but not for issuer tender offers subject to Exchange Act Rule 13e-4. Applicable foreign law may also impact a third-party offeror's ability to provide a subsequent offering period.

141 Tenders may be made through nominees, such as broker-dealers, who hold the target securities in "street name," or directly by the ultimate beneficial holder of the target securities.

can occur almost immediately after the expiration of an offer.[142] Therefore, bidders in domestic offers are able to terminate the back-end withdrawal rights almost immediately after expiration by accepting securities tendered (assuming all offer conditions have been satisfied or waived). Bidders can begin the payment process promptly after expiration of the offer, consistent with their obligations under U.S. law to pay promptly.[143]

The mechanics of the tender process in non-U.S. tender offers are generally very different. Tenders often are made through many different financial institutions instead of through a single tender agent, as in the United States.[144] The process of centralizing and counting tendered securities therefore may take an extended period of time.[145] In some countries, entities other than the bidder or its agents undertake the counting process and the announcement of the result of the tender offer.[146]

Because of these differences in procedure, the bidder in a cross-border tender offer may not know whether the minimum tender condition has been satisfied immediately after the end of the initial offering period. The bidder cannot accept

142 See Exchange Act Rule 14e-1 [17 CFR 240.14e-1] (stating that a bidder must promptly pay for or return tendered securities after the expiration or withdrawal of a tender offer). According to Rule 14e-1(d), in a U.S. offer, the bidder has only until 9:00 a.m. Eastern time on the next business day after the expiration of the tender offer to announce the extension of the offer.

143 "Prompt payment" in U.S. offers is generally understood to mean payment within three days of expiration. See Guidance on Mini-Tender Offers and Limited Partnership Tender Offers, Release No. 34-43069 (July 24, 2000) [65 FR 46581].

144 See, e.g., Technip, S.A. (August 30, 2001)(describing the tender process through banks, and other financial institutions and intermediaries) and Vodafone AirTouch Plc (December 22, 1999)(noting that under German law, tenders of target securities could be made through any branch of over 300 depositary banks through which such securities were held).

145 See, e.g., Business Object S.A. (December 5, 2007).

146 Id. (The letter states that once the French Offer has expired, securities tendered in the French Offer are "centralized" at Euronext, which then counts the total number of securities tendered. The Autorite des Marches Financiers (the French regulator) then announces the results of the offer).

tendered securities until all offer conditions, including the minimum tender condition, have been satisfied or waived and the counting process is completed.[147] We already have recognized that the mechanics of the tendering and counting regimes in other countries justifies different treatment under our rules,[148] and for the same reasons, we believe it is appropriate to provide an exemption in this area.

Bidders previously have sought relief from the back-end withdrawal rights provisions for Tier II cross-border tender offers, during the period in which tendered securities are being counted and until the announcement of the results of the offer, where no subsequent offering period is provided.[149] The relief requested generally is premised on the following factors:

- The initial offering period of at least 20 business days has expired, and withdrawal rights were provided during that period;

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[147] While a bidder technically could accept tendered securities immediately after the expiration of a cross-border tender offer by waiving the minimum tender condition, we believe this would be a significant hardship for bidders and would negatively impact bidders' ability to conduct cross-border tender offers.

[148] See Exchange Act Rules 13e-4(i)(2)(iv) and 14d-1(d)(iv). As a result of the differences in process between the U.S. and various foreign jurisdictions, Tier II currently includes prompt payment relief to allow a bidder meeting the conditions of that exemption to pay for tendered securities in accordance with home country law or practice.

[149] See, e.g., Barclays PLC tender offer for ABN AMRO Holding N.V. (August 7, 2007)("Barclays") (period of no longer than five Dutch trading days); Endesa, S.A. (when the tendered shares are being counted and until payment occurs, in accordance with Spanish law and practice); Portugal Telecom (three Portuguese business days after the special session of Euronext Lisbon); E.ON (when the tendered shares are being counted and until payment occurs, in accordance with Spanish law and practice); and Bayer AG (April 28, 2006).

- All offer conditions, other than the minimum tender condition, are satisfied or waived as of the expiration of the initial offering period;[150] and
- Back-end withdrawal rights are suspended only during the period necessary to centralize and count the tendered securities, and are reinstated immediately at the end of that process, to the extent they are not terminated by acceptance of tendered securities immediately afterwards.[151]

As proposed, both third-party bidders for securities of a foreign private issuer and foreign private issuers repurchasing their own securities would be permitted to suspend back-end withdrawal rights while tendered securities are being counted, even where no subsequent offering period is provided. The revised rules would be conditioned on the following factors:

- The Tier II exemption must be available;
- The offer must include an offering period, including withdrawal rights, of at least 20 U.S. business days;

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150 If a bidder counts the number of securities tendered as of the expiration date in determining whether the minimum acceptance condition has been satisfied, we view this condition as having been satisfied as of expiration. This is the case even though the counting process may, as a logistical matter, take some period of time after expiration to be completed.

151 See the letters listed in footnote 149 above. Note that the only conditions that may survive the expiration of the initial offering period are regulatory approvals necessary to consummate the tender offer. We believe that the existence of the back-end withdrawal rights provided in Exchange Act Rule 13e-4(f)(2)(ii) and Section 14(d)(5) of the Exchange Act provide a critical safeguard where a regulatory condition survives the expiration of the initial offering period. These provisions allow tendering security holders to withdraw their tendered securities after a certain period of time. Certain regulatory approval processes, such as anti-trust approvals, may be lengthy and back-end withdrawal rights may provide an important safeguard in such cases. See generally, ProSiebenSat.1 Media AG (January 30, 2007)(in granting no-action relief from the prompt payment requirements of Exchange Act Rule 14e-1(c) where a regulatory condition was expected to survive the expiration of a tender offer, the staff explicitly noted that tendering target holders would have withdrawal rights through the date of receipt of such regulatory approvals). The staff will continue to consider limited relief under those circumstances only where a compelling reason exists.

- At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the bidder is still counting tendered securities to determine if the minimum acceptance condition has been satisfied; and
- Withdrawal rights are suspended only during the necessary centralization and counting process period and are reinstated immediately thereafter, except to the extent that they are terminated by the acceptance of tendered securities.

Request for Comment

- Is it appropriate and in the best interests of U.S. investors to permit the suspension of back-end withdrawal rights, as proposed?
- Do the proposed conditions address bidders' practical concerns while still protecting tendering security holders?
- Should we permit back-end withdrawal rights to be suspended only during the counting process? Or should this relief be provided through the announcement of the results of the tender offer?

4. Expanded relief for subsequent offering periods

Since the adoption of the cross-border exemptions, foreign requirements and practices relating to tender offers have frequently led to conflicts with the Commission's rule on subsequent offering periods.[152] Today we propose to address some of the more common areas of conflict. The most frequent area of conflict relates to the maximum

[152] Exchange Act Rule 14d-11. At the same time we adopted the existing cross-border exemptions, we also changed our rules for domestic tender offers to permit the use of subsequent offering periods. See Regulation of Takeovers and Security Holder Communications, Release No. 33-7760 (October 22, 1999) [64 FR 61408] ("Regulation M-A Adopting Release"). We made this change in part because of years of experience with the subsequent offering period in cross-border tender offers.

limit on the length of the subsequent offering period of 20 U.S. business days imposed by our rules.[153] In some instances, foreign law mandates a subsequent offering period of longer than 20 U.S. business days.[154] In other non-U.S. jurisdictions, market practice dictates a subsequent offering period of longer than 20 business days.[155] In these jurisdictions bidders must seek relief to extend the permissible time period of their subsequent offering periods to reconcile U.S. rules with foreign law or customary practice.[156]

We believe establishing a maximum time period for subsequent offering periods in cross-border tender offers is no longer necessary, in part because it creates unnecessary conflict between U.S. and foreign law or practice. Therefore, we propose to eliminate this time limit for cross-border tender offers eligible to rely on the Tier II exemptions by

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153 Our rules permit (but do not require) a bidder in a third-party tender offer to provide a subsequent offering period of between three and 20 U.S. business days, under certain conditions. The conditions outlined in Exchange Act Rule 14d-11 are: (a) the initial offering period of at least 20 business days has expired; (b) the offer is for all outstanding securities of the class, and if the bidder offers security holders a choice of different forms of consideration, there is not a ceiling on any form of consideration offered; (c) the bidder immediately accepts and promptly pays for all securities tendered during the initial offering period; (d) the bidder announces the results of the tender offer by 9:00 a.m. Eastern standard time on the morning after expiration of the initial offering period and immediately begins the subsequent offering period; (e) the bidder immediately accepts and promptly pays for all securities as they are tendered in the subsequent offering period; and (f) the bidder offers the same form and amount of consideration in both the initial and subsequent offering periods.

154 See, e.g., Embratel Particpacoes S.A. (December 6, 2006)("Embratel"); and Barrick Gold Corp. (January 19, 2006).

155 See RWE Aktiengesellschaft (March 22, 2002)("RWE")(noting that subsequent offering periods lasting significantly longer than 20 business days are the custom in Great Britain and are permitted under The City Code on Takeovers); Serono S.A. (noting that French law does not set a maximum for the number of days in a subsequent offering and requesting relief for a 30 trading day subsequent offering period, with immediate acceptance of tendered shares on an "as tendered" basis); Rio Tinto plc (July 24, 2007)("Rio Tinto")(noting that Canadian law sets no maximum period for subsequent offering periods); STATs ChipPAC Ltd. (March 15, 2007)(relief for a subsequent offering period of up to four months from the commencement date); and Harmony Gold 2004 (requesting relief for a subsequent offering of longer than 20 U.S. business days, as permitted under South African law and as is customary market practice in that jurisdiction).

156 Id.

adding a new provision specifically allowing Tier II cross-border tender offers to include subsequent offering periods longer than 20 U.S. business days. Allowing subsequent offering periods in cross-border tender offers to extend beyond the current 20-day maximum period is consistent with one of the primary reasons we revised our rules to permit subsequent offering periods generally: to enable bidders to reach the necessary thresholds for acquiring the remaining target securities not tendered in an initial offering period and to pay tendering security holders before they would receive payment in a second-step "squeeze out" process.[157] In some foreign jurisdictions, the ability of a bidder to acquire securities of the target that remain outstanding after a tender offer is more limited than in the United States.[158] We believe the ability to extend the subsequent offering period for longer than 20 U.S. business days will provide an opportunity for remaining target security holders to tender into a successfully-consummated offer, after which the market for their securities may be very limited.[159] The subsequent offering period allows target security holders to be paid before a compulsory acquisition can be

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[157] See Regulation M-A Adopting Release, Section II.G.1. ("The purpose of the subsequent offering period is two-fold. First, the period will assist bidders in reaching the statutory state law minimum necessary to engage in a short-form, back-end merger with the target. Second, the period will provide security holders who remain after the offer one last opportunity to tender into an offer that is otherwise complete in order to avoid the delay and illiquid market that can result after a tender offer and before a back-end merger.").

[158] Where an acquiror obtains more than 50 percent of the target securities of a domestic company, it generally can acquire the remaining target shares through a back-end merger. In some foreign jurisdictions, the bidder's ability to "squeeze out" remaining target shareholders is more limited. See, e.g., In the Matter of Texas Utilities Company (March 27, 1998)("Texas Utilities")(noting that under U.K. law, the compulsory acquisition process is available only when the bidder owns at least 90 percent of the subject securities and this process is the only means to acquire 100 percent of the subject class).

[159] See Regulation M-A Adopting Release, Section II.G.1. and footnote 157 above.

completed, in a circumstance where an offer has become unconditional and will certainly be consummated.[160]

Request for Comment

- Are there any other conflicts between U.S. and foreign laws or practice arising out of the subsequent offering period structure that should be addressed through additional rule revisions?
- Is it appropriate, as proposed, to eliminate the 20 U.S. business day limit on the length of the subsequent offering period for Tier II cross-border tender offers?
- Should we eliminate the 20 U.S. business day limit on the length of the subsequent offering period for all tender offers generally, including those for domestic issuers?
    - Do bidders for U.S. companies face any practical difficulties because of the 20 U.S. business day limit?
- Is the limit on the length of the subsequent offering period necessary for investor protection, either in the U.S. or in cross-border offers? Should we retain a limit but increase it, for example, to 30 or 60 U.S. business days?

a. Proposed revisions to prompt payment rule

Another area of conflict in subsequent offering period practice that we address today relates to the requirement under U.S. rules that bidders must immediately accept and promptly pay for all securities "as they are tendered during the subsequent offering

160 See footnote 157 above.

period."[161] The requirement to purchase securities tendered during the subsequent offering period on a rolling basis exists because, in the absence of withdrawal rights, which need not be provided during a subsequent offering period,[162] tendering security holders should receive the offer consideration as quickly as possible. Bidders in cross-border tender offers often are required to, or for practical reasons need to, follow local practices when paying for securities tendered in a subsequent offering period.[163] We have been advised, however, that the requirement that securities be paid for on an as tendered basis in the same manner as in the United States may conflict with market practice in certain non-U.S. jurisdictions, and is in many instances practicably unworkable there.[164]

Today we propose to allow, under certain circumstances, securities tendered during the subsequent offering period for a Tier II cross-border tender offer to be purchased on a modified rolling basis. We do this by including language in proposed new Rule 14d-1(d)(2)(iv) that defines "prompt payment" for purposes of the requirement under Rule 14d-11(e) to purchase on an as tendered basis. Instead of requiring daily aggregation of securities tendered during the subsequent offering period, the proposed

161 Exchange Act Rule 14d-11(e).

162 See Note to Exchange Act Rule 14d-11.

163 See Barclays (relief granted to permit payment for securities tendered in the subsequent offering period within five Dutch trading days after the end of that period); Rio Tinto plc (shares tendered during a subsequent offering period may be taken up and paid for within ten calendar days of the date of tender, in accordance with Canadian law); Aventis (June 10, 2004)(relief granted to permit payment for securities tendered into a French offer to be made within 12-18 French trading days after the expiration of that period).

164 See Barrick Gold Corporation (October 10, 2006)(discussing multiple "take-up" dates required under Canadian rules). See also Singapore Technologies Semiconductors Pte Ltd. (March 15, 2007) and BCP.

rule would permit such securities to be "bundled" and paid for within 14 business days from the date of tender. We chose 14 business days as the time period because, in our experience, that amount of time is sufficient to cover the subsequent offering periods used in most foreign jurisdictions.[165] Depending on the length of the subsequent offering period and the payment practice in the applicable foreign jurisdiction, this may allow payment for securities tendered during the subsequent offering period to be made at the end of that period. We understand that this is market practice in some foreign jurisdictions.[166]

Another practical difficulty involving subsequent offering periods arises because, in certain foreign jurisdictions, bidders are legally required to pay interest on securities tendered during the subsequent offering period. Generally, the rate of interest is set by law and is calculated from the date on which securities are tendered.[167] Sometimes

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165 In this context, we propose to define "business day" without reference to a business day in the United States. A business day as used in proposed Rule 14d-1(d)(2)(iv) is determined with reference to the relevant foreign jurisdiction. By not defining business day in accordance with the U.S. calendar, we hope to make this rule modification more useful because U.S. and non-U.S. holidays will vary.

166 See Barclays (Dutch practice requires payment for securities tendered during a subsequent offering period to be made within five Dutch trading days after the end of that period); Alcan (noting that French practice is to pay for securities tendered in the subsequent offering period at the end of that period); and Smith & Nephew Group plc (April 4, 2003)(payment within ten Swiss trading days after the end of the subsequent offering period is required under Swiss law).

167 For example, in Brazil, bidders must pay interest at a statutory rate on securities "put" to the bidder after the termination of a successful voluntary offer. We consider such a put right to be a tender offer or to constitute the subsequent offering period in a voluntary offer. See the description of this feature of Brazilian law in Embratel and Telemar Participacoes S.A. (October 9, 2007)("Telemar"). See also, Bayer AG (September 26, 2006)("Bayer 2006")(describing a similar requirement under German law).

interest is calculated as of a set reference point not directly tied to the tender offer timetable.[168]

Under either scenario, paying interest on securities tendered during a subsequent offering period conflicts with U.S. tender offer rules in several respects. U.S. rules specify that for offers subject to Regulation 14D, a bidder must pay the same form and amount of consideration for securities tendered during the subsequent offering period as it pays for those tendered into the initial offering period.[169] For those types of offers, it is also impermissible to pay different amounts of consideration for securities tendered within either the initial or the subsequent offering periods.[170] Companies have addressed this conflict by seeking exemptive relief.[171]

We propose to revise our rules to permit the payment of interest for securities tendered during a subsequent offering period in a Tier II cross-border tender offer where required under foreign law.[172] The proposed new provision explicitly notes that paying interest on securities tendered during the subsequent offering period would not be deemed to violate the equal treatment principles in Rule 14d-10(a)(2).[173] As discussed

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168 Under German law, for example, we have been advised that if a bidder acquires a sufficient percentage of a target's shares in a voluntary tender offer, it may enter into a "domination agreement" with the target. The bidder is then required to pay interest at a rate set by German law on all securities tendered during the subsequent offering period, from the date that such domination agreement becomes effective. See Blackstone Entities (December 16, 2004)("Blackstone").

169 Exchange Act Rule 14d-11(f).

170 Exchange Act Rule 14d-10(a)(2).

171 See e.g., Telemar; Embratel; and Blackstone.

172 See proposed Exchange Act Rule 14d-1(d)(2)(vii).

173 See proposed Exchange Act Rule 14d-1(d)(2).

above, under the equal treatment and all-holders provisions of the tender offer rules,[174] a bidder could not pay interest only on securities tendered into a foreign offer.

Request for Comment

- Is it appropriate to permit payment for securities tendered during the subsequent offering period in cross-border tender offers to be made up to 14 business days after the date of tender?
  - Is 14 business days a sufficient period to make this relief useful for cross-border tender offers that include a subsequent offering period? Would a shorter (five, seven or 10 business days) or longer period (15, 20 or 30 business days) of time better serve the interests of bidders or tendering security holders?
  - Should we permit payment for securities tendered during the subsequent offering period to be made within a certain number of days after the end of that period, such as within five, 10 or 14 business days, even if we eliminate the time limit on the length of the subsequent offering period? Or would this disadvantage tendering security holders?
- Should we revise our rules to permit the payment of interest on target securities tendered during the subsequent offering period, as proposed?
- Should we expand the proposed relief to encompass interest paid on securities tendered during the initial offering period?

[174] Exchange Act Rule 14d-10.

- Should we provide this relief only where interest is required to be paid under foreign law, as proposed?
- Should the proposed amendment only permit de minimis interest payments? If so, what limits are appropriate?

b. Prompt payment and "mix and match" offers

The final issue we address with respect to subsequent offering periods involves "mix and match" offers. The requirement to pay for shares on an as tendered basis during the subsequent offering period is particularly problematic in cross-border tender offers that include a mix and match election feature. In this offer structure, target security holders are offered a set mix of cash and securities of the bidder – often referred to as the "standard entitlement" – with the option to elect a different proportion of cash and securities, to the extent that other tendering security holders make opposite elections.[175] The bidder typically sets a maximum amount of cash or securities that it will issue in the offer; to the extent that more tendering target security holders elect cash or bidder securities, their elections are prorated to the extent they cannot be satisfied through "offsetting elections" made by other target security holders.[176]

Mix and match offers often conflict with U.S. requirements applicable to the subsequent offering period. First, those rules provide that a bidder may offer a choice of different forms of consideration in the subsequent offering period, but only if there is no

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175 See Barclays and SERENA Software Inc. (April 13, 2004)(setting a cap on the number of bidder shares and cash that would be issued in a mix and match election, with elections for more cash or shares being offset against one another).

176 Id.

ceiling on any form of consideration offered.[177] In addition, the rules require a bidder to offer the same form and amount of consideration to tendering security holders in both the initial and subsequent offering periods.[178] Both requirements present difficulties in the context of mix and match offers. In these kinds of offers, bidders want to impose a maximum limit on either (or both) the number of securities or the amount of cash they will be obligated to deliver if the offer is successful.[179] In addition, the offset feature characteristic of mix and match offers is inconsistent with the prohibition on offering different forms and amounts of consideration in the initial and subsequent offering periods.

Because of the prompt payment and other requirements of U.S. rules and the requirements of foreign law or practice in cross-border offers, bidders in mix and match offers often request relief to use two different proration and offset pools in their offers: one for securities tendered during the initial offering period and another for those tendered in the subsequent offering period.[180] That is, bidders match elections made during the initial offering period against each other to determine offsets and proration and begin the payment process for those securities as promptly as practicable after the end of the initial offering period.[181] Similarly, securities tendered during the subsequent

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177 Exchange Act Rule 14d-11(b).

178 Exchange Act Rule 14d-11(f).

179 See letters cited in footnote 175 above.

180 Id.

181 This is necessitated by foreign rules, which typically require those securities to be accepted and paid for while the subsequent offering period is ongoing. U.S. rules also require that securities tendered in an initial offering period be accepted and promptly paid for at the end of that period. Exchange Act Rule 14d-11(c).

offering period are matched against each other, not against those tendered during the initial offering period, so as not to delay the payment process. As a result, the mix of consideration provided to tendering security holders may be different in the initial and subsequent offering periods.

Today we propose to revise our rules to specifically allow separate offset and proration pools for securities tendered during the initial and the subsequent offering periods.[182] We view these changes as necessary and appropriate to facilitate the prompt payment for securities tendered during these offer periods, and to permit the use of the mix and match offer structure generally. Because of the same practical considerations, we also propose to eliminate the prohibition on a "ceiling" for the form of consideration offered in the subsequent offering period, where target security holders are given the ability to elect between two or more different forms of offer consideration. These changes would be accomplished by adding a provision in Rule 14d-1(d)(2) that specifies that such practices are permissible for Tier II cross-border offers.[183]

Request for Comment

- Would these proposed rule changes address the practical needs of cross-border offerors? Would there be any disadvantages for target security holders?
- Should we extend these changes to all tender offers, including tender offers for U.S. issuers? Would bidders for U.S. issuers use the ability to make mix and match offers? Would such a structure be workable in the U.S. and in the best interests of U.S. investors?

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[182] See proposed Exchange Act Rule 14d-1(d)(2)(ix).

[183] See id.

5. Additional guidance with respect to terminating withdrawal rights after reduction or waiver of a minimum acceptance condition

U.S. tender offer rules generally provide that a bidder must allow an offer to remain open for a certain period of time after a material change in its terms is communicated to target security holders.[184] The minimum time periods established allow target security holders time to learn of and react to information about material changes. Some target holders may want to tender in response to the new information, while others who already have tendered may seek to withdraw their securities. For this reason, U.S. rules mandate that, for tender offers subject to Section 13(e) or 14(d) of the Exchange Act, in addition to keeping the offer open for a set period of time after providing notice of a material change, the bidder must provide withdrawal rights during such period.[185]

In the years leading up to the adoption of the existing cross-border exemptions in 1999, we found that in practice, this U.S. withdrawal rights requirement created a conflict with foreign practice in cross-border tender offers. We discussed in the 1998 Cross-Border Proposing Release how the U.S. requirement to provide withdrawal rights for a

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184 Exchange Act Rule 14d-4(d)(2)(i)-(iv) sets forth the minimum time periods for which an offer must remain open after certain specified types of changes in the terms of that offer are communicated to target security holders. The Rule states that an offer must remain open for: (1) ten business days after dissemination of a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee or other similarly significant change; (2) ten business days for a prospectus supplement included as part of a post-effective amendment; (3) twenty business days for a prospectus supplement when the initial prospectus was materially deficient; and (4) five business days for a material change other than price or share levels. Exchange Act Rule 14d-4(d)(2) by its terms applies only to third-party tender offers for Exchange Act registered securities. However, we have stated that we view the time periods established in that rule as general guidelines applicable to all tender offers, including those subject only to Regulation 14E. See the discussion in the Regulation M-A Adopting Release, Section II.E.2. In addition, Rule 14e-1(b), applicable to all tender offers, specifies that a tender offer must be kept open for a minimum of ten business days after an increase or decrease in the amount of securities sought or the consideration offered or a change in the dealer's soliciting fee.

185 Id.

set period after the waiver or reduction in a minimum acceptance condition created a conflict with U.K. practice, the jurisdiction with which we had the most experience at that time.[186] We noted that the staff had granted relief to bidders to address this conflict in individual cases.[187]

In adopting the cross-border exemptions, we affirmed the staff's interpretive position that a bidder meeting the conditions of the Tier II exemptions may waive or reduce the minimum acceptance condition without providing withdrawal rights during the time remaining in the tender offer after the waiver or reduction.[188] We conditioned a bidder's ability to rely on this guidance on the following:

- The bidder must announce that it may reduce or waive the minimum condition at least five business days before it reduces or waives it;[189]
- The bidder must disseminate this announcement through a press release and other methods reasonably designed to inform U.S. security holders, which may include placing an advertisement in a newspaper of national circulation in the United States;[190]

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186 See 1998 Cross-Border Proposing Release, Section II.C.2.f.

187 See id. citing e.g., In the Matter of Pacificorp and The Energy Group, Exchange Act Release No. 38776 (June 25, 1997).

188 Cross-Border Adopting Release, Section II.B.

189 A statement at the commencement of the offer that the bidder may reduce or waive the minimum acceptance condition is insufficient to satisfy this element. See Cross-Border Adopting Release, Section II.B.

190 Some bidders have asked for the elimination of the requirement that the notice of a potential waiver or reduction in the minimum acceptance condition be placed in a newspaper of national circulation in the United States. We continue to believe that this requirement serves an important function in notifying target security holders about a possible change in the terms of the offer, and therefore we are retaining it.

- The press release must state the exact percentage to which the condition may be reduced. The bidder must announce its actual intentions once it is required to do so under the target's home country rules;
- During the five-day period after the announcement of a possible waiver or reduction, security holders who have tendered into the offer must be afforded the right to withdraw tendered securities;
- The announcement must advise security holders to withdraw their tendered securities immediately if their willingness to tender into the offer would be affected by the reduction or waiver of the minimum acceptance condition;
- The procedure for reducing or waiving the minimum acceptance condition must be described in the offering document; and
- The bidder must hold the offer open for acceptances for at least five business days after the reduction or waiver of the minimum acceptance condition.

When the bidder terminates withdrawal rights pursuant to this interpretive position, all offer conditions must be satisfied or waived so that the offer is wholly unconditional when withdrawal rights terminate.[191] A bidder may not terminate

[191] We note that this is consistent with the interpretive position previously expressed by the staff. See Section II.A. Question 1 in the Third Supplement to the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 2001), at http://www.sec.gov/interps/telephone/phonesupplement3.htm.

withdrawal rights where an extension is otherwise required under our rules because of another material change in the terms of the offer.[192]

While we continue to recognize that bidders in cross-border tender offers may need the flexibility afforded by this interpretive position, we are aware of certain issues arising from its application. When we adopted the interpretive position regarding waiver or reduction of a minimum acceptance condition, we did so primarily on the basis of the staff's experience with U.K. law and practice.[193] The regulatory accommodation was necessitated by U.K. practice and the particular circumstances common to the U.K. markets. The vast majority of the transactions for which the staff had granted this relief before we adopted the interpretive position involved cash tender offers.[194]

In the years since the Commission adopted the interpretive position, we have become aware of the unintended consequences of this position in the context of certain kinds of offers, including exchange offers and competed offers. We believe it is necessary to provide additional guidance on the circumstances under which bidders may rely upon this interpretive position in cross-border tender offers to waive or reduce a minimum acceptance condition without providing withdrawal rights after such waiver. For these reasons, today we are limiting the interpretive position adopted in the Cross-Border Adopting Release.

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[192] See, e.g., STATS ChipPAC Ltd. (March 15, 2007)("STATS ChipPAC")(noting that a bidder may not terminate withdrawal rights or close an offer during any extension mandated under Regulations 14D or 14E). In addition to the extension requirements in Rule 14e-1(b), we note that the Commission has expressed the view that the minimum time periods set forth in Rule 14d-4(d)(2) represent "general guidelines that should be applied uniformly to all tender offers, including those subject only to Regulation 14E." See Regulation M-A Adopting Release, Section II.E.2.

[193] See Cross-Border Adopting Release, Section II.B.

[194] See, e.g., Texas Utilities.

The interpretation originally was premised on bidders' need to reduce the minimum acceptance condition in order to declare the offer wholly unconditional, thereby permitting the participation of certain institutional holders that were prevented by charter from tendering into conditional offers.[195] The interpretive guidance about the ability to waive or reduce the minimum acceptance condition was and continues to be limited to instances where it is necessary because of specific features of home country law or practice that make it impossible or unnecessarily burdensome to comply with the extension requirements of U.S. law.

We also think it is important to note that, where bidders may seek to waive or reduce a minimum acceptance condition in a Tier II-eligible tender offer without extending withdrawal rights after the waiver or reduction, the initial offering materials or a supplement must fully discuss the implications of the waiver or reduction.[196] We note that this necessary disclosure may be challenging to provide in the context of an exchange offer, but we believe security holders need this disclosure to make an informed investment decision about the potential impact of the bidder accepting a lesser percentage of securities than originally proposed as the minimum acceptance condition.

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195 See, e.g., Willis Corroon Group plc (July 22, 1998) and Thorn plc (June 30, 1998). For example, we were advised that certain U.K. institutional holders are prohibited from tendering into an offer until all offer conditions have been satisfied or waived. For that reason, it is critical that the bidder reduce the minimum tender condition in an effort to induce these institutions to tender, which in turn may allow the bidder to reach the 90 percent ownership level necessary to effect a compulsory acquisition under U.K. law.

196 This is a general requirement under the tender offer rules. See, e.g., Item 1 of Schedule TO and Item 101 of Regulation M-A (requiring the filer to describe the essential terms and to describe the significance of the transaction for target security holders). See also, footnote 254 below for transactions subject to the registration requirements of Section 5 of the Securities Act.

In addition to the potential need to provide alternate sets of pro forma financial statements under our existing disclosure rules,[197] we believe reducing the minimum acceptance condition significantly below the level at which it is initially set may fundamentally change the nature of the transaction and the relationship between the offeror and the target company going forward. For example, an offeror could go from potentially holding a majority interest in the target to a minority stakeholder with limited ability to influence the management of the target. This change has implications for both the target holders who choose to tender into the offer and receive bidder shares, as well as those who elect not to tender and remain as target security holders. It also has implications with respect to the acquiror's ability to consolidate the financial statements of the target.

Consequently, even for cash tender offers, the staff has conditioned the granting of no-action relief in the cross-border context on bidders adequately disclosing in the initial offer materials the impact of a potential waiver or reduction.[198] For example, where a bidder initially includes an 80 percent minimum acceptance condition in its offer, but seeks the flexibility to reduce this condition to 51 percent and purchase tendered securities immediately without affording withdrawal rights, the staff has noted that the disclosure document must fully and fairly present the potential impact of both outcomes for target shareholders. In addition, the staff also has encouraged bidders to consider the

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197 See Item 5 of Forms S-4 and F-4 and Exchange Act Rule 11-02(b)(8) of Regulation S-X [17 CFR 210.11-02(b)(8)]. Rule 11-02(b)(8) mandates that where a transaction is structured in such a way that significantly different results may occur, additional pro forma presentation must be provided which give effect to the range of possible results.

198 See, e.g., Royal Bank.

disclosures necessary with regard to the ability to govern or otherwise integrate the target company after any acquisition at a lower level.

The difficulty in providing the necessary disclosure is heightened where there are two or more competing bids, creating an even greater level of uncertainty. In that circumstance, a bidder that waives or reduces its minimum acceptance condition to purchase a minority stake in the target may nevertheless be able to thwart the minimum acceptance condition of a competing bidder, thereby defeating the competing bid. Under these circumstances, target security holders are disadvantaged because they have no opportunity to react to the change in the terms of the offer by withdrawing their securities and accepting the competing bid. As noted above, this may also affect the success of the competing bid.

Today we are refining our prior guidance to clarify that, in addition to the conditions outlined in the Cross-Border Adopting Release and the general disclosure obligations discussed above, the relief from the extension requirements of Rule 14d-4(d)(2) adopted in the Cross-Border Adopting Release may not be relied upon unless the bidder is eligible to rely on the Tier II exemptions and the bidder undertakes not to waive or reduce the minimum acceptance condition below a majority.[199] This will limit the impact on target security holders of allowing this type of change without providing withdrawal rights, while balancing the needs of bidders to meet the requirements of foreign home country law or practice. In addition, this interpretive position is limited to circumstances where there exists a requirement of law or practice in

[199] By a majority, we mean more than 50 percent of the outstanding target securities that are the subject of the tender offer.

the foreign home country justifying a bidder's inability to extend the offer after a waiver or reduction in the minimum offer condition. Furthermore, it does not apply to mandatory extensions for changes related to the offer consideration, the amount of target securities sought in the offer, and a change to the dealer's soliciting fee.[200]

Bidders seeking to rely on this guidance, as modified, must fully disclose and discuss all of the implications of the potential waiver or reduction, including at the specific levels contemplated, in its offering materials. For example, in some foreign jurisdictions, the ability to operate and fully integrate the target company as a subsidiary of the bidder after a tender offer depends on the bidder's ability to purchase a percentage of target securities higher than a simple majority.[201] In those jurisdictions, the impact of waiving or reducing the minimum acceptance condition below the levels necessary to operate and fully integrate the target as a subsidiary must be fully explained in the initial offering materials disseminated to target security holders. Where such disclosure is not provided, the bidder may not rely on the interpretive guidance set forth in the Cross-Border Adopting Release, as modified today. In those circumstances, the bidder must disseminate additional disclosure and also must allow adequate time in the offer period, including extension of withdrawal rights, as mandated by our rules.[202]

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200 See Exchange Act Rules 13e-4(e)(3)(ii), 14d-4(d)(2)(ii) and 14e-1(b).

201 We have been advised that Germany is one such foreign jurisdiction. Under German law, 75 percent of a target's security holders must approve a "domination agreement" between the target and the bidder in order for the bidder to effectively exercise control of the target company after a tender offer. Therefore, unless the bidder can obtain at least 75 percent of the target's securities in the tender offer, it cannot be assured of the ability to fully integrate the target company. See, e.g., Bayer 2006 and Blackstone.

202 See footnote 197 above.

Request for Comment

- Should we continue to allow bidders in Tier II-eligible offers to waive or reduce the minimum acceptance condition without providing withdrawal rights?
- Are the conditions set forth in the Cross-Border Adopting Release adequate? Or overly burdensome?
- Is it appropriate to modify such relief, as discussed above?
- Should we condition the ability to waive or reduce the minimum acceptance condition without providing withdrawal rights on the undertaking by the bidder not to waive below a majority, as proposed? What should constitute a "majority" for these purposes?
- Should we continue to require bidders seeking to rely on the interpretation to place an advertisement in a newspaper of national circulation in the United States? Does this serve a useful function under current market practice? Does it constitute an undue burden?
- Is the guidance, as modified above, clear? Should it be codified in rules?

6. Early termination of the initial offering period or a voluntary extension of the initial offering period

Under U.S. tender offer rules, the initial offering period in a tender offer must remain open for specified minimum time periods after a material change in the terms of

an offer.[203] The minimum time periods vary with the materiality of the change.[204] For a change other than one related to the tender price or the number of securities sought in the offer, five business days may be sufficient to allow security holders time to learn of, and react to, new information.[205] We believe that where the expiration of a tender offer has been set, whether at the outset of the offer or through a voluntary extension, a change in that expiration date constitutes a material change requiring an offer to remain open within the time periods established by our rules. These minimum time periods are important because they allow security holders who have already tendered into the offer to react to the change by withdrawing their tendered securities; similarly, those who have not tendered may choose to do so in response to the change.

The minimum time periods established by our rules for changes to the terms of a tender offer may conflict with foreign law or practice, where bidders may be required to terminate an offer and withdrawal rights immediately after all offer conditions are satisfied.[206] Thus, in some foreign jurisdictions, bidders must accept tendered securities and begin the payment process as soon as all offer conditions are satisfied, even if this

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203 Exchange Act Rules 13e-4(e)(3) and 14d-4(d)(2) set forth the minimum required time periods for "registered securities offers," where the bidder is offering registered securities and commences an offer before the effectiveness of its registration statement. See footnote 184 above with respect to the Commission's statement concerning the broader applicability of those time periods for other kinds of tender offers. In addition, Rule 14e-1(b) also sets forth timing requirements with respect to certain kinds of changes in the terms of the offer.

204 See Exchange Act Rules 13e-4(e)(3)(i) through (iv) and 14d-4(d)(2)(i) through (iv) and 14e-1(b).

205 See Exchange Act Rules 13e-4(e)(3) and 14d-4(d)(2)(i). Of course, additional time may be needed for specific types of new information that is of particular importance to target security holders. See Exchange Act Rules 13e-4(e)(3)(ii) and 14d-4(d)(ii) (stating that ten business days is the required period for a change "similarly significant" to a change in price or the number of securities sought).

206 We refer to the time when all offer conditions have been satisfied or waived as the time when the offer becomes "wholly unconditional."

occurs before the scheduled expiration date of the initial offering period or any voluntary extension of that period.[207] In other foreign jurisdictions, longstanding practice dictates early termination of a voluntary extension of the initial offering period when an offer becomes wholly unconditional.[208] These jurisdictions take the view that once the offer is wholly unconditional and is therefore certain to be consummated, the initial offering period should close immediately and tendering security holders should receive the offer consideration as soon as possible. Security holders who did not tender before the end of the initial offering period can tender into the subsequent offering.

In the Cross-Border Adopting Release, we adopted a staff interpretive position relating to a change in a specific type of offer condition, the minimum acceptance condition.[209] Such a change represents a modification of the original conditions of the tender offer, not the satisfaction of an existing offer condition. However, we did not provide similar guidance with respect to early termination of the initial offering period, or any extension of that period, for changes other than to the minimum acceptance condition.

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207 See STATS ChipPAC (stating that under the Singapore Code, payment for securities tendered in a tender offer must be made within 21 calendar days after such offer is declared unconditional or after the relevant holder accepts the offer, whichever is later); Jilin Chemical Industrial Company Limited (December 21, 2005)("Jilin Chemical")(stating that under the Hong Kong Code, once a tender offer becomes wholly unconditional, the bidder must pay for tendered securities within ten days of that date); and Harmony Gold Mining Ltd. (March 10, 2005)("Harmony Gold 2005") (describing South African legal requirements for prompt payment that are triggered by the offer going unconditional, which may occur before the scheduled expiration of the initial offering period or any voluntary extension of that period).

208 This is the case in the United Kingdom. See, e.g., RWE.

209 See Cross-Border Adopting Release, Section II.B. Today, as discussed above in Section II.C.5, we are modifying our guidance with respect to the bidder's ability to waive or reduce the minimum acceptance condition in a Tier-II tender offer without providing withdrawal rights.

Both before and after the adoption of the cross-border exemptions, bidders in cross-border tender offers frequently have sought additional relief from the staff to terminate the initial offering period before its scheduled expiration, thereby terminating withdrawal rights, upon the satisfaction of all offer conditions.[210] In connection with early termination, some bidders also have concurrently requested relief from the requirement under our rules to promptly "publish, send or give" to target security holders information concerning any material change in the terms of a tender offer.[211]

Under specified circumstances, bidders have been given relief to permit the early termination of the initial offering period (or any voluntary extension of that period).[212] A voluntary extension is an extension that is not required under U.S. tender offer rules. Early termination of the initial offering period is not permitted, however, where U.S. rules require mandatory offer extensions for certain changes to the terms of an offer, including those arising from changes in the offer consideration, the dealer's soliciting fee, or the percentage of target securities for which the offer is made, or other material changes.[213] Thus, bidders making any of these kinds of changes to the terms of a tender offer may not terminate an initial offering period (or any of that period) before the scheduled expiration of the mandatory extension.

The relief granted by the staff in this area is contingent on several conditions similar to those we established for bidders wishing to waive or reduce a minimum

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210 See AstraZeneca PLC (May 23, 2006); Harmony Gold 2005; and In the Matter of Central and South West Corp. (September 27, 1995).

211 See Exchange Act Rule 14d-4(d). See Jilin Chemical (requesting no-action relief under Exchange Act Rules 14d-4(d) and 14d-6(c)).

212 See footnote 210 above.

213 See Exchange Act Rules 13e-4(f)(1)(ii) and 14e-1(b).

acceptance condition.[214] Bidders seeking to terminate the initial offering period before its scheduled expiration may do so only if, at the time the initial offering period expires and withdrawal rights terminate:

- The initial offering period has been open for at least 20 U.S. business days and all offer conditions have been satisfied;[215]
- The bidder has adequately discussed the possibility of and the impact of the early termination in the original offer materials;
- The bidder provides a subsequent offering period after early termination of the initial offering period;
- All offer conditions have been satisfied when the initial offering period terminates;[216] and
- The bidder does not terminate the initial offering period during any mandatory extension of the initial offering period required under U.S. tender offer rules.[217]

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214 See, e.g., RWE.

215 Id.

216 A bidder may not waive an offer condition without providing withdrawal rights after the waiver to allow security holders who have already tendered into the offer the opportunity to react to information about the waiver. Because a waiver is entirely within the control of the bidder and represents a change in the terms of the offer, the bidder must afford tendering security holders the right to withdraw their securities in response to the change. To the extent that foreign law would permit a waiver of the offer conditions to trigger a requirement to immediately terminate the initial offering period or any voluntary extension of that period, requests for relief will be considered on a case-by-case basis. As noted above, we address the specific circumstance of a bidder that seeks to waive the minimum acceptance condition in a tender offer in another section of this release. See Section II.C.5. above. However, the ability of a bidder to waive an offer condition in a cross-border tender offer may be more limited than in a domestic offer, because in some foreign jurisdictions, the waiver of an offer condition is permitted only with the permission of the home country regulator. In addition, foreign rules may limit the type of conditions that may be included in a cross-border tender offer.

217 See discussion above for the definition of "mandatory extension" as we use that term here.

At this time, we are not codifying the guidelines set forth in staff no-action precedent for cross-border tender offers regarding the ability to terminate an initial offering period or a voluntary extension of that period early. Considering the responses we receive to our requests for comment below, we will determine whether to revise our rules to codify this relief, under the conditions specified.

Request for Comment

- Is this relief necessary to alleviate practical difficulties? If so, should the relief be codified in rules?
- Should we allow a bidder in a Tier II-eligible cross-border tender offer to terminate the initial offering period or any voluntary extension of that period upon the satisfaction of all offer conditions? Or should the rules limit this relief only to early termination of the initial offering period or only to early termination of a voluntary extension of the initial offering period?
- Should we allow early termination only where it is specifically required under the law of the target's home jurisdiction? Or should this be permitted when customary under foreign practice as well?
- Should we condition this relief on any other conditions besides those listed above? For example, should we require the same kind of advance notice as we propose for a waiver of the minimum acceptance condition in a tender offer?

7. Codification of Rule 14e-5 cross-border exemptions

We propose to modernize and enhance the utility of Exchange Act Rule 14e-5 by codifying exemptive relief issued in the context of cross-border tender offers.[218] Rule 14e-5 safeguards the interests of persons who sell their securities in response to a tender offer. As we noted in 1999, the rule protects investors by preventing an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms.[219] The rule prohibits the disparate treatment of security holders, prevents the avoidance of proration requirements, and guards against the dangers posed by a bidder's purchases outside an offer that may involve fraud, deception and manipulation.[220]

Specifically, Rule 14e-5 prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer.[221] The rule's prohibitions apply from the time of public announcement of the tender offer until the offer expires.[222] The rule applies to "covered persons"[223] as that term is defined in the

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218 See footnotes 231 through 233 below.

219 Cross-Border Adopting Release [64 FR 61382 at 61387].

220 Regulation of Takeovers and Security Holder Communications, Release No. 34-40633 (November 3, 1998) [63 FR 67331 at 67359].

221 "Subject securities" means the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction. 17 CFR 229.1000(g). "Related securities" means securities that are immediately convertible into, exchangeable for, or exercisable for subject securities. See Exchange Act Rule 14e-5(c)(6).

222 Exchange Act Rule 14e-5(a).

223 Exchange Act Rule 14e-5(c)(3).

rule. Covered persons include the offeror and its affiliates,[224] the offeror's dealer-manager and its affiliates,[225] any advisor to the offeror and its affiliates or the offeror's dealer-manager and its affiliates whose compensation is dependent on the completion of the offer,[226] as well as any person acting, directly or indirectly, in concert with the abovementioned persons in connection with any purchase or arrangement to purchase any subject securities or any related securities.[227]

In the Cross-Border Adopting Release, we adopted an exception to allow purchases or arrangements to purchase made outside of, but during, Tier I tender offers.[228] As limited to Tier I tender offers, the exception extends only to tender offers for the securities of foreign private issuers "where U.S. persons hold of record ten percent or less of the class of securities sought in the offer."[229] We determined to "continue to review requests for relief from Rule 14e-5 for offers other than Tier I eligible offers on a case-by-case basis."[230] Since that time, we have received numerous requests for relief to allow purchases outside of tender offers conducted under the Tier II exemptions.

Over the past several years in the cross border context, frequent exemptions from Rule 14e-5's prohibition have been granted for Tier II tender offers in three recurring areas: purchases and arrangements to purchase securities of a foreign private issuer (1)

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224 Exchange Act Rule 14e-5(c)(3)(i).

225 Exchange Act Rule 14e-5(c)(3)(ii).

226 Exchange Act Rule 14e-5(c)(3)(iii).

227 Exchange Act Rule 14e-5(c)(3)(iv).

228 Exchange Act Rule 14e-5(b)(10).

229 Cross-Border Adopting Release [64 FR 61382 at 61388].

230 Id.

pursuant to the non-U.S. tender offer for a cross-border tender offer where there are separate U.S. and non-U.S. offers;[231] (2) by offerors and their affiliates outside of a tender offer;[232] and (3) by financial advisor's affiliates outside of a tender offer.[233] In 2006 and 2007, three class exemptive letters were issued in these areas.[234] The rule changes we propose today are intended to codify this exemptive relief.

As discussed above, a Tier II tender offer for a foreign target company may be structured as two concurrent but separate tender offers: one made to U.S. security holders and another made to target security holders outside the U.S.[235] If purchases pursuant to the foreign offer are made during the Rule 14e-5 prohibited period,[236] those purchases would run afoul of the rule because they technically constitute purchases outside the U.S. tender offer. Exemptive relief has been commonly provided in connection with Tier II offers to allow purchases or arrangements to purchase in the foreign offer where there are safeguards to protect the interests of U.S. tendering security holders. This relief facilitates cross-border tender offers and encourages the inclusion of U.S. security holders in such offers. We propose to change Rule 14e-5 to codify that

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231 See, e.g., Mittal (providing class relief for similarly situated parties, under the conditions specified).

232 See, e.g., Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc (March 2, 2007)("Sulzer")(providing class relief to similarly situated parties, under the conditions specified).

233 See, e.g., Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors (April 4, 2007)("Financial Advisors")(providing class relief for similarly situated parties, under the conditions specified).

234 See notes 231 through 233 above. As noted there, the class exemptive letters indicate that they may be relied upon by all similarly-situated parties.

235 Exchange Act Rule 14d-1(d)(2)(ii).

236 The Rule 14e-5 prohibited period is the period of time from public announcement of the tender offer until expiration.

relief today, to allow purchases or arrangements to purchase the subject securities pursuant to a foreign offer (or multiple foreign offers)[237] and during a U.S. tender offer.

Proposed Rule 14e-5(b)(11) would permit purchases or arrangements to purchase pursuant to a foreign tender offer (or in more than one foreign offer) during the Rule 14e-5 prohibited period if certain conditions are satisfied. This proposed exception would permit purchases in a foreign offer or offers made concurrently or substantially concurrently with a U.S. offer under Rule 14d-1(d)(2)(ii). The tender offer must qualify as a Tier II tender offer under Rule 14d-1(d).[238] Thus, the subject company must be a foreign private issuer.

The proposed exception is conditioned on the existence of certain safeguards to help protect U.S. security holders. These conditions address the economic terms, consideration, and procedural terms of the tender offer. The conditions require that U.S. security holders are treated at least as favorably as non-U.S. tendering security holders. The proposal also permits any cash consideration to be paid to U.S. security holders to be converted from the currency paid in the foreign offer to U.S. dollars at the exchange rate disclosed in the U.S. offering documents. In addition, the conditions require transparency regarding the offeror's intent to make purchases pursuant to a foreign offer in the U.S. offering documents. As the activity that the proposed exception covers is quite narrow,

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237 As discussed above, we propose to allow bidders eligible to rely on the Tier II exemption to separate their offer into a U.S. offer and multiple non-U.S. offers. We also propose to extend relief from Exchange Act Rule 14e-5 for purchases in more than one non-U.S. offer during the term of the U.S. offer.

238 Consistent with Mittal, the proposed exception is limited to tender offers that qualify as Tier II tender offers under Rule 14d-1(d). Tender offers that do not qualify as Tier II tender offers, such as issuer tender offers, would not meet the requirements of this proposed exception.

the exception is limited to purchases in foreign tender offers and does not apply to open market transactions, private transactions, or other transactions outside the tender offer.

The second and third recurring relief requests under Rule 14e-5 for cross-border tender offers concern purchases and arrangements to purchase by an offeror and its affiliates, as well as by a financial advisor's affiliates.[239] Some cross-border tender offers are structured as a single global offer made in the U.S. and other jurisdictions. Purchases and arrangements to purchase the subject securities outside the tender offer, including open market purchases and privately negotiated purchases, very often are permitted under foreign law. The staff has granted relief to allow purchases outside a tender offer when this activity is permissible under the laws of the target's foreign home jurisdiction if certain conditions designed to promote the fair treatment of tendering security holders are met. We propose to change Rule 14e-5 to codify that relief.[240]

Proposed Rule 14e-5(b)(12) would permit purchases or arrangements to purchase outside of a Tier II tender offer by (i) an offeror and its affiliates; and (ii) an affiliate of a financial advisor if certain conditions are satisfied. This rule revision is intended to address situations where the subject company is a non-U.S. company, the majority of whose shareholders reside outside the U.S. Thus, the subject company must be a foreign private issuer, and the covered person must reasonably expect that the tender offer

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239 An affiliate of a financial advisor includes a separately identifiable department of the financial advisor.

240 The proposed Rule 14e-5(b)(12) exception does not impose any additional conditions to those provided in the Sulzer and Financial Advisors letters. However, some conditions from those letters are not incorporated into the proposal in an effort to streamline the rule text in a manner that would not compromise the fair treatment of security holders. For example, condition number ten in the Financial Advisors letter concerns voluntary compliance with the United Kingdom's City Code and condition numbers three and five in Sulzer concerns compliance with the laws of the target's home jurisdiction and bilateral or multilateral memorandum of understanding are not included in the proposal.

qualifies as Tier II.[241] The proposal prohibits any purchases or arrangements to purchase in the U.S. otherwise than pursuant to the tender offer. Further, it contains conditions to enhance the transparency of the excepted activity. For example, the proposal would require that the U.S. offering materials prominently disclose the possibility of or the intention to make purchases or arrangements to purchase outside the tender offer. The proposal also would require disclosure in the U.S. of purchases made outside the tender offer to the extent that such information is made public in the home jurisdiction.

Where an offeror or its affiliate purchases or arranges to purchase outside of a tender offer, the proposed exception would impose one additional condition regarding consideration. In order to safeguard against the disparate treatment of security holders, the proposed exception would require that the tender offer price be raised to equal any higher price paid outside of the tender offer.

Where an affiliate of a financial advisor purchases or arranges to purchase outside of a tender offer, our proposed exception would impose additional conditions. In order to prevent the flow of information that may result in a violation of U.S. securities laws, these conditions relate to information barriers and common officers or employees. Specifically, the proposal would require that the financial advisor and affiliate maintain and enforce written policies and procedures designed to prevent the flow of information among the financial advisor and the affiliate that might result in a violation of the federal securities laws and regulations. It also would require that the affiliate have no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or

241 We would modify the reasonable expectation condition if the proposal to change the timing of the Tier II calculation to a date no earlier than 60 days before the tender offer announcement is adopted.

support personnel) in common with the financial advisor that directly effect or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services. The proposed exception also would require that the financial advisor have a registered broker-dealer affiliate under Section 15(a) of the Exchange Act.[242] As the exception is premised on the affiliate of the financial advisor carrying out its normal business activity when purchasing outside a tender offer, it would not permit purchases or arrangements to purchase to be made to facilitate the tender offer. Accordingly, purchasing activity effected in reliance on the proposed exception should be consistent with the affiliate's prior levels of activity. We note that risk arbitrage is excluded from the exception applicable to the financial advisor's affiliate.[243] Risk arbitrage is so closely related to the tender offer that the incentive for abusive behavior is significant. Finally, we propose to add definitions of subject company[244] and home jurisdiction[245] to Rule 14e-5, consistent with existing definitions.

Request for Comment

- We solicit comment on all aspects of the proposed exceptions, including each of the enumerated conditions.

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242 15 U.S.C. 78o.

243 Risk arbitrage may involve the purchase of the subject security and the sale of stock in the proposed acquirer. See Financial Advisors and the attached request dated April 3, 2007 regarding Blanket Exemptive Relief Request under Rule 14e-5 excepting risk arbitrage from the list of trading activities at page 3.

244 17 CFR 229.1000.

245 Exchange Act Rule 14d-1.

- We solicit specific comments on each of the conditions in the Rule 14e-5(b)(11) proposal concerning Tier II status, economic terms, consideration, currency conversion, procedural terms, disclosure and purchases being made solely pursuant to the foreign tender offer.
- We solicit specific comments on each of the conditions in the Rule 14e-5(b)(12) proposal concerning foreign private issuer and Tier II status, no purchases or arrangements to purchase in the U.S. other than pursuant to the tender offer, and disclosure. We also solicit comment on the price matching condition applicable to the offeror and its affiliates, as well as each of the additional conditions applicable to a financial advisor's affiliate, including the financial advisor having an affiliate that is registered as a broker or dealer under Section 15(a) of the Exchange Act.
- Are there additional means besides analyzing prior purchasing activity by the financial advisor's affiliate to assure that routine trading activity outside the tender offer is not conducted with the intent to affect the tender offer?
- Are there additional conditions that should be added to the proposed exceptions to safeguard the interests of persons who sell their securities in response to a tender offer? In particular, should conditions number ten from the Financial Advisors letter[246] and numbers three and five from the Sulzer

[246] Condition number ten states: "The Financial Advisor, through its Affiliates and Departments, conduct the Trading Activities voluntarily in compliance with the pertinent provisions of the United Kingdom's City Code on Takeovers and mergers and Rules Governing Substantial Acquisitions of Shares (the 'City Code'), and the Affiliates and Departments conduct themselves as if they were connected exempt principal traders as defined in the City Code, including complying with regulations with respect to the establishment and maintenance of information barriers, conflict of interest provisions and other requirements, other than with respect to the notification of relevant trades to the Panel...". Financial Advisors at p. 3.

letter[247] be incorporated into the Rule 14e-5(b)(12) proposal?

- Are there other alternatives that would better protect the interests of security holders?
- We solicit comment on suggested definitions of risk arbitrage.
- In addition to risk arbitrage, is there any other purchasing activity that should be excluded from the proposed Rule 14e-5(b)(12) exception?

D. Expanded availability of early commencement for exchange offers

In 1999, we adopted rule revisions intended to minimize the regulatory disparity between cash and stock tender offers.[248] Before those changes, exchange offers in which the bidder offered its shares as part or all of the offer consideration were at a disadvantage compared to cash offers because of the regulatory review process associated with the filing of a Securities Act registration statement.[249] Cash tender offers could commence on the date of the filing of a tender offer statement with the Commission. Before the 1999 rule revisions, exchange offers, by contrast, could not begin until the staff completed its review of the registration statement filed by the bidder and it had been declared effective. This disparity was of particular concern in the tender offer context,

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247 Condition number three states: "The Prospective Purchasers comply with the applicable laws and regulations of the 'home jurisdiction' as defined in Rule 14d-1." Sulzer at p. 2. Condition number five states: "The Commission and the home jurisdiction are parties to a bilateral or multilateral memorandum of understanding (MOU) as to the consultation and cooperation in the administration and enforcement of securities laws." Sulzer at p. 3.

248 See Regulation M-A Adopting Release, Section II.3.A.

249 See Regulation M-A Proposing Release, Section I. ("In some cases, where the staff undertakes to review and comment during the waiting period, the delay of effectiveness can be quite lengthy. This delay is particularly troublesome for bidders in exchange offers. In contrast, cash offers, which may compete with exchange offers, can commence as soon as the required information is filed with the Commission and disseminated to security holders. The delay in commencing an exchange offer can place the bidder at risk that a competing all-cash bid will commence and close before the exchange offer can even commence.").

where multiple bidders may make contemporaneous offers for the same target company through competing offers.

To address this disparity in the regulatory process for cash tender offers and exchange offers, we adopted rule changes permitting exchange offers to commence upon the date of the filing of a registration statement under specified conditions.[250] However, bidders exercising the option to "early commence" an exchange offer may not terminate that offer and purchase tendered shares until the registration statement has been declared effective by the Commission.[251] We recognized in proposing the early commencement option that a regulatory disparity in the treatment of cash and stock tender offers could continue to exist because the staff review process might delay the effectiveness of the registration statement in an exchange offer and thus could delay the bidder's ability to close the exchange offer.[252] In adopting the early commencement option, however, the staff undertook to expedite the review of such exchange offers so that they could compete on an equal footing with cash tender offers.[253] We believe the staff generally has been successful in meeting this commitment.

Since we made early commencement available, we have recognized that a regulatory disparity continues to exist because the early commencement option is not

[250] See Regulation M-A Adopting Release, Section II.E.1.

[251] See Securities Act Rule 162(a) [17 CFR 230.162(a)].

[252] See Regulation M-A Proposing Release, Section II.A.3.A.

[253] See Regulation M-A Adopting Release, Section II.E.1.

available for exchange offers that are not subject to Rule 13e-4 or Regulation 14D.[254] In certain foreign jurisdictions, the staff has been advised that applicable non-U.S. tender offer rules provide that, where a bidder makes a tender offer for one class of target securities, it also must make an offer or offers for any other class or classes of securities issued by the same target and convertible into the subject securities. Because these offers are made contemporaneously and through a single offer document, if one class of target securities is not subject to Rule 13e-4(e) or Rule 14d-4(b), the bidder effectively loses the ability to commence early under our existing rules. This may create an undue burden for bidders, where the offer for each class of target securities is made in accordance with the requirements of Regulation 14D or Rule 13e-4, as modified by the Tier II cross-border exemptions.

We believe that all exchange offers eligible for the Tier II cross-border exemptions should be able to take advantage of the early commencement procedure, regardless of whether the exchange offer is subject to the provisions of Regulation 14E only, where the offeror voluntarily provides protections required in an offer subject to Rule 13e-4 or Regulation 14D. Since its adoption, the early commencement procedure has worked well in facilitating exchange offers and we believe extending the procedure to all Tier II offers would be appropriate. Under the expanded rules we propose today, bidders for foreign securities that are not registered under the Exchange Act would be

254 Securities Act Rule 162(a) provides an exemption from the registration requirements of Section 5(a) of the Securities Act only for exchange offers subject to Rule 13e-4(e) or 14d-4(b). Since those rules apply only to tender offers for target securities registered under Section 12 of the Exchange Act and in limited other circumstances, early commencement is not currently available for all exchange offers. See footnote 109 above for a discussion of when Exchange Act Rule 13e-4 and Regulation 14D apply.

able to take advantage of the early commencement option, subject to the conditions discussed below.

Today we propose to expand the availability of early commencement for cross-border exchange offers not subject to Rule 13e-4 or Regulation 14D under the conditions outlined in our proposed rules.[255] A new provision in the Tier II exemptions would permit early commencement, where the exchange offer meets the conditions of the exemptions. We also propose a corresponding change to Securities Act Rule 162 to extend the exemption from Section 5(a) in that rule for exchange offers not subject to Rule 13e-4 or Regulation 14D that otherwise meet the conditions for the Tier II exemptions.

Initially, the Commission did not make this option available because we were concerned that such offers were not subject to all of the disclosure and procedural protections applicable to registered offers.[256] In particular, the absence of the requirement to provide withdrawal rights in offerings for unregistered classes of securities caused us to retain the requirement that a bidder could not commence such offers before the registration statement filed to register the share issuance had been declared effective by the Commission.[257] The proposed rules would address these

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255 Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

256 See Section I.E. Question 4 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at http://www.sec.gov/interps/telephone/phonesupplement3.htm (noting that the early commencement option is not available for debt restructurings under existing rules, because Regulation 14D and Rule 13e-4 apply to tenders for equity securities only).

257 Securities Act Rule 162(a) states that an exchange offer subject to Exchange Act Rule 13e-4(e) or 14d-4(b) may commence upon the filing of a registration statement "so long as no securities are purchased until the registration statement has been declared effective and the tender offer has expired in accordance with the tender offer rules."

concerns by permitting early commencement for exchange offers for unregistered securities only where the bidder provides withdrawal rights in the offer to the same extent as would be required under Regulation 14D or Rule 13e-4.[258] In addition, the proposed rule would require the same minimum time periods after the occurrence of specified changes as are required for other "early commencement" offers.[259]

Request for Comment

- Should the expanded eligibility to commence early be limited, as proposed, to cross-border exchange offers eligible to rely on the Tier II exemptions only?
- Should the expanded eligibility be conditioned on the bidder providing withdrawal rights and keeping the offer open for certain minimum time periods after information about material changes is disseminated to security holders, as proposed? Are there any other procedural protections applicable to offers subject to Regulation 14D or Rule 13e-4 besides withdrawal rights that should be required in an early commencement offer not subject to Regulation 14D or Rule 13e-4?
- Should the early commencement option be made available for all exchange offers, including those for domestic target companies not within the scope of current Rule 162? For example, would this be useful in the case of tender offers for debt securities, which are not covered by Regulation 14D or Rule 13e-4?

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[258] Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

[259] Proposed Securities Act Rule 162(a).

- Are there certain types of exchange offers for which early commencement should not be permitted, whether in the cross-border context or otherwise? For example, should transactions in which an issuer privately places securities and, shortly thereafter, conducts an exchange offer to exchange them for registered securities[260] be permitted to commence early, where such offers are not subject to Rule 13e-4?
- What have been bidders' experiences with the usefulness of the early commencement option in our current rules, in light of the staff review and comment process?

E. Proposed changes to schedules and forms

1. Form CB

When an offeror or issuer relies on the Tier I cross-border exemptions in connection with a cross-border business combination transaction or rights offering, it may be required to furnish to the Commission an English translation of the offer materials, submitted under cover of Form CB.[261] When we adopted Form CB in 1999, we specified that the form could be submitted in paper form only. In 2002, however, the Commission adopted rule changes mandating electronic filing for persons already reporting under

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260 See the no-action letter issued to Exxon Capital Holdings Corp. (April 1988). These offers are commonly known as "Exxon Capital exchange offers."

261 Exchange Act Rules 14d-1(c)(3)(iii) and 13e-4(h)(8)(iii). Form CB must be furnished to the Commission by the first business day after publication or dissemination of the attached disclosure document in the applicable foreign jurisdiction(s). See Securities Act Rules 801(a)(4)(i) and 802(a)(4)(i), and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii). The obligation to furnish a Form CB arises only when the bidder in a tender offer otherwise would have been required to file a Schedule TO or a registration statement for an exchange offer; thus, no Form CB is required for cash tender offers subject only to Regulation 14E.

Section 13(a)[262] or 15(d)[263] of the Exchange Act.[264] If the person furnishing the Form CB is not an Exchange Act reporting entity, it may currently submit the Form CB in paper or via the Commission's Electronic Data Gathering, Analysis, and Retrieval system, or EDGAR.[265]

As a result of advances in technology and its widespread use, we believe it would be appropriate to require all Form CBs to be filed electronically via our EDGAR system. We therefore propose to amend Item 101(a) of Regulation S-T to require that all Form CBs be submitted electronically.[266] For the same reasons, we also propose to require the electronic filing of the form for appointment of an agent in the United States for service of process, which must be filed by all foreign companies that furnish a Form CB to the Commission.[267] For purposes of the current cross-border exemptions, our rules require Form F-X[268] to be filed electronically only when the Form CB must be so filed, i.e., when the foreign company filing it is already subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act.[269]

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262 15 U.S.C. 78m.

263 15 U.S.C. 78o(d).

264 See Rule 101(a)(1)(vi) of Regulation S-T [17 CFR 232.101(a)(1)(vi)].

265 See Rule 101(b)(7) of Regulation S-T [17 CFR 232.101(b)(7)].

266 See proposed Rule 101(a)(1)(vi) of Regulation S-T.

267 See proposed Rule 101(a)(1)(vii) of Regulation S-T.

268 Form F-X is a form for appointing an agent in the United States for service of process. It must be filed by foreign filers only.

269 See Rules 101(a)(vii) and 101(b)(8)(i) of Regulation S-T.

We note that, in order to file electronically, an offeror or issuer that is not already doing so would need to obtain filing codes required to file on EDGAR. An offeror or issuer that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a "Central Index Key (CIK)" code, would obtain the codes by filing electronically a Form ID[270] at https://www/filermanagement.edgarfiling.sec.gov and filing, in paper by fax within two business days before or after filing the Form ID, a notarized authenticating document. The authenticating document would need to be manually signed by the applicant over the applicant's typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID.[271] If the authenticating document is filed after electronically filing the Form ID, it would need to include the accession number assigned to the electronically filed Form ID as a result of its filing.[272]

Electronic filing in all cases would benefit investors by enabling them to more easily access these forms through the Commission's website. If adopted, this requirement would have no impact on the liability of the persons furnishing their offer materials under cover of Form CB.[273] Additionally, it would not change the circumstances under which a Form CB or Form F-X must be filed.

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270 17 CFR 239.63, 249.446, 269.7 and 274.402.

271 An offeror or issuer could confirm the authenticity of a Form ID by, for example, stating that "[name of offeror or issuer] hereby confirms the authenticity of the Form ID [filed] [to be filed] on [specify date] containing the information contained in this document."

272 17 CFR 232.10(b). An "accession number" is a unique number generated by EDGAR for each electronic submission. Assignment of an accession number does not mean that EDGAR has accepted a submission.

273 We note that persons furnishing Form CB are not subject to Section 18 liability with respect to the information provided.

We are not currently proposing, but we solicit comment on, whether we should change the cover page of the Form CB to make it easier for the staff to monitor the application of the cross-border exemptions. We could amend the cover page of the Form CB to include a space where persons furnishing the form would specify the U.S. ownership interest in the foreign target company or in the issuer for rights offerings supporting reliance on the exemptions. This would help us monitor the application and effectiveness of the cross-border exemptions. This information already would be available to the person furnishing the Form CB, since it is required for the Tier I calculation.[274]

Request for Comment

- Should we require all Form CBs to be furnished to the Commission in electronic form via our EDGAR system, as proposed? Would this requirement present a hardship for non-reporting entities submitting the form? For example, would the process for procuring a notarized authenticating document in a foreign jurisdiction for purposes of obtaining a Form ID present a hardship for non-reporting entities?
- If we change our rules to require the electronic submission of all Form CBs, should we adopt the same requirements for electronic filing of Form F-Xs, as proposed, when required to be submitted with the Form CB?
- Are there reasons why electronic filing would not be desirable?

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[274] For bidders relying on the hostile presumption available for non-negotiated transactions, the Form CB would list the percentage of U.S. ownership of the target yielded by the ADTV calculation, unless the bidder had reason to know a different level of U.S ownership.

- Should we require the filing person to fill in a box on the cover page of the Form CB specifying the level of U.S. ownership of the target or issuer that permits reliance on the cross-border exemptions?

2. Proposed changes to Schedule TO, Form F-4 and Form S-4

We also propose to add a box on the cover page of the Schedule TO and Forms F-4 and S-4 that a filing person would be required to check to indicate reliance on one of the applicable cross-border exemptions.[275] This would be helpful to the staff as well as to filing persons. For example, the inclusion of this information on the cover page of a tender offer statement or registration statement, filed in connection with a cross-border transaction in which the filer is seeking to rely on an applicable cross-border exemption, would enable the staff to perform the review process more efficiently. The availability of this information would eliminate staff comments that are based on misperceptions about which exemption the filer is seeking and which U.S. rules apply to the transaction, thereby reducing the time and cost involved for the filer in responding to staff comments. Currently, there is often no way to tell from reading the tender offer materials whether filers are relying on the cross-border exemptions.

We also solicit comment on whether we should include a space or box on the cover page of these schedules and forms requiring the filer to specify the U.S. ownership percentage that permits reliance on the exemption claimed. We do not propose this change today, but we believe it could be helpful in certain circumstances and are interested in commenters' views on whether this would present an undue burden or liability risk for filers. If we were to require this, it would be required only if one or more

275 Existing Form CB contains such a box.

of the cross-border exemptions is being relied upon. As with Form CB, filers already would possess this information in determining eligibility to rely on the applicable cross-border exemption.

Request for Comment

- Would the proposed requirement to check a box identifying the cross-border exemption relied upon be a burden for filers? Would the information be useful to the public?
- Should we also add a box or blank space on the cover page of Schedule TO and Forms S-4 and F-4 where filers would list the percentage of the target securities held by U.S. persons that permits reliance on the applicable cross-border exemption? Would this requirement represent an undue hardship or liability for filers?
- Would investors or others find this information useful in connection with their consideration of the transaction?

F. Beneficial ownership reporting by foreign institutions

1. Background

The beneficial ownership reporting requirements in Sections 13(d)[276] and 13(g)[277] of the Exchange Act[278] and the corresponding regulations[279] provide investors and the issuer with information about accumulations of securities that may have the potential to

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276 15 U.S.C. 78m(d).

277 15 U.S.C. 78m(g).

278 15 U.S.C. 78a et seq.

279 Regulation 13D-G, Exchange Act Rule 13d-1 et seq. [17 CFR 240.13d-1 et seq.].

change or influence control of the issuer. This statutory and regulatory framework establishes a comprehensive reporting system for gathering and disseminating information about the ownership of equity securities.

The beneficial ownership reporting provisions require, subject to exceptions, that any person who acquires more than five percent of a class of equity securities registered under Section 12 of the Exchange Act[280] and other specified equity securities report the acquisition on Schedule 13D within ten days. Persons holding more than five percent of a class of such securities at the end of the calendar year, but not required to report on Schedule 13D, must file a short-form Schedule 13G within 45 days after December 31. These Schedule 13G filers include persons exempt from the requirements of Section 13(d),[281] as well as specified institutional investors holding securities in the ordinary course of business and not with a control purpose.[282] As specified in Rule 13d-1(b)(1)(ii), the types of institutional investors that may file on Schedule 13G under that rule include a broker or dealer registered under Section 15(a) of the Exchange Act,[283] a bank as defined in Section 3(a)(6) of the Exchange Act,[284] an insurance company as defined in Section 3(a)(9) of the Exchange Act,[285] an investment company registered

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280 15 U.S.C. 78l.

281 This category consists of persons filing on Schedule 13G because their acquisitions are statutorily or administratively exempt from reporting on Schedule 13D.

282 Exchange Act Rule 13d-1(b)(1)(ii).

283 15 U.S.C. 78o(b).

284 15 U.S.C. 78c(a)(6).

285 15 U.S.C. 78c(a)(9).

under Section 8 of the Investment Company Act of 1940,[286] an investment adviser registered under Section 203 of the Investment Advisers Act of 1940,[287] an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act,[288] and related holding companies and groups. The list of institutional investors in Rule 13d-1(b)(1)(ii) currently does not include non-domestic institutions generally, and is limited to institutions such as brokers, dealers, investment advisers and investment companies registered with the Commission, or regulated banks, pension funds or insurance companies.

In 1977, we proposed an amendment to the precursor to Rule 13d-1(b)(1)(ii)[289] which would have allowed non-domestic entities similar to domestic brokers, dealers, banks, investment companies, investment advisers, employee benefit plans, and parents and groups of these persons to use the short form Schedule 13G to report beneficial ownership, provided that such persons agreed to make available to the Commission the same information they would be required to furnish in responding to the disclosure requirements of Schedule 13D.[290] When we adopted final rules in 1978, however, we

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286 15 U.S.C. 80a-8.

287 15 U.S.C. 80b-1 et seq.

288 Codified principally in 29 U.S.C. 1001-1461.

289 Exchange Act Rule 13d-5 was the precursor to Exchange Act Rule 13d-1(b).

290 See Beneficial Ownership Disclosure Requirements, Release No. 34-13292 (February 24, 1977) [42 FR 44964].

declined to amend the rule to allow foreign entities, who otherwise qualified, to use the short form available to U.S. institutions.[291]

The 1978 adopting release indicated that applications for exemptive orders by foreign entities would be entertained to enable them to report on Schedule 13G. The release discussed several conditions to the availability of such exemptive orders, and stated that the Commission would entertain applications when the acquisitions are in the ordinary course of business and not with the purpose nor with the effect of changing or influencing control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect. It stated that the Commission may consider any further conditions that may be appropriate when granting exemptive orders.

Historically, use of the Schedule 13G by foreign institutions filing as qualified institutions under Rule 13d-1(b)(i)(ii) has been limited to institutions that have obtained an exemptive order from the Commission[292] or, under the current practice, a no-action position from the Division of Corporation Finance based upon the requester's undertaking to grant the Commission or the staff access to information that would otherwise be disclosed in a Schedule 13D and the comparability of the foreign regulatory

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291 The release stated that we determined not to adopt the amendment "in view of the substantial enforcement difficulties encountered in seeking to assure compliance by foreign persons with the provisions of Section 13(d)." See Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (April 21, 1978) [43 FR 18484].

292 Id.

scheme applicable to the particular category of institutional investor.[293] In connection with the amendments to the beneficial ownership reporting requirements proposed in 1996, we noted that we "believe[d] that a non-U.S. institution seeking relief to file pursuant to Rule 13d-1(b)(1) should be subject to a regulatory scheme in its country comparable to the U.S. regulatory scheme for the particular category of institution and that such institutions should undertake to grant the Commission access to information that would otherwise be disclosed on Schedule 13D."[294] We stated that no change to the practice of issuing exemptive orders or staff no-action positions was proposed.[295] We requested comment regarding whether the rules should be amended to expressly allow foreign institutional investors that are the functional equivalent of our domestic institutions to file on Schedule 13G.[296]

When we adopted amendments to the beneficial ownership reporting rules in 1998, we stated that we were not expanding the list of qualified institutional investors in Rule 13d-1(b)(1)(ii) to include foreign institutions.[297] Further, we stated that the use of

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293 See, e.g., Canada Pension Plan Investment Board (May 5, 2006)(granting relief for the Canada Pension Plan (CPP) Investment Board to file on Schedule 13G where the Board represented that the Canadian Pension Plan was the functional equivalent of a U.S. private pension fund and the regulatory regime governing the CPP Investment Board was substantially similar to the regulations applicable to U.S. pension funds under the Employee Retirement Income Security Act of 1974) and Citigroup Inc. (May 27, 2004)(granting relief for certain qualifying subsidiaries of Citigroup organized under the laws of England and Wales; the subsidiaries conducted investment banking business, including market-making, through trading in their own accounts and for their customers and represented that they were subject to regulation in the United Kingdom that was comparable to U.S. regulations).

294 See Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-37403 (July 3, 1996) [61 FR 36521] (the "Reproposing Release").

295 Id.

296 Id.

297 See Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (January 12, 1998) [63 FR 2854].

Schedule 13G pursuant to the provisions of Rule 13d-1(b)(1) would continue to be limited to institutions such as brokers, dealers, investment companies, and investment advisers registered with the Commission, or regulated banks, pension funds, or insurance companies, and its availability would not be extended to foreign institutions generally.[298] The adopting release noted that foreign institutional investors that do not have a disqualifying purpose or effect would be able to rely on the passive investor provisions of Rule 13d-1(c) to file a Schedule 13G.[299] To the extent that any foreign institutional investor sought to report on Schedule 13G as a qualified institutional investor, the institution would be required to obtain an exemptive order or no-action position. We continue to receive and grant requests from foreign institutions seeking to file on Schedule 13G as qualified institutional investors.[300]

2. Proposed rules

The past ten years have brought tremendous change to our capital markets. As the capital markets become increasingly global, we believe we need to continually re-evaluate our regulatory scheme to determine whether it is efficiently and effectively protecting investors and not imposing unnecessary burdens. We recognize that the

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298 Id.

299 The passive investor provision was adopted in 1998 to expand the class of investors eligible to file on the short form Schedule 13G. See Release No. 34-39538. Under Exchange Act Rule 13d-1(c), a passive investor choosing to file a Schedule 13G must file within ten calendar days after acquiring beneficial ownership and must certify that it does not have a disqualifying purpose or effect. Qualified institutional investors filing on Schedule 13G pursuant to Exchange Act Rule 13d-1(b) must file the form within 45 calendar days after the calendar year end of the year in which, on the last day of the year, its beneficial ownership of the subject class exceeds 5 percent. Under the amendments we propose today and discussed below, a foreign institution would be permitted to file on Schedule 13G as a qualified institutional investor if it meets the specified conditions.

300 See footnote 293 above.

burden imposed on foreign institutions that must file a Schedule 13D (or obtain an individual no-action letter) is more extensive than the filing requirements applicable to comparable U.S. institutions that are able to report beneficial ownership on Schedule 13G. We also recognize that foreign institutions filing as passive investors pursuant to Rule 13d-1(c) are subject to more stringent requirements than institutions eligible to rely on Rule 13d-1(b).[301] We weigh these burdens against the important safeguards that the provisions of Rule 13d-1(b) provide. We believe that it may be possible to extend Schedule 13G filing eligibility pursuant to Rule 13d-1(b) to foreign institutions, while maintaining the protections of the rule.[302]

Accordingly, we propose to amend Rule 13d-1(b)(1)(ii) to include foreign institutions that are substantially comparable to the U.S. institutions listed in subparagraphs (A) - (J) of the current rule. In this regard, to be eligible to file on

[301] Currently, a difference exists for passive investors and qualified institutional investors in the timing requirements for filing an initial Schedule 13G, as discussed above, and filing amendments to Schedule 13G. Passive investors amend Schedule 13G in a manner similar to qualified institutional investors, but more promptly. Another difference in the filing requirements for passive investors and qualified institutional investors is the applicable certification. Finally, an investor beneficially owning more than 20 percent of a class of securities may not file as a passive investor. A qualified institutional investor is not subject to the 20 percent limit. These differences present a significant burden for institutions that do a significant amount of trading or engage in securities transactions on behalf of clients. Allowing foreign institutions to file as qualified institutional investors would reduce the filing burden for those foreign institutions and decrease the disparities in the way U.S. and foreign institutions are treated under the rules.

[302] We note that in 2004, the Commission adopted a rule that remedied disparate treatment of domestic and foreign banks. See Foreign Bank Exemption from the Insider Lending Prohibition of the Exchange Act Section 13(k), Release No. 34-49616 (April 26, 2004) [69 FR 24016].

Schedule 13G, the foreign institution would be required to determine,[303] and certify on Schedule 13G, that it is subject to a regulatory scheme comparable to the regulatory scheme applicable to its U.S. counterparts.[304] Additionally, in its certification on Schedule 13G, the foreign institution would need to undertake to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D. If these proposed rule changes are adopted, Rule 13d-1(b) would continue to be available only to institutions that acquired and held the equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer.[305]

Under Rule 13d-1(e), when a passive investor or qualified institutional investor

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303 Similar to a domestic institution, a foreign institution would need to determine whether it qualified to use the short-form Schedule 13G at the time it exceeded the beneficial ownership threshold. This initial determination as to form eligibility would require a foreign institution to determine, at the time it exceeds the beneficial ownership threshold, whether it is subject to a foreign regulatory scheme applicable to the particular category of institutional investor comparable to the applicable U.S. regulatory scheme. If the foreign institution made such a determination, it would be eligible to file on Schedule 13G as a qualified institutional investor, as long as it could provide the certification required by Schedule 13G. If at any time before filing a Schedule 13G pursuant to proposed Rule 13d-1(b)(1)(ii)(K) the foreign institution determined that it was no longer able to rely on the provision, it would be required to file a Schedule 13D in accordance with the rules.

304 When determining whether the foreign regulatory scheme is comparable to the U.S. regulatory scheme, the foreign institution should consider a number of factors, including whether the institution is engaged in a business similar to the business engaged in by the qualified institutional investors listed in Rule 13d-1(b)(1)(ii), and whether the institution affords protections similar to those offered by domestic institutions (such as minimum capital requirements, deposit guarantees, licensing requirements, periodic reporting of information in the home country, power of inspection by home country regulators, etc.). See, e.g., Natixis S.A., Banque Fédérale des Banqes Populaires and Caisse National des Caisses d'Epargne (October 9, 2007)(granting relief where the requestor and its subsidiaries represented they were engaged in businesses similar to those engaged in by one or more qualified institutional investors listed in Rule13d-1(b)(1)(ii) and that they were subject to regulation in France that was substantially comparable to the U.S. regulatory scheme) and DnB NOR ASA and Qualifying Subsidiaries (January 9, 2008)(granting relief where DnB NOR and its qualifying subsidiaries represented that they were engaged in businesses similar to those engaged in by one or more classes of persons identified in Rule 13d-1(b)(1)(ii) and that they were subject to extensive regulation in the jurisdictions in which they operate analogous to U.S. regulations).

305 See Exchange Act Rule 13d-1(b).

determines that it holds subject securities with a disqualifying purpose or effect, it must file a Schedule 13D no later than 10 calendar days after the change in investment purpose.[306] Therefore, in the event that an institution – foreign or domestic – determines that it holds subject securities with a disqualifying purpose or effect, it would be required to file a Schedule 13D. In addition, the institution would be subject to a "cooling-off period."[307] During the cooling-off period, the reporting person is prohibited from voting or directing the voting of the subject securities or acquiring additional beneficial ownership of any equity securities of the issuer or any person controlling the issuer. We believe the cooling-off period provides an important safeguard for the market and investors and allows them time to react to the information in the Schedule 13D filing.

As noted above, in the past we expressed concern regarding possible difficulties with enforcement in the event that we sought additional information from a foreign institution. We believe that such difficulties are mitigated by various factors. First, we are proposing that any foreign institution availing itself of Schedule 13G certify that it is subject to a comparable regulatory scheme and that it will provide Schedule 13D-type information upon request. Second, much of the additional Schedule 13D-type information already may be provided to the primary home country regulator and may be publicly available or available in the event of a formal request.

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[306] Exchange Act Rule 13d-1(e).

[307] We adopted the cooling-off period in 1998, and it applies to both passive investors and qualified institutional investors; therefore, it would apply to a foreign institution filing under proposed Exchange Act Rule 13d-1(b). The cooling-off period begins with the change in investment purpose and lasts until the expiration of the tenth calendar day from the date the investor filed a Schedule 13D.

Request for Comment

- Would the proposed amendments alleviate practical difficulties for foreign beneficial owners without affecting the quality of information available to U.S. investors?
- Should a foreign institution be required, as proposed, to certify on Schedule 13G that it is subject to a regulatory scheme comparable to the U.S. regulatory scheme for the particular category of institution?
  - Would foreign institutions find it difficult to certify that they are subject to comparable regulation? How should we alleviate any difficulty?
  - Should the certification be different or include any other information? Should the certification language include a statement that the foreign institution is subject to comprehensive supervision or regulation in its home jurisdiction,[308] rather than the language we proposed? Why or why not?
- Should filing on Schedule 13G only be available, as proposed, to non-U.S. persons who undertake on Schedule 13G to furnish the staff with information, at its request, that would otherwise be disclosed in a Schedule 13D?

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308 Similar language is used in Exchange Act Rule 13k-1, which provides an exemption for foreign banks from the insider lending prohibition of Section 13(k). The rule provides a definition of a foreign bank and includes conditions that foreign banks must meet, such as being required to insure deposits or being subject to a deposit guarantee.

- Should a foreign institution that seeks to use a Schedule 13G also be required to file a Form F-X? Should the Form F-X, like Schedule 13G, be required to be filed electronically?
- Should a foreign institution that intends to rely on proposed new Rule 13d-1(b)(1)(ii)(K) be required to file a public notice of such intent? If such a notice was required to be filed, when should the notice be filed and should the filer be required to make the proposed certification at the time the notice is filed?
- Should we also require foreign institutions filing as passive investors under Rule 13d-1(c) to file a Form F-X?
- Should the use of Schedule 13G by foreign institutions relying on the proposed rule be limited to institutions from jurisdictions that have a bilateral enforcement memorandum of understanding (MOU) with the SEC or institutions that are signatories to the IOSCO Multilateral Memorandum of Understanding concerning consultation, cooperation and the exchange of information?

G. Interpretive Guidance

1. Application of the all-holders rule to foreign target security holders

Most of this release deals with cross-border business combination transactions where the target is a foreign private issuer. In this section, however, we address an issue involving the treatment of foreign target security holders in tender offers generally, including those for U.S. target companies. The issue of bidders' ability to exclude foreign target security holders is addressed here because it closely relates to the issue of

the exclusion of U.S. target security holders in cross-border tender offers, which we discuss in the next section below. As we continue to encourage our fellow international securities and takeover regulators to minimize the ability of bidders to exclude U.S. holders from business combination transactions, we recognize the need to take similar steps with regard to the ability of bidders to exclude non-U.S. holders pursuant to our rules.

In 1986, we adopted Rule 14d-10 and amended Rule 13e-4(f) to require that all target security holders in a tender offer subject to either of those rules be included in the tender offer and treated equally.[309] These rules require that third-party tender offers subject to Section 14(d) of the Exchange Act, as well as issuer tender offers subject to Section 13(e) of the Exchange Act, be open to all holders of the subject class of securities.[310] This equal treatment provision does not prohibit tender offers for less than all outstanding securities of a subject class, but it does require that all security holders be able to accept the tender offer if they choose.[311]

The all-holders provisions in Rules 14d-10 and 13e-4(f) apply equally to U.S. as

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309 See Amendments to Tender Offer Rules: All-Holders and Best-Price, Release No. 34-23421 (July 11, 1986) [51 FR 25873] ("All-Holders and Best Price Adopting Release").

310 Pursuant to these provisions, the bidder may not restrict the offer to target holders as of a particular record date only. See footnote 35 in All-Holders and Best Price Adopting Release. While as a practical matter, the bidder will look to beneficial holders as of a recent date in distributing the offer materials, the offer must be open to all target security holders, including those who purchase after the tender offer commences. See In the Matter of Application of WHX Corp., Exchange Act Release No. 47980 (June 4, 2003), vacated on other grounds, WHX Corp. v. SEC, 362 F.3d 854 (D.C. Cir. 2004).

311 If the tender offer is for less than all of the securities of the subject class and the offer is oversubscribed, the bidder must purchase tendered securities on a pro rata basis. See Section 14(d)(6) of the Exchange Act and Exchange Act Rules 13e-4(f)(3) and 14d-8.

well as non-U.S. target holders.[312] However, we are aware that certain bidders are purporting to exclude foreign target security holders in tender offers subject to these rules. Therefore, we wish to reiterate our position that the all-holders requirement does not allow the exclusion of any foreign or U.S. target holder in tender offers subject to those rules. We believe it is in the interests of U.S. investors to enforce U.S. equal treatment principles for the benefit of non-U.S. target security holders. This is particularly true today, where comparable foreign all-holders requirements may protect U.S. investors by preventing their exclusion from cross-border offers.

We recognize, however, that the requirement to make an offer available to all foreign target holders, particularly for registered exchange offers, may present a burden for bidders that may need to comply with both foreign and U.S. rules. We are soliciting comment on whether any amendments to the U.S. equal treatment provisions are necessary or advisable to allow certain target security holders to be excluded from the offer. In this regard, we note the exception in Rule 14d-10(b), which states that the all-holders rule will not "prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute."[313] We are soliciting comment as to whether this rule

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312 See All-Holders and Best-Price Adopting Release, Section III.A.2., which stated "While a tender offer subject to Sections 13(e) and 14(d) of the Williams Act must be held open to all holders of the subject class of securities, <u>including foreign persons</u>, Rules 14d-10(b)(1) and 13e-4(f)(9)(i) make clear that the all-holders requirement does not affect the required dissemination of tender offers. ... The Commission has not interpreted these provisions as requiring dissemination of tender offer materials outside of the United States, and the adoption of the all-holders requirement is not intended to impose any additional requirements in this regard." (emphasis added; footnotes omitted).

313 Exchange Act Rule 13e-4(e)(9) contains a comparable provision for issuer tender offers.

should be amended to include a similar provision with respect to target holders in foreign jurisdictions. We are also soliciting comment as to whether we should specifically define what a "good faith effort" means.

Notwithstanding the requirements of Rule 14d-10 and Rule 13e-4(f) to extend an offer to all holders of a target company's securities, these provisions have not been interpreted to require that offering materials be mailed into foreign jurisdictions.[314] We recognize that disseminating a U.S. offer document in non-U.S. jurisdictions may implicate applicable foreign laws. Certain foreign jurisdictions allow bidders not to mail offer materials into certain foreign jurisdictions. For instance, the U.K. Takeover Panel has adopted a "de minimis" exception permitting bidders not to mail offer materials to target holders in jurisdictions where few target securities are held. Under that rule, bidders for U.K. target companies may choose not to mail offer materials to target security holders outside the U.K. and outside the European Economic Area (the "EEA") when a particular jurisdiction presents significant risks of civil, regulatory or criminal liability to the bidder and less than three percent of the securities of the target are held of record in that jurisdiction.[315] We note that even when the U.K. Code does not require the

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[314] See footnote 312 above.

[315] The City Code on Takeovers and Mergers, Rule 30.3. The note to Rule 30.3 provides an exception to the UK's dissemination requirement with respect to shareholders outside of the EEA. The note states:

> Where local laws or regulations of a particular non-EEA jurisdiction may result in a significant risk of civil, regulatory or, particularly, criminal exposure for the offeror or the offeree company if the information or documentation is sent or made available to shareholders in that jurisdiction without any amendment, an unless they can avoid such exposure by making minor amendments to the information being provided or documents being sent or made available either:
>
> (a) the offeror or the offeree company need not provide such information or send or make such information or documents available to registered shareholders of the offeree company who are located in that jurisdiction if less than 3% of the shares of the offeree company are held by

dissemination of offer materials into a particular foreign jurisdiction pursuant to this provision, it does not sanction a prohibition on tenders from security holders located there.

We further note that certain bidders have required target holders to certify that tendering their securities complies with local laws or that an exemption applies that allows such tenders without further action by the bidder to register or qualify its offer. We do not believe it is appropriate to shift this burden of assuring compliance with the relevant jurisdiction's laws to target security holders because target security holders may not be in possession of relevant facts regarding the bidder's action and the provisions of local law in their home jurisdiction necessary to make this determination.

Request for comment

- Is it necessary or appropriate for bidders in tender offers for U.S. target companies to exclude foreign target security holders in certain non-U.S. jurisdictions? Why? Is the answer different for cash tender offers versus exchange offers?
- Should bidders be allowed to condition tendering into an offer on the subject security holder certifying to compliance with the securities law requirements of its jurisdiction?

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registered shareholders located there at the date on which the information is to be provided or the information or documents are to be sent or made available ...; or

(b) in all other cases, the Panel may grant a dispensation where it would be proportionate in the circumstances to do so having regard, notably, to the cost involved, any resulting delay to the transaction timetable, the number of registered shareholders in the relevant jurisdiction, the number of shares involved and any other factors invoked by the offeror or the offeree company.

- Would permitting exclusion of some foreign target holders result in decreased protections for U.S. holders in cross-border tender offers?
- Should Rule 14d-10 and Rule 13e-4 be amended to include a provision expressly stating that those rules will not prohibit a bidder from excluding shareholders in a particular foreign jurisdiction, where the bidder is prohibited from making the tender offer by foreign law after a good faith effort by the bidder to comply with the law?
    - What should be considered a "good faith effort" for purposes of such a rule change?
    - Should the number or percentage of security holders in a particular jurisdiction or the cost or additional timing requirements of complying with a particular jurisdiction's rules impact the good faith determination?
- Should our rules be revised to permit exclusion of foreign target security holders in any jurisdiction where a minimal number of target holders are located? If so, what would be an appropriate de minimis threshold? Three percent? Five percent?
    - If the rules should be amended as described, should such a provision be expanded to specifically include situations where a bidder is unable to determine the beneficial ownership of the securities in a foreign jurisdiction?

- If we were to adopt a de minimis exclusion, should we permit exclusion only where the bidder also establishes a significant risk of civil or criminal liability by extending the offer into that jurisdiction?

- Should we require dissemination of offering materials to all holders of a target's securities, whether or not they are located in the United States? If we adopted such a requirement, should there be exceptions? If so, what should they be?

2. Ability of bidders to exclude U.S. target security holders

As discussed above, one of the primary motivations of the Commission in adopting the cross-border exemptions was to facilitate the inclusion of U.S. security holders in cross-border business combination transactions. We believe those exemptions have been successful generally in encouraging offerors in cross-border business combination transactions to include U.S. security holders in those transactions. At the request of commenters, the Cross-Border Adopting Release also provided guidance on whether and under what circumstances offer materials for offshore tender and exchange offers may be posted on the Internet without triggering U.S. tender offer and registration rules.[316] This followed earlier Commission guidance on the use of Internet Web sites to solicit securities transactions and to offer securities.[317] The issue of using Internet Web sites in offshore tender and exchange offers is part of a broader question as to whether and how bidders in cross-border business combination transactions legitimately may

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[316] See Cross-Border Adopting Release, Section II.G.

[317] See Statement of the Commission regarding use of Internet Web sites to offer securities, solicit securities transactions or advertise investment securities offshore, Release No. 33-7516 (March 23, 1998) [63 FR 14806] ("1998 Internet Release").

avoid the application of U.S. registration and tender offer rules. Based on our experience with these matters since 1999, we believe it may be helpful to provide additional guidance on issues specific to cross-border tender offers.

Whether U.S tender offer rules apply in the context of a cross-border tender offer depends on whether the bidder triggers U.S. jurisdictional means in making a tender offer.[318] Today foreign jurisdictions commonly require information about a tender offer or business combination transaction to be posted on a publicly-available and unrestricted Web site.[319] In addition, it is common for both bidders and target companies in business combination transactions to post information about the transactions on their own Internet Web sites, whether or not they are required by the law of the foreign home jurisdiction to do so.

As discussed above, the Commission has provided guidance on measures acquirors may take to avoid triggering U.S. jurisdictional means.[320] We have recognized

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318 Section 14(d)(1) of the Exchange Act reads in relevant part: "It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title ... if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such information as the Commission may by rules or regulations prescribe...."

319 See, e.g., ProSiebenSat.1 Media AG (September 12, 2005)(describing the procedure in Germany of posting the offer documents on an Internet web site). Such foreign provisions may include a requirement to post the offer documents themselves, or notice of the offer with instructions on how to obtain the offer materials.

320 See generally, the 1998 Internet Release and the Cross-Border Adopting Release.

that bidders who are not U.S. persons[321] may structure a tender offer to avoid the use of the means or instrumentalities of interstate commerce or any facility of a national securities exchange in making its offer and, thus avoid triggering application of our rules.[322] A bidder making a tender offer for target securities of a foreign private issuer may exclude U.S. target security holders if the offer is conducted outside the United States and U.S. jurisdictional means are not implicated.[323] However, a bidder may implicate U.S. jurisdictional means if it fails to take adequate measures to prevent tenders by U.S. target holders while purporting to exclude them. While we encourage bidders to allow U.S. target security holders to participate in cross-border tender offers, when a bidder permits them to participate in a tender offer, it must follow U.S. rules unless an exemption applies. The relevant question thus becomes how bidders may conduct exclusionary offers that are limited to non-U.S. holders[324] without implicating U.S. tender

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[321] In our view, it generally is inappropriate for a U.S. bidder to exclude U.S. target security holders when making a tender offer for a foreign private issuer target company. We continue to believe that, in light of the cross-border exemptions adopted in 1999, a U.S. bidder generally would not have reason to exclude U.S. target security holders in making an offer for the securities of a foreign private issuer. See Cross-Border Adopting Release, Section II.G.4. The rule revisions proposed today, if adopted, would reinforce this view.

[322] See All-Holders and Best Price Adopting Release, Section III.A.3. (finding that amendments to the all-holders and best price provisions specifically exempting offshore exclusionary offers from those provisions were unnecessary, given the application of the jurisdictional means test).

[323] See footnote 319 above.

[324] We use the term "exclusionary offer" to mean tender offers that exclude U.S. target holders of the subject class of securities for which the offer is made.

offer rules, particularly where those offers are subject to the equal treatment principles in Section 13(e) or 14(d) of the Exchange Act.[325]

The Commission has recognized, and we reaffirm today, that business combination transactions present special considerations not common to capital-raising issuances.[326] Because of their pre-existing investment in a target company, target security holders, including U.S. holders, are likely to seek out any information about the target company, the acquiror, and the proposed transaction.[327] U.S. security holders also may have a greater incentive and opportunity to find a means to participate in transactions involving the target securities they own. Even where they are not able to do so, U.S. holders' interest in those securities may be affected significantly by a business combination transaction involving the target company.[328]

For these reasons, bidders seeking to avoid the application of U.S. law should take special precautions to assure that their offer is not made in the United States. We have provided guidance on how they may do so in the context of cross-border tender offers.[329]

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325 For tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act, such as third-party offers for a target class of securities that is not registered under Section 12 of the Exchange Act, no all-holders requirement exists. Therefore, U.S. target security holders technically may be excluded from those offers even where the U.S. jurisdictional means are triggered; however, these offers would need to comply with the procedural and anti-fraud requirements of applicable U.S. rules.

326 See Cross-Border Adopting Release, Section II.G.2.

327 This is particularly true today, where advances in technology permit investors to establish online alert systems to inform them of any news relating to a target company.

328 This is particularly the case in cross-border tender offers, where bidders' ability to "squeeze out" target security holders remaining after a tender offer may be more limited than in the United States. For example, in some countries, bidders must achieve ownership levels significantly in excess of 51 percent of target securities to be able to compulsorily acquire the remaining target securities. Where target securities are delisted after the tender offer, U.S. holders excluded from the offer may be left with an illiquid security.

329 See Cross-Border Adopting Release, Section II.G.2.

Perhaps the most basic measure is to include legends on the offer materials themselves and on any Internet Web site on which they are posted, indicating that the offer is not being made in the United States.[330] In addition, the bidder should take special precautions to assure that tenders are not accepted from nor sales of bidder securities made (in the case of exchange offers) to target security holders resident in the United States.[331] These may include, in responding to inquiries and processing letters of transmittal, obtaining adequate information to determine whether the target security holder is a U.S. investor.[332] In addition, the bidder could require representations by the tendering security holder, or anyone tendering on that person's behalf, that the tendering holder is not a U.S. holder or someone tendering on behalf of a U.S. holder.[333]

Several issues have come to light with respect to these measures to keep a tender offer outside of the United States. First, we reiterate that a legend or disclaimer stating that the offer is not being made into the United States, or that the offer materials may not be distributed there, is not likely to be sufficient in itself because, as discussed in the preceding paragraph, if the bidder wants to support a claim that the offer has no jurisdictional connection to the United States, it also will need to take special precautions to prevent sales to or tenders from U.S. target holders.[334] In some cases, bidders

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330 See 1998 Internet Release, Section III.B.

331 See Cross-Border Adopting Release, Section II.G.2. We note that business combinations other than tender offers, where the target company is being merged out of existence, are different because once such transactions are approved, all target holders' securities will be acquired. In business combinations other than tender offers, we have stated that we do not believe the acquiror should avoid the payment of consideration to U.S. target holders. Id.

332 Id.

333 Id.

334 See Cross-Border Adopting Release, Section II.G.2.

purporting to make exclusionary tender offers offshore have attempted to circumvent foreign all-holders requirements by including statements that the tender offer is not "being made into the United States." We do not view such statements as sufficient in themselves to avoid being subject to the U.S. federal securities laws if, as a practical matter, U.S. holders are not and may not be prevented from participating in the offer using U.S. jurisdictional means.

Bidders may require a representation or certification from tendering holders that they are not U.S. holders to avoid triggering U.S. law.[335] We recognize the possibility that target security holders could misrepresent their status in order to be permitted to tender into an exclusionary offer. We have stated that where this occurs, bidders will not be viewed as having targeted U.S. investors, thereby invoking U.S. jurisdictional means.[336] However, this position is premised on the bidder having taken adequate measures reasonably designed to guard against purchases from and sales to U.S. holders.[337] It is also premised on the absence of indicia that would or should put the bidder on notice that the tendering holder is a U.S. investor.[338] Where tenders in exclusionary offers are made through offshore nominees, bidders could require that these nominees certify that tenders are not being made on behalf of U.S. holders. We

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335 See Cross-Border Adopting Release, Section II.G.2.

336 See 1998 Internet Release, Section III.C.

337 Id.

338 These would include receipt of payment drawn on a U.S. bank, provision of a U.S. taxpayer identification number or statements by the tendering holder that notwithstanding a foreign address, the tendering holder is a U.S. investor. We have explicitly noted that if, after implementing measures intended to safeguard against tenders by U.S. persons, the bidder discovers it has purchased securities from U.S holders, it should consider other measures that may avoid this lapse in the future. Id.

recognize that this may be problematic where the law of the applicable foreign jurisdiction prevents the nominee from knowing the identity or location of beneficial holders on whose behalf they hold.

While we encourage the participation of U.S. target security holders in cross-border tender offers and other business combination transactions, their participation should be accomplished in compliance with U.S. rules or through applicable cross-border exemptions. In the future, the staff will more closely monitor exclusionary offers to determine whether Commission action is necessary to protect U.S. target holders.

Request for comment

- Should the Commission provide additional guidance on the specific measures an acquiror may or should take to avoid triggering U.S. jurisdictional means in the context of cross-border business combination transactions?
- What measures are reasonable and effective, and in the best interests of U.S. investors?
- Should we also consider further rulemaking to address the situation where a bidder seeks to avoid U.S. jurisdictional means by excluding U.S. target security holders, but is subject to foreign home country rules mandating that all target security holders must be permitted to participate in the offer? How would such rules balance the practical needs of bidders with the requirement to protect the interests of U.S. investors?

3. Vendor placements

In many business combination transactions, the offer consideration may include securities of the bidder. In some transactions, cash may be offered together with the

bidders' securities and, in other transactions, no cash will be offered and the bidder's securities will constitute the sole consideration offered to tendering holders of the target's securities.

For Tier I-eligible tender offers, for purposes of complying with the equal treatment requirement, bidders are permitted to offer cash consideration to U.S. holders in lieu of offering securities so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders. In addition, most Tier I-eligible offers should be eligible for the exemption from Securities Act registration provided by Rule 802. If Rule 802 or another exemption from registration is not available, then the bidder is required to register the securities being offered under the Securities Act.

In certain cross-border exchange offers, bidders may seek to avoid the registration requirements under the Securities Act by establishing a vendor placement arrangement for the benefit of U.S. target security holders who tender into the offer. In a vendor placement, the bidder generally employs a third party to sell in offshore transactions the securities to which tendering U.S. security holders are entitled in the offer. The bidder (or the third party) then remits the proceeds of the resale (minus expenses) to those U.S. target security holders that tendered into the offer.

Where permissible, the vendor placement process allows bidders in cross-border exchange offers to extend the offer into the United States but avoid the Securities Act registration requirements. In effect, the vendor placement is an effort to convert an exchange offer involving the offer and sale of the bidder's securities (which would

require Securities Act registration) into an offer involving solely cash (which does not require registration) as it relates to tendering U.S. security holders.

The staff often receives inquiries about the use of the vendor placement structure in cross-border offers and has in the past issued no-action letters permitting the use of the structure in limited situations.[339] Although tendering holders receive cash in a vendor placement, the amount of cash received is largely dependent on the market value of the underlying security. The protections of the Securities Act are intended to give investors access to information when making an investment decision with respect to the purchase of a security. A vendor placement does not in all circumstances eliminate the requirement for Securities Act registration, because tendering U.S. holders may be effectively making an investment decision with respect to the purchase of a security.

In the no-action letters issued by the staff, there are a number of factors the staff looks to in deciding whether the vendor placement arrangement obviates the need for Securities Act registration. These factors include:

- the level of U.S. ownership in the target company;
- the amount of bidder securities to be issued overall in the business combination as compared to the amount of bidder securities outstanding before the offer;
- the amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the amount of bidder securities outstanding before the offer;

339 See, e.g., Singapore Telecommunications Ltd (May 15, 2001); Oldcastle, Inc. (July 3, 1986); Electrocomponents PLC (September 23, 1982), Equitable Life Mortgage and Realty Investors (December 23, 1982); Getty Oil (Canadian Operations) Ltd. (May 19, 1983) and Hudson Bay Mining and Smelting Co., Ltd. (June 19, 1985).

- the liquidity and general trading market of the bidder's securities;
- the likelihood that the vendor placement can be effected within a very short time after the termination of the offer and the bidder's acceptance of shares tendered in the offer;
- the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales; and
- the process used to effect the vendor placement sales.

We believe these factors are relevant to whether registration is required. In addition to the other factors listed above, offerors should be particularly cognizant of U.S. target ownership levels.

We believe that a vendor placement arrangement in cross-border exchange offers would be subject to Securities Act registration unless the market for the bidder securities to be issued in the exchange offer and sold pursuant to the vendor placement procedure is highly liquid and robust and the number of bidder securities to be issued in the exchange offer and for the benefit of tendering U.S. holders is relatively small compared to the total number of bidder securities outstanding. We also would consider:

- the timeliness of the vendor placement process; that is, whether sales of bidder securities through the vendor placement process are effected within a few business days of the closing of the offer;
- whether the bidder announces material information, such as earnings results, forecasts or other financial or operating information, before that process is complete; and

- whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

In tender offers subject to Section 14(d) of the Exchange Act, the all-holders and best price requirements in Rule 14d-10 also are implicated by the use of the vendor placement structure because U.S. target security holders would receive different consideration from their non-U.S. counterparts. We generally believe that the parameters of the Tier I cross-border exemptions should represent the appropriate limits under which a bidder in a tender offer subject to Regulation 14D may offer cash to U.S. security holders while issuing shares to their counterparts outside the United States.

Bidders making a cross-border exchange offer sometimes ask whether they may exclude some U.S. target holders and include in the exchange offer only those U.S. target holders (such as accredited investors) for whom an exemption from the registration requirements of the Securities Act may be available. We have stated that exchange offers for securities subject to Section 14(d) of the Exchange Act may not be made in the United States on a private offering basis, consistent with the all-holders provisions of Rule 14d-10.[340] Thus, even where the bidder is eligible to rely on an exemption from Securities Act Section 5 for such offers, it would violate the equal treatment provisions applicable to such offers by excluding target security holders for whom an exemption was not available. Similarly, as discussed above, offering cash under a vendor placement arrangement to some U.S. holders and bidder securities to others (such as institutions) is not permitted in tender offers subject to the all-holders rule.

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[340] See footnote 91 in the Cross-Border Adopting Release.

Bidders may continue to use vendor placement arrangements in accordance with the guidance set forth here. Where a bidder seeks to use the vendor placement structure for a tender offer subject to Rule 14d-10 at U.S. ownership levels above Tier I, it must seek an exemption from those rules. As noted above, such relief will be granted only where it is in the interests of U.S. investors.

III. GENERAL REQUEST FOR COMMENT

We request and encourage any interested person to submit comments on any aspect of our proposals or guidance and any of related matters that might impact the proposed amendments or guidance. We request comment from investors, issuers, and other users of the information that may be affected by the proposed rule changes and interpretive guidance. We also request comment from service professionals, such as law and accounting firms. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiatives if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. PAPERWORK REDUCTION ACT

Some provisions of the proposed rule amendments require the "collection of information" within the meaning of the Paperwork Reduction Act of 1995 (the "PRA").[341] We will submit our proposed revisions to the Office of Management and

[341] 44 U.S.C. 3501 et seq.

Budget ("OMB") for review in accordance with the PRA.[342] The titles for the collections of information are:

(1) "Form S-4" (OMB Control No. 3235-0065);

(2) "Form F-4" (OMB Control No. 3235-0325);

(3) "Form ID" (OMB Control No. 3235-0328);

(4) "Form CB" (OMB Control No. 3235-0518);

(5) "Form F-X" (OMB Control No. 3235-0379);

(6) "Schedule TO" (OMB Control No. 3235-0515); and

(7) "Securities Ownership - Regulation 13D (Commission Rules 13d-1 through 13d-7 and Schedules 13D and 13G)" (OMB Control No. 3235-0145).

We adopted these existing forms and schedules pursuant to the Securities Act and Exchange Act. Forms F-4 and S-4 contain disclosure requirements for registration statements that are prepared by issuers to provide investors information to make informed investment decisions in registered offerings of securities. Form CB and Schedule TO provide investors with information to make informed investment decisions regarding certain business combination transactions and rights offerings. Regulation 13D was adopted pursuant to the Exchange Act and sets forth the disclosure requirements for securities ownership reports filed by investors.

The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by these regulations constitute reporting and cost burdens imposed by each collection of information. An agency may

[342] 44 U.S.C. 3507(d); 5 CFR 1320.11.

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.

A. Summary of Proposals

1. Proposed amendments to the Tier I exemption and Form CB

The proposed rule amendments would add to the types of affiliated transactions that could be effected in reliance on the Tier I exemption from Rule 13e-3(g)(6). A Form CB would be required when an issuer or acquiror relies on the expanded Tier I exemption proposed and publishes or otherwise disseminates an informational document to holders of the subject securities. Because more transactions would become eligible to rely on the exemption from Rule 13e-3 for cross-border transactions, this rule change may result in additional submissions of Form CB. If the rule were not expanded, however, the issuer or affiliate would be required to comply with the more burdensome filing requirements of Schedule 13E-3 if the issuer or affiliate sought to include U.S. security holders in the transaction. We believe the proposed rule and reduced filing requirement would encourage issuers or affiliates to include U.S. security holders in transactions that otherwise may have excluded them to avoid Rule 13e-3 and the corresponding Schedule 13E-3 filing requirements. Domestic or foreign entities or persons engaged in cross-border business combination transactions would likely be the respondents to the collection of information requirements.

Unlike Schedule 13E-3, Form CB is a notice filing that is little more than a cover sheet that incorporates offer documents sent to security holders pursuant to applicable foreign rules in the issuer's or target's home country. The party furnishing the form must attach an English translation of the offer materials disseminated abroad. Form CB must

be submitted by the next U.S. business day after that document is disseminated under home country rules.

We propose to require all Form CBs to be filed electronically. Under existing rules, only persons who are already subject to reporting obligations under Section 13(a) or 15(d) of the Exchange Act are required to submit Form CB electronically and all others may submit the form in paper. We also propose to require that Form F-Xs filed in connection with Form CBs to be filed electronically. We do not expect these amendments to affect the overall collection of information burden of these forms.

Form ID is filed by registrants, individuals, transfer agents, third-party filers or their agents to request the assignment of access codes that permit the filing of securities documents on EDGAR. This form enables the Commission to assign an identification number (CIK), confirmation code, password and password modification authorization code to each EDGAR filer, each of which is designed to protect the security of the EDGAR system. While we do not expect that the proposed amendments will affect the overall collection of information burden of Forms CB and F-X, we do expect that it will cause additional respondents to file a Form ID each year and, as a result, will increase the annual collection of information burden for that form. We estimate that 65,700 respondents file Form ID each year at an estimated burden of .15 hours per response, all of which is borne internally by the respondent for a total annual burden of 9,855 hours. For fiscal year 2007, a total of 189 Form CBs were filed with the Commission. Of those 189 Form CBs, 100 were filed in paper. We expect the proposed amendments will cause an additional 100 respondents to file a Form ID each year and, as a result, cause an

additional annual burden of 15 hours (100 x .15). For purposes of the PRA, we estimate that the additional burden cost resulting from the proposed amendments will be zero.

2. Proposed amendments to Forms S-4, F-4, and Schedule TO

We propose amendments to the cover page of Forms S-4 and F-4 and Schedule TO that would require the filer to check a box specifying the applicable cross-border exemption being relied upon in connection with the transaction. Domestic and foreign persons or entities filing these documents would be the respondents to the collection of information requirement. This change would not affect the substantive obligation to file the forms or schedule. This additional information would allow the staff to better process such filings and monitor the application of the cross-border exemptions. For our proposal regarding Schedule TO and Forms S-4 and F-4, the amount of information required to be included in each schedule or form would change minimally with the addition of a check box. Accordingly, for purposes of the PRA, our preliminary estimate is that the amount of time necessary to prepare each schedule or form, and hence, the total amount of burden hours, would not change.

3. Proposed Amendments to Schedule 13G

Exchange Act Schedule 13G is a short-form filing for persons to report ownership of more than five percent of a class of equity securities registered under Section 12 of the Exchange Act. Generally, the filer must certify that the securities have not been acquired and are not held for the purpose of, or with the effect of, changing or influencing the control of the issuer of the securities. For purposes of the PRA, we currently estimate that compliance with the Schedule 13G requirements under Regulation 13D requires 98,800 burden hours in aggregate each year, broken down into 24,700 hours (or 2.6 hours

per respondent) of respondent personnel time and costs of $22,230,000 (or $2,340 per respondent) for the services of outside professionals.[343]

The proposed amendment to Rule 13d-1 would expand the availability of Schedule 13G to foreign institutions governed by a regulatory system substantially comparable to the U.S. regulatory system for domestic institutions. We propose to allow specified foreign institutions to report beneficial ownership of more than five percent of a subject class of securities on Schedule 13G instead of Schedule 13D. Foreign institutions of the type specified in amended Rule 13d-1(b) would be the likely respondents to the collection of information requirements. These institutions either currently would be filing on Schedule 13D as required by existing rules, or would be required to seek no-action letters from the staff to permit them to file on Schedule 13G to the same extent as their domestic counterparts, so long as they satisfy certain conditions. Amending the rule would enable foreign institutions meeting the conditions in the rule to file the Schedule 13G without seeking a no-action letter. Therefore, the amended rule may result in only a slight increase in the number of Schedule 13G filers.[344]

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343 These figures assume 9,500 respondents file Schedule 13G with the Commission annually. We estimate that 25 percent of the burden of preparation is carried by the company internally and that 75 percent of the burden of preparation is carried by outside professionals retained by the issuer. These figures assume an average cost of $300 per hour for the services of outside professionals. We have increased the cost estimate to $400 since our last estimate provided to OMB, based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission. Therefore, the revised cost for the service of outside professionals would be $29,640,000 ($400 x 74,100 hours) or $3,120 per respondent.

344 Based on the number of no-action requests in this area in recent years, we believe that approximately three filers per year would benefit from this proposed change and would avoid the time and expense of submitting a no-action request to the staff. In addition, foreign institutions currently filing on Schedule 13D who have not sought no-action relief to file on Schedule 13G would also benefit by becoming eligible to use the shorter Schedule 13G. See discussion above.

For purposes of the PRA, we estimate that the proposed amendments to Schedule 13G would create an incremental burden of two hours per response, which we would add to the existing Schedule 13G burden resulting in a total burden of 117,800 hours.[345] We note that the burden associated with the proposed amendments to Schedule 13G initially would be higher with an estimated burden of five hours. Over time, however, we believe that on average the burden would lessen and therefore estimate an incremental burden of two hours per response. Each additional filer would incur a burden of approximately .50 hours of respondent personnel time (25 percent of the total burden) and costs of $450 for the services of outside professionals (75 percent of the total burden). In sum, we estimate that the amendments to Schedule 13G would increase the annual paperwork burden by approximately 1.50 hours of respondent personnel time[346] and a cost of approximately $1,350 for the services of outside professionals.[347]

We estimate that Schedule 13D has a total burden of approximately 14.5 hours per response to prepare and is filed by 3,000 respondents annually. For purposes of the PRA, we currently estimate that compliance with the Schedule 13D requirements under Regulation 13D requires 43,500 burden hours in aggregate each year, broken down into

345 We currently estimate the burden for preparing a Schedule 13G filing to be 10.4 hours, resulting in a total of 98,800 burden hours in aggregate each year. If each additional filer incurred an additional two hours, the resulting burden would be 117,800 total burden hours ((10.4 hours + two hours) x 9500 respondents).

346 Three additional filers x .50 hours of respondent personnel time = 1.50 aggregate burden hours.

347 Three additional filers x $450 = $1,350.

10,875 hours (or 3.6 hours per respondent) of respondent personnel time and costs of $9,787,500 (or $3,263 per respondent) for the services of outside professionals.[348]

Based upon these estimates, a foreign institution currently filing a Schedule 13D that would be eligible to file a Schedule 13G pursuant to the proposed rule would benefit from a cost reduction of $473 per respondent.[349] As noted above, however, for a number of years, the staff has provided no-action relief to foreign institutions seeking to file a Schedule 13G rather than a Schedule 13D. For those institutions that are already filing a Schedule 13G pursuant to no-action relief, the proposed rules should only increase the cost associated with providing the required certification in Schedule 13G and will not significantly impact the cost of complying with the requirements of Regulation 13D.

B. Solicitation of comments

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond,

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[348] As noted above, we have increased the cost estimate to $400 since our last estimate provided to OMB, based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission. Therefore, the revised cost for the service of outside professionals would be $13,050,000 ($400 x 10,875 hours) or $4,350 per respondent.

[349] We calculate this figure in the following manner: $3,263 - ($2,340 + $450) = $473. The total cost burden of Schedule 13G is estimated currently at an aggregate burden of $22,230,000, or $2,340 per respondent ($22,230,000/9,500 respondents = $2,340).

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 20549-1090, with reference to File No. S7-10-08. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-10-08, and be submitted to the Securities and Exchange Commission, Office of the Secretary – Records Management Branch, 100 F Street, NE, Office of Filings and Information Services, Washington, DC 20549. 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 assured of having its full effect if OMB receives it within 30 days of publication.

V. COST-BENEFIT ANALYSIS

We are proposing amendments to our rules that would reduce the overall cost for issuers and acquirors engaged in cross-border business combination transactions. We also provide interpretive guidance regarding the application of certain rules. Under current rules, where there are conflicts between U.S. and foreign law or practice, acquirors in cross-border business combination transactions frequently seek no-action or exemptive letters from the staff. Under the proposed rule amendments, much of the relief sought in the past would be available without the need for no-action or exemptive letters.

As a result, the benefits of the rule amendments would include an increase in regulatory certainty about the U.S. rules governing cross-border business combination transactions and a substantial savings in the cost of preparing letters requesting no-action or exemptive relief. Decreasing the burden on acquirors of complying with U.S. rules governing business combination transactions is designed to encourage them to extend more transactions to U.S. target holders; therefore, we believe the proposed rule revisions would be in the interests of U.S. investors while continuing to provide appropriate protections. In order to more fully characterize these benefits, we seek comments on the average cost of preparing such letters and the amount of time spent working through concerns raised during the staff's review of such letters. We also solicit comments on any incremental costs of undertaking cross-border transactions that might arise from the proposed rule amendments. We request any relevant data from commenters that would help us quantify these costs and related benefits.

In analyzing the costs and benefits of the proposed rules, we compare estimated future cross-border transaction activity that would likely occur under the proposed rules with what would occur in a benchmark case without the rules. Because the proposed rules would assure parties of their ability to engage in practices that are permitted now only through the request and issuance of a no-action or exemptive letter, the benchmark case is the level of transaction activity that would occur if parties did not have access to such regulatory relief.

A. Proposed changes to the eligibility test for determining eligibility to rely on the cross-border exemptions

1. Proposed changes

The changes we propose to the test for determining eligibility to rely on the cross-border exemptions for business combination transactions are limited in nature and scope and do not represent a significant departure from our current rules. They are intended to address specific problems acquirors have faced in determining whether they can rely on the cross-border exemptions. These changes are not intended to expand or reduce the number of parties eligible to use the cross-border exemptions. The changes will not materially affect the cost of undertaking such transactions relative to what would occur if parties could not reliably obtain no-action or exemptive letters, as currently is the case.

We propose to allow acquirors to calculate the required U.S. beneficial ownership figure within a range of dates that is no more than 60 days before a specified reference date. Currently, our rules require the calculation to be done as of a set date. We also propose to change the reference date for purposes of the required calculation for business combination transactions. Under current rules, the calculation was required to be done as of the 30th day before commencement of a cross-border business combination transaction. As proposed, we would require the calculation to be done no more than 60 days before the public announcement of the cross-border business combination transaction. We also propose limited changes to the manner in which U.S. ownership may be calculated for cross-border tender offers accomplished on a non-negotiated or hostile basis. These changes are intended to clarify certain elements of the "hostile presumption" test for these kinds of offers that have created uncertainty for acquirors in the past. As discussed above, the reference date for the negotiated transaction and hostile

presumption tests for business combination transactions also would be changed to key off of the public announcement of the transaction. Finally, in this release and the proposed rules, we provide some guidance on the "reason to know" element of the hostile presumption test, which we hope would make the application of the test simpler and more certain for acquirors.

2. Benefits

We anticipate that the enhanced flexibility to choose a date within a range may make it easier for acquirors to accomplish the required calculation as specified under our rules, thereby promoting use of the exemptions and the inclusion of U.S. holders while reducing the acquirors' burden of seeking no-action or exemptive letters in this area. Changing the reference point for the calculation of U.S. ownership to the public announcement of the transaction would mean that the calculation would be done as of a date when the target's security holder base may be unaffected (or less affected, if there are some changes in response to rumors in the market) by the announcement of the transaction, which would provide a more accurate picture of the security holder base. This change also would allow acquirors more flexibility in planning cross-border business combination transactions and therefore, we expect bidders would be encouraged to engage in these transactions. It is unclear whether using public announcement as the reference point for the calculation would have the effect of increasing or reducing U.S. ownership in the target company.

3. Costs

Under the proposed amendments, U.S. investors may lose certain protections under the U.S. rules governing cross-border business combination transactions if the

foreign private issuer in which they own securities becomes the subject of such a transaction and the acquiror relies on the cross-border exemptions. To the extent that the applicable cross-border exemptions would exempt the acquiror from compliance with U.S. registration, filing and disclosure requirements, U.S. investors would lose these protections. In such circumstances, however, we believe that the benefit to U.S. investors of being included in the transaction rather than being excluded justifies the cost of reduced protections under U.S. law. Otherwise, we do not believe that U.S. investors would be harmed by the proposed flexibility in calculation of U.S. ownership.

B. Changes to the Tier I cross-border exemptions

1. Expansion of the Tier I exemption from Rule 13e-3

We propose to expand the set of cross-border business combination transactions that are exempt from the requirements of Rule 13e-3. Currently, the cross-border exemption from Rule 13e-3 applies only to tender or exchange offers or business combinations conducted under Tier I.[350] We propose to expand the exemption to encompass any kind of affiliated transaction that otherwise meets the conditions of the Tier I exemption, including schemes of arrangement, cash mergers, compulsory acquisitions for cash, and other types of transactions.

a. Benefits

The expansion of the Tier I exemption from Rule 13e-3 would likely result in fewer filings of Schedule 13E-3, thus reducing the costs for issuers and affiliates in cross-border transactions that would otherwise be subject to those rules. Under the current

[350] As noted previously, the Tier I exemption is available when U.S. holders beneficially own no more than ten percent of the foreign private issuer target's securities.

rules, the burden of complying with Rule 13e-3 and Schedule 13E-3 may be greater for foreign filers than domestic filers. Foreign filers may not have a counterpart to these rule provisions in their home jurisdiction and may not be subject to the same fiduciary duty standards that form the basis for this heightened disclosure system for affiliated transactions.

Currently, some entities engaged in affiliated cross-border business combination transactions that would have been subject to Rule 13e-3 under our current rules and cross-border exemptions request individual exemptive relief from the staff. The staff has routinely granted these requests. To the extent that these kinds of requests would no longer be necessary, the rule change we propose today would further reduce the costs for these entities. Issuers and affiliates may have excluded U.S. holders from transactions where they would have been required to file a Schedule 13E-3. We have been told that entities may have avoided making an offer to U.S. holders to avoid application of these rules, although it is difficult to isolate the effect of this provision on the number of entities that chose not to include U.S. holders. During 2007, approximately 110 Schedules 13E-3 were filed, 10 of which were filed by foreign private issuers. During that same period, no requests for no-action relief on this issue were granted. Therefore, we assume the overall effect would not be significant, although we are not able to estimate the number of transactions that may have been structured to avoid U.S. jurisdictional means, thereby avoiding the requirement to file a Schedule 13E-3. We solicit comment regarding the number of entities or persons that the rule amendment would affect and the increases or decreases in cost that are likely to result. We believe the rule amendment would result in a cost reduction because it would lower the costs and

burdens associated with extending these kinds of transactions into the United States. This amendment would be in the interests of U.S. investors to the extent that the expanded exemption from Rule 13e-3 motivates an acquiror to include U.S. investors in the transaction. Since the exemption applies only where U.S. security holders make up no more than ten percent of the subject security holder base, and because the heightened disclosure requirements of Schedule 13E-3 may be onerous for foreign filers, we believe this exemption may result in more cross-border transactions being extended to U.S. investors.

b. Costs

U.S investors of foreign private issuer targets in cross-border business combination transactions that would have been subject to Rule 13e-3 but for our proposed rule amendment would lose the benefits of the disclosure in Schedule 13E-3, to the extent that such disclosure is not required under applicable foreign law.

We seek data regarding the number of Schedules 13E-3 filed with respect to the securities of foreign private issuers, the number of entities or persons that the rule amendment would affect, and the increases or decreases in cost that are likely to result, so we may be able to estimate the costs and benefits associated with any possible reduction of Schedule 13E-3 filings.

2. Technical change to Rule 802 of Regulation C

We also propose technical changes to the language of Rule 802. These changes are not intended to substantively change the filing obligations under the current rule, and we do not believe they would have any impact on the way that rule currently functions,

except to clarify how it may be used. Therefore, the proposed changes would likely confer no significant costs or benefits.

C. Proposed changes to the Tier II cross-border exemptions

The rule changes we propose represent an expansion of the current cross-border exemptions available to tender offers that meet the conditions outlined in our rules. The Tier II exemptions – which exempt certain tender offers for foreign target companies in which U.S. persons beneficially own more than ten percent but not more than 40 percent of the target's subject securities – currently apply to tender offers conducted by third parties, issuers or affiliates, where those tender offers are subject to Rule 13e-4 or Regulation 14D. The rule changes we propose would expand the relief provided in the Tier II exemptions, and clarify that the Tier II exemptions also may be used for cross-border tender offers subject only to Regulation 14E of the Exchange Act. We also propose to expand Tier II relief for dual offers by allowing offerors to make more than one concurrent non-U.S. offer, and to allow certain U.S. offers to include non-U.S. persons and certain foreign offers to include U.S. persons. Additionally, we propose changes to Rule 14e-5 to codify recent exemptive relief for Tier II-eligible tender offers.

1. Benefits

These changes to the Tier II cross-border exemptions would expand the relief provided for eligible cross-border tender offers.[351] The rule changes would reduce the need for bidders to seek individual no-action or exemptive relief from the staff. Since they represent areas in which relief is most frequently requested and granted for these

[351] See the discussion above regarding the changes to the threshold eligibility determination relating to the calculation of U.S. ownership.

kinds of transactions, the changes would reduce the associated costs and burdens of applying for relief. Where we already have reduced the associated costs and burdens of requesting and granting relief through Rule 14e-5 class exemptive letters, the codification of that relief in rule text benefits market participants by modernizing the rule and enhancing its utility by providing one readily-accessible location for exempted activities. Because the proposed rule changes will make it easier to make purchases outside of a U.S. tender offer in a manner consistent with relief frequently granted by the staff in this area, we believe the proposed changes also would have the effect of encouraging acquirors and bidders to extend cross-border tender offers to U.S target holders on the same terms as all other target security holders.

To the extent that some of these proposed rule changes were not contemplated in the 1999 Cross-Border Adopting Release and came about only as a result of the staff's issuance of no-action and exemptive letters, we analyze the benefits and costs of the proposed revisions against the rules adopted in 1999 rather than against the perceived state of the rules as created by the issuance of no-action relief. When the Tier II exemption was adopted in 1999, by its terms it only applied to tender offers subject to Rule 13e-4 or Regulation 14D. However, we believe the benefits of the Tier II exemption would apply equally to cross-border tender offers governed by Regulation 14E only. By expanding the Tier II exemption to cover such offers, the changes we propose would allow more acquirors to take advantage of the exemption and thus allow more U.S. investors to benefit from being included in the offer. Expanding the category of offers for which Tier II relief is granted also would allow more flexibility in structuring offers and encourage more acquirors to take advantage of the exemption. Similarly, the

proposed changes to the Tier II relief for dual offers and the proposed changes to Rule 14e-5 are intended to address certain foreign regulatory conflicts that were not fully appreciated when the Tier II exemption was adopted in 1999. By revising our rules to address these conflicts, we hope to enhance the applicability of the Tier II exemption and the exemptions to Rule 14e-5 and therefore encourage more acquirors to take advantage of the exemptions and include U.S. holders in cross-border transactions.

2. Costs

As with transactions governed by Regulation 14D and Rule 13e-4, the cost of reducing the protections of the Williams Act may include reduced procedural and informational safeguards for U.S. investors; however, the exemptions have been designed to reduce such a possibility. We are not aware of any other cost that would be incurred by expanding Tier II relief to tender offers governed by Regulation 14E only. In addition, because these amendments would not change the filing obligations of acquirors, investors would not lose the benefits of any required disclosure. Neither the existing or proposed changes to Tier II affect the registration requirements of Section 5 of the Securities Act, which are not covered by these exemptions.

The codification of Rule 14e-5 class exemptive letters into rule text should not increase costs to market participants, as the substance of the relief is not being altered. It is only a mechanism for the relief that is being changed from class exemptive letters to propose rule exemptions. While permitting purchases outside of a tender offer might negatively impact U.S. investors by weakening the equal treatment and proration protections of our rules, we believe that the conditions imposed on the ability to purchase outside of a Tier II tender offer under the proposed rules should help to safeguard the

interests of U.S. security holders. We solicit comment on any increases or reductions in costs to security holders that may result from the proposals.

D. Expanded availability of early commencement

1. Proposed change to Rule 162

The rules we propose today would expand the ability to commence an exchange offer before the registration statement filed with respect to the securities offered is declared effective by the Commission. Our current rules permit "early commencement" only where an exchange offer is subject to Rule 13e-4 or Regulation 14D. For tender offers conducted under Tier II, we propose to extend the option to all exchange offers, so long as withdrawal rights are provided to the same extent as would be required under Rule 13e-4 or Regulation 14D.

2. Benefits

The proposed rule change would further harmonize the treatment of exchange offers and cash tender offers. It would not impact the filing and disclosure obligations of the acquiror under the Securities Act, or the requirement to comply with the tender offer rules in Regulation 14E. Because foreign law may provide that a tender offer for one class of securities will trigger an obligation to make a contemporaneous offer for a related class, this rule change could enhance the ability of such exchange offers to commence early, and therefore could enhance the speed with which such offers may be effected. The proposed rule change also could allow combined offers to compete with cash bids.

The rule would provide the benefit to investors of receiving withdrawal rights when they otherwise would not have been required under U.S. rules. It also could cause offerors to extend an exchange offer to U.S. target security holders, where concerns about

delays arising from the U.S. registration process might otherwise have caused them to exclude U.S. investors.

3. Costs

As discussed above, allowing an early commencement option for an exchange offer may result in informational costs for target security holders. Broadening the availability of early commencement may mean that investors may be more likely to receive updates to the original prospectus, to the extent that staff review results in material changes to that document. In addition, this may present increased costs for offerors who must recirculate in circumstances where they have elected to commence their offer early, before the staff comment process (where applicable) is complete.

E. Proposed changes to forms and schedules

In this release, we propose changes to the manner in which several forms and schedules are filed. We propose that all Form CBs, and Form F-Xs filed in connection with a Form CB, be required to be filed electronically. Currently, Form CB must be filed electronically only where the person furnishing it already is subject to Exchange Act Sections 13(a) or 15(d) reporting requirements. A Form F-X filed in connection with a Form CB must be filed electronically under the same circumstances.

In addition, we propose to add a box to the cover page of Schedule TO and Forms S-4 and F-4 where the filing person would specify the applicable cross-border exemption or exemptions being relied upon to conduct the applicable transaction. The cover page of Form CB already requires disclosure of this information. However, that form needs to be filed only for some cross-border transactions, and only for those conducted under Tier I or Rules 801 or 802. Under the rules proposed today, filers

relying on the Tier II cross-border exemptions and filing a Schedule TO also would be required to indicate which, if any, cross-border exemption they are relying on in conducting their tender offer.

Similarly, filers of Form S-4 or F-4 that are conducting a cross-border transaction under the Tier II exemptions would be required to specify the cross-border exemption claimed on the cover page of those forms. In some cases, they also would be filing a Schedule TO, where the exchange offer is subject to Rule 13e-4 or Regulation 14D. However, Form S-4 or F-4 may be filed before Schedule TO, where an exchange offer commences early, and it would be helpful to have this information at the earliest possible time in the offering process (see discussion of benefits below). In other cases, where the subject class of securities is not subject to Rule 13e-4 or Regulation 14D, but the filer is relying on the Tier II exemptions under the expanded availability we propose today, requiring this information on the cover page of the Form S-4 or F-4 would be the only source of this information. The changes we propose to Schedule TO and Forms S-4 and F-4 would have no impact on the obligation of an offeror to file those forms.

1. Benefits

Requiring all Form CBs and related Form F-Xs to be filed via the Commission's electronic data gathering and retrieval system, or EDGAR, would make those forms more quickly and easily accessible to the public, including U.S. investors. Instead of having to come in person or through an agent to the Commission's public reference room to conduct a search for these paper forms, investors would be able to access them electronically through the Commission's Web site or through any commercial service that links to EDGAR. Requiring Form CB to be filed electronically also would enable

the press and other market participants to access these forms more easily and quickly, thereby benefiting the market participants and investors by possibly making information about the transaction more readily available.

Filers should further benefit from increased efficiencies in the filing process. Electronic filing avoids the delays and uncertainties sometimes associated with manual delivery of paper filings. Not having to submit multiple copies of paper documents to the Commission may reduce burdens on filers, especially if they are located outside of the United States. In addition, the longer filing hours for the direct electronic submission of documents (until 10 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is in effect) would allow filers additional flexibility in meeting their obligation to submit Form CB and Form F-X (where required) on the next business day after the attached disclosure document is disseminated pursuant to home country law.[352]

As to the information sought in Form S-4 or F-4 or Schedule TO, we believe this information would serve an important function for purposes of the staff review process and also would benefit filers. Currently, the staff may not be aware when reviewing a registration statement or tender offer statement that the filer is relying upon an applicable cross-border exemption to modify the terms of its offer. Consequently, the staff may not know whether non-compliance with all the rules that would govern a particular transaction is a matter that the staff should pursue through the comment process.

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[352] Although filings are accepted until 10 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, Regulation S-T Item 13(a)(2) states that except as otherwise provided in the rule, "all filings submitted by direct transmission commencing on or before 5:30 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, shall be deemed filed on the same business day, and all filings submitted by direct transmission commencing after 5:30 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, shall be deemed filed as of the next business day." Therefore, offerors or issuers would be able to submit documents after Commission business hours on the day of dissemination and have the filing date be the next business day.

Providing this information when the Form S-4 or F-4 or Schedule TO is initially filed would eliminate the need for the staff to issue, and the bidder to respond to, unnecessary comments based on a lack of knowledge about reliance on a cross-border exemption.

2. Costs

There are costs associated with requiring all Forms CBs and related Form F-Xs to be filed electronically. During the fiscal year ended October 1, 2007, 45 initial Form CBs and 57 amendments were filed in paper. Initial costs of electronic filing include those associated with purchasing compatible computer equipment and software, including EDGAR software if obtained from a third-party vendor and not from the Commission's Web site. Initial costs also include training of existing employees to make the required EDGAR filings, or engaging a third-party to make them on the filer's behalf. Additional costs may be associated with the formatting and transmission of a filer's document on EDGAR. However, today financial printers and other information technology specialists capable of electronic document processing for the EDGAR system are widely available in the United States and abroad.

In addition, there would be initial costs associated with filing a Form ID in order to obtain the access codes needed to file a Form CB and Form F-X electronically.[353] To file Form ID, an offeror or issuer must learn the related electronic filing requirements, obtain access to a computer and the Internet, use the computer to access the

[353] Offerors and issuers that already have EDGAR access codes would not need to file a Form ID. We assume, however, that about 53 percent of Form CB filers do not or would not already have codes. Assuming a cost of $175 per hour for in-house professional staff, we estimate the current Form ID aggregate burden cost at $2,625 per year ($175 per hour x 15 hours per year). The additional Form ID burden cost resulting from the proposed amendments and the total Form ID burden cost that will result from adding the estimated additional Form ID burden cost to the estimated current Form ID burden cost will be $1,727,250 (9,855 hours per year + 15 hours per year = 9,870 hours per year); 9,870 hours per year x $175 per hour = $1,727,250.

Commission's EDGAR Filer Management Web site, respond to Form ID's information requirements and fax to the Commission a notarized authenticating document. We expect that offerors or issuers would incur few, if any, additional costs related to obtaining computer and Internet access. We believe the vast majority of offerors and issuers already would have access to a computer and the Internet.

Since a Form CB and the accompanying Form F-X required for foreign filers are not forms associated with periodic reporting on a regular basis and are required only for certain specified kinds of extraordinary transactions, we believe ongoing costs associated with the proposed rule amendments may not be significant. We solicit comments regarding the initial and ongoing costs that would be incurred by filers submitting Form CB and related Form F-X electronically.

We believe the costs associated with our proposed changes to Schedule TO and Forms S-4 and F-4 would be minimal. As discussed above, these changes would not impact the obligation to file the schedule or form, nor would they change the substantive disclosure required. Filers would already know whether, and if so, what cross-border exemption they will rely upon in conducting their transaction. The proposed rule change would require them only to specify that information for the benefit of the staff and others viewing the filings.

F. Changes to the beneficial ownership reporting rules

We propose to amend our rules to allow foreign institutions of the same type as the domestic institutions listed in Rule 13d-1(b)(1)(ii) to file on Schedule 13G instead of Schedule 13D. The proposed rule would permit filing on Schedule 13G for certain specified types of institutions, where they have acquired securities in the ordinary course

of their business and not with the purpose or effect of changing or influencing control of the issuer of the subject securities. In order to use Schedule 13G to the same extent as their U.S. counterparts, these foreign "qualified institutional" filers also would have to meet certain conditions currently set forth in the staff's no-action letters. One such condition is the requirement to certify that the regulatory scheme applicable to that type of institution in its home country is comparable to the regulatory system applicable to its U.S. counterpart. Another such condition is an undertaking to provide to the Commission staff, upon request, the information that would have been required under Schedule 13D.

1. Benefits

Currently, the staff commonly grants requests from foreign institutions comparable to the types of institutions listed in Rule 13d-1(b) to file on Schedule 13G if they meet the conditions outlined in the no-action letters. In the release adopting amendments to the beneficial ownership rules in 1998, the Commission discussed the fact that in the past, foreign institutional investors requested exemptive and no-action letters.[354] The Commission also stated that foreign institutions that wanted to use Schedule 13G as a qualified institutional investor should continue to request no-action relief from the staff. Because the staff's issuance of no-action letters was contemplated at the time of the 1998 amendments to the beneficial ownership rules, we only consider the costs and benefits of the proposed rule relevant to the staff's current practice of issuing no-action letters. From this perspective, the proposed rule change would eliminate the costs and burdens on foreign institutions of seeking such relief individually. For foreign

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[354] See Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (January 12, 1998) [63 FR 2854].

institutions that would otherwise have been eligible to file on Schedule 13G as passive investors under current rules, filing under Rule 13d-1(b) reduces the burden on those filers because the initial filing obligation is less onerous for qualified institutional filers. For example, qualified institutions filing under Rule 13d-1(b) are required to file a Schedule 13G within 45 days after the end of the calendar year in which they own over five percent of the subject class as of the last day of that year. By contrast, passive investors reporting on Schedule 13G pursuant to Rule 13d-1(c) must file their initial report within ten days of the acquisition of more than five percent of the class. Unlike qualified institutional filers, passive investors may not file on Schedule 13G when their ownership equals or exceeds 20 percent of the subject class. No such limit exists for qualified institutional filers.

2. Costs

Schedule 13D requires more extensive disclosure than Schedule 13G. Therefore, to the extent that a filer taking advantage of the proposed rule revisions otherwise would be required to file a Schedule 13D (or a Schedule 13G as a passive investor), there may be some information cost to U.S. investors by permitting the filer to use Schedule 13G. For instance, Schedule 13D requires information about the purpose of the beneficial owner's transaction in the securities, investment intent, and sources of funding. To the extent that such information may be of value to investors in making informed investment decisions, there would be a cost in permitting these institutions to file on Schedule 13G. We seek comment on the usefulness to investors of requiring these foreign institutions to file on Schedule 13D.

Foreign institutions wishing to take advantage of the proposed rule change would incur certain costs to satisfy the conditions for filing on Schedule 13G. In particular, foreign institutions would need to assess whether their home country regulatory scheme is comparable to the regulatory scheme applicable to their U.S. counterparts. This might involve seeking the advice of home country or U.S. legal counsel. However, we believe the incremental costs of complying with the proposed rule would be minimal because foreign institutions are commonly granted no-action relief to file on Schedule 13G under the same circumstances as we propose to permit under the new rule.

Request for Comment

We are sensitive to the costs and benefits imposed by our rules, and have identified certain costs and benefits related to these proposals. We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs and benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments.

VI. CONSIDERATION OF IMPACT ON ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 2(b) of the Securities Act[355] and Section 3(f) of the Exchange Act[356] require us, when engaged 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

[355] 15 U.S.C. 77b(b)

[356] 15 U.S.C. 78c(f).

the Exchange Act, Section 23(a)(2) of the Exchange Act[357] requires us 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 request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their view, if possible.

The proposed changes to the test for determining eligibility to rely on the Tier I and Tier II cross-border exemptions and Rule 802 under Regulation C are intended to facilitate the application of those exemptions. When the exemptions were adopted in 1999, we determined that the cross-border exemptions are important tools to promote the inclusion of U.S. investors in transactions required to be conducted in accordance with a foreign regulatory system. Streamlining and improving the eligibility standards for the cross-border exemptions enhances their utility by promoting their ease of use, thereby encouraging the inclusion of U.S. investors in cross-border transactions.

The purpose of the proposed amendment to Rule 13e-3(g)(6) is to expand the exemption from Rule 13e-3 for cross-border transactions meeting the conditions of Tier I. This proposed amendment should reduce regulatory compliance burdens for issuers and affiliates engaged in affiliated cross-border transactions that would otherwise be subject to Rule 13e-3. The ability to avoid the application of Rule 13e-3 for certain cross-border transactions is expected to benefit U.S. investors, because an issuer or affiliate may

[357] 15 U.S.C. 78w(a)(2).

choose to exclude them if it is the only means to avoid the heightened disclosure burdens of Rule 13e-3.

The purpose of the proposed changes to the Tier II tender offer exemptions in Rules 13e-4(i), 14d-1(d) and 14e-5 is to expand those exemptions to better address areas of recurring regulatory conflict. By codifying relief previously granted by the staff for individual transactions, the changes would reduce compliance burdens on issuers and bidders who would no longer need to seek such relief for each individual transaction. By enhancing the flexibility of U.S. tender offer rules in cross-border transactions, where those rules conflict with common elements of foreign law or practice, the changes would increase the likelihood that bidders would include U.S. investors in these transactions.

We do not anticipate that the proposed changes to Rule 14e-5 will have a significant impact, if any, on the economy because they simply codify the current scope of activities exempted from that rule's prohibitions through existing class exemptive letters. We believe that the proposed changes to Rule 14e-5 should not place any burden on competition as the proposed rule changes apply equally to all market participants covered by the rule. We believe that the Rule 14e-5 class exemptive letters concerning Tier II cross-border transactions have promoted efficiency and capital formation by eliminating the time and cost burdens associated with individual grants of relief. We believe that the codification of those letters similarly should foster efficiency and cross-border capital formation.

The proposed amendment to Rule 162(a) expanding the ability of offerors to commence an exchange offer early where a tender offer is not subject to Regulation 14D or Rule 13e-4 would further equalize the regulatory burden between cash tender offers

and exchange offers. Because foreign rules often contain a mandatory offer requirement, obligating an offeror to make a tender offer for a given class of securities, these rule changes would place mandatory offers for unregistered classes of securities on an equal footing with offers for registered equity securities.

The proposed changes to require that Forms CB and F-X be filed electronically on EDGAR could impose additional compliance costs on filers. Since Form F-X is filed only by foreign companies, the proposed change to that form would not impact U.S. companies. Requiring these forms to be filed electronically by all entities would level the playing field, since the forms are currently required to be filed electronically only by entities subject to a reporting obligation under Exchange Act Section 13(a) or 15(d).

The proposed changes to Schedule TO and Forms S-4 and F-4 would result in negligible additional compliance costs for filing persons. Because the proposed changes would require filers to publicly disclose information that they would already know if they are relying on the cross-border exemptions, we believe there would be little cost in implementing this change. Where the filer of a Schedule TO or Form S-4 or Form F-4 is not relying on the cross-border exemptions, no action would be required. In addition, this requirement applies equally to domestic and foreign filers. The proposed changes with respect to this schedule and these forms would not alter in any way the circumstances under which an offeror would incur a filing obligation under our rules.

The proposed rule changes generally would enhance efficiency in conducting cross-border tender offers and business combination transactions by streamlining the application of U.S. and foreign rules that may apply to those transactions. We expect that they would promote capital formation by facilitating cross-border business combination

transactions conducted under multiple and possibly conflicting regulatory systems. Some of the proposed rule revisions, such as the changes that would broaden the availability of early commencement for exchange offers and the applicability of the Tier II exemptions for tender offers not subject to Rule 13e-4 or Regulation 14D, may be viewed as enhancing competition between competing offers for the same target securities, because they would make these provisions available to different kinds of offers. Furthermore, the proposed rule changes would reduce the regulatory burden on entities engaging in cross-border business combination transactions generally, which may promote competition by encouraging additional entities to engage in these types of transactions. We solicit comment on whether the proposed rule changes would impose a burden on competition or whether they would promote efficiency, competition and capital formation. For example, would the proposals have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act? Would the proposals have an adverse effect on U.S. or foreign issuers? Commenters are requested to provide empirical data and other factual support for their views where possible.

VII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

This Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms.[358]

[358] Based on an analysis of the language and legislative history of the Regulatory Flexibility Act, Congress does not appear to have intended the Act to apply to foreign issuers. Therefore, we are analyzing the impact on small U.S. entities only.

A. Reasons for, and objectives of, proposed action

The proposed rule changes are intended primarily to facilitate the inclusion of U.S. target security holders in cross-border business combination transactions. The rule changes would result in further reductions in the cost and burdens associated with including U.S. target holders in those transactions. U.S. target holders previously excluded from such transactions would benefit by having additional transactions extended to them.

The proposed rule changes are incremental in nature and would not be a significant departure from the current cross-border exemptions. The changes would further harmonize U.S. and foreign law and practice, and to facilitate greater inclusion of U.S. target holders in cross-border transactions. In many instances, the proposed changes would codify existing staff interpretations and exemptive relief. We do not believe any less restrictive alternative to the proposed rule amendments exists that would serve the purpose of the tender offer and registration requirements of the federal securities laws. We did not identify alternatives to the proposed rules that are consistent with their objectives and our statutory authority. The proposed rules would not duplicate or conflict with any existing federal rule provisions.

B. Legal basis

We are proposing the amendments to the forms and rules under the authority set forth in Sections 3(b), 7, 8, 9, 10, 19, and 28 of the Securities Act, and Sections 12, 13, 14, 23, 35A, and 36 of the Exchange Act.

C. Small entities subject to the proposed rules

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[359] 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.[360] A "small business" and "small organization," when used with reference to an issuer other than an investment company, generally 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 that may be considered reporting small entities.[361] The proposed rules may affect each of the approximately 1,100 issuers that may be considered reporting small entities. We have no data to determine how many reporting or non-reporting small businesses may actually rely on the proposed rules, or may otherwise be impacted by the rule proposals. Acquirors relying on the exemptions may or may not have reporting obligations under the Exchange Act prior to engaging in a cross-border business combination transaction. An acquiror's ability to rely on the exemptions is not determined by the acquiror's size or market capitalization. However, we believe that small businesses are not typically acquirors in cross-border transactions. We believe that the proposed amendments would result in savings to entities (both small and large) that

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359 5 U.S.C. 601(6).

360 Securities Act Rule 157 (17 CFR 230.157) and Exchange Act Rule 0-10 (17 CFR 240.0-10) contain the applicable definitions.

361 The estimated number of reporting small entities is based on 2007 data, including the Commission's EDGAR database and Thomson Financial's Worldscope database.

qualify for the exemptions. We request comment on the number of small entities that would be affected by our proposals, including any available empirical data.

D. Reporting, recordkeeping and other compliance requirements

The proposed amendments would not impose any new reporting, recordkeeping or other compliance requirements on issuers that are small entities.

E. Duplicative, overlapping or conflicting federal rules

The Commission believes that there are no rules that duplicate, overlap or conflict with the proposed amendments.

F. Significant alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities; (ii) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendment, or any part thereof, for small entities.

The proposed amendments are designed to expand and enhance the usefulness of the current cross-border exemptions. The Commission believes that different compliance or reporting requirements are not necessary because the proposed amendments do not establish any new reporting, recordkeeping, or compliance requirements for small entities. 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 all entities that are able to avail themselves of the exemptions.

G. Solicitation of comment

The Commission encourages the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. We will consider any comments in preparing the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and the comments will be placed in the same public file as comments on the proposed amendments themselves. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact.

VIII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (the "SBREFA"),[362] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the 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.

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[362] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 50 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. §601).

We request comment on whether our proposals would be a "major rule" for purposes of the SBREFA. We solicit comment and empirical data on:

- 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.

IX. STATUTORY BASIS AND TEXT OF PROPOSAL

We propose amendments to the forms and rules under the authority set forth in Sections 3(b), 7, 8, 9, 10, 19 and 28 of the Securities Act, and Sections 12, 13, 14, 23, 35A, and 36 of the Exchange Act.

List of Subjects

17 CFR Parts 230, 232, 239, 240, and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSALS

In accordance with the foregoing, we are proposing to amend 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. Revise §230.162(a) to read as follows:

§ 230.162 Submission of tenders in registered exchange offers.

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), offerors may solicit tenders of securities in an exchange offer subject to § 240.13e–4(e) or § 240.14d–4(b) of this chapter, and in exchange offers conducted under § 240.13e-4(i) or § 240.14d-1(d) of this chapter that are not subject to § 240.13e-4(e) or § 240.14d-4(b) of this chapter to the extent permitted under § 240.13e-4(i)(2)(vi) and § 240.14d-1(d)(2)(x) of this chapter, before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules.

* * * * *

3. Revise § 230.800(h)(1) to read as follows:

§ 230.800 Definitions for §§ 230.800, 230.801 and 230.802.

* * * * *

(h) * * *

(1) Calculate percentage of outstanding securities held by U.S. holders as of the record date for a rights offering and as of a date no more than 60 days before the public announcement of an exchange offer or a business combination.

* * * * *

4. Amend § 230.802 by revising paragraphs (a)(2), (a)(3), (c)(2), (c)(3) and (c)(4) to read as follows:

§ 230.802 Exemption for offerings in connection with an exchange offer or business combination for the securities of foreign private issuers.

* * * * *

(a) * * *

(2) Equal treatment. The offeror must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the subject securities. The offeror, however, need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the offeror must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

(3) Informational documents. (i) If the offeror publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the exchange offer or business combination, the offeror must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the offeror is a foreign company, it must also file a Form F-X (§ 239.42 of this chapter) with the Commission at the same time as the submission of the Form CB to appoint an agent for service of process in the United States.

(ii) The offeror must disseminate the informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction.

(iii) If the offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

* * * * *

(c) * * *

(2) The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States or on the OTC market, as reported to the Financial Industry Regulatory Authority Inc., over the 12-calendar-month period ending on a date no more than 60 days before public announcement of the offer, exceeds 10 percent of the worldwide aggregate trading volume of that class of securities over the same period;

(3) The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission before the public announcement of the offer indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or

(4) The offeror knows, or has reason to know, before the public announcement of the offer, that U.S. ownership exceeds 10 percent of the subject securities. As an example, for purposes of this paragraph, an offeror is deemed to have reason to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. This example is not intended to be exclusive.

PART 232 – REGULATION S-T – GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

5. The authority citation for Part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

6. Amend § 232.101 by:

a. Revising paragraphs (a)(1)(vi) and (a)(1)(vii);

b. Removing and reserving paragraph (b)(7); and

c. Revising paragraph (b)(8) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(vi) Form CB (§§ 239.800 and 249.480 of this chapter) filed or submitted under § 230.801 or 230.802 of this chapter or § 240.13e–4(h)(8), 240.14d–1(c), or 240.14e–2(d) of this chapter;

(vii) Form F-X (§ 239.42 of this chapter) when filed in connection with a Form CB (§§ 239.800 and 249.480 of this chapter);

* * * * *

(b) * * *

(8) Form F-X (§ 232.42 of this chapter) if filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251-230.263 of this chapter);

* * * * *

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. Form S-4 (referenced in § 239.25) is amended by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the "Calculation of Registration Fee" table 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

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e-4(i) (Issuer Tender Offer) ☐

Exchange Act Rule 14d-1(d) (Third Party Tender Offer) ☐

* * * * *

9. Amend Form F-4 (referenced in §239.34) by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the "Calculation of Registration Fee" table to 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

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e-4(i) (Issuer Tender Offer) ☐

Exchange Act Rule 14d-1(d) (Third Party Tender Offer) ☐

* * * * *

10. Amend Form F-X (referenced in §239.42) by revising the Note to General Instruction II.B.(2) 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

* * * * *

II. * * *

B. * * *

(2) * * *

Note: Regulation S-T Rule 101(b)(8) only permits the filing of the Form F-X in

paper if filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251 - 230.263 of this chapter).

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

11. 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.

* * * * *

12. Amend § 240.13d-1 by:

a. Removing "; and" from the end of paragraph (b)(1)(ii)(I);

b. Adding paragraph (b)(1)(ii)(K); and

c. Removing the authority citation following the section.

The addition reads as follows:

§ 240.13d-1. Filing of Schedules 13D and 13G.

* * * * *

(b)(1) * * *

(ii) * * *

(K) A non-U.S. institution that is the functional equivalent of any of the institutions listed in paragraphs (b)(1)(ii)(A) through (J) of this section, so long as the non-U.S. institution is subject to a regulatory scheme that is comparable to the regulatory scheme applicable to the equivalent U.S. institution; and

* * * * *

13. Amend § 240.13d-102 by:

a. Revising Instruction 12 to the Instruction for the Cover Page before the Notes:

b. In Item 3 removing the period at the end of paragraphs (a), (b), (c), and (d) and in each place adding a semicolon;

c. In Item 3 removing the period at the end of paragraph (j) and in its place adding a semicolon and adding paragraph (k); and

d. In Item 10 redesignating paragraph (b) as paragraph (c) and adding new paragraph (b).

The revision and additions read as follows:

§ 240.13d-102 Schedule 13G – Information to be included in statements filed pursuant to § 240.13d-1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d-2.

* * * * *

Instructions for Cover Page:

* * * * *

(12) Type of Reporting Person--Please classify each "reporting person" according to the following breakdown (see Item 3 of Schedule 13G) and place the appropriate Symbol on the form:

Category	Symbol
Broker Dealer................................	BD
Bank......................................	BK
Insurance Company..........................	IC
Investment Company.........................	IV
Investment Adviser.........................	IA
Employee Benefit Plan or Endowment Fund...	EP

Parent Holding Company/Control Person.......	HC
Savings Association........................	SA
Church Plan................................	CP
Corporation................................	CO
Partnership................................	PN
Individual.................................	IN
Non-U.S. Institution..............	FI
Other......................................	OO

---

* * * * *

Item 3. * * *

(k) [ ] A non-U.S. institution that is the functional equivalent of any of the institutions listed in paragraphs (a) - (j) of this Item. Please specify the type of institution: ___________

* * * * *

Item 10. Certification

* * * * *

(b) The following certification shall be included if the statement is filed pursuant to § 240.13d-1(b)(1)(ii)(K):

By signing below I certify that, to the best of my knowledge and belief, the foreign regulatory scheme applicable to [insert particular category of institutional investor] is comparable to the regulatory scheme applicable to the functionally equivalent U.S. institution(s). I also undertake to furnish to the Commission staff, upon request, information that would otherwise be disclosed in a Schedule 13D.

* * * * *

14. Amend § 240.13e-3 by revising paragraph (g)(6) to read as follows:

§ 240.13e-3 Going private transactions by certain issuers or their affiliates.

* * * * *

(g) * * *

(6) Any tender offer or business combination made in compliance with § 230.802 of this chapter, § 240.13e–4(h)(8) or § 240.14d–1(c) or any other kind of transaction that otherwise meets the conditions for reliance on the cross-border exemptions set forth in § 240.13e-4(h)(8), 240.14d-1(c) or 230.802(a) of this chapter except for the fact that it is not technically conducted under those rules.

15. Amend § 240.13e-4 by:

a. Revising the introductory text of paragraph (i);

b. Revising paragraph (i)(2)(ii);

c. Adding paragraphs (i)(2)(v) and (vi); and

d. Revising paragraph 2.i. to the Instructions to paragraph (h)(8) and (i).

The revisions and additions read as follows:

§ 240.13e-4 Tender offers by issuers.

* * * * *

(i) <u>Cross-border tender offers (Tier II).</u> Any issuer tender offer (including any exchange offer) that meets the conditions in paragraph (i)(1) of this section shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section, provided that such issuer tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (i)(2) of this section. In addition, any issuer tender offer (including any exchange offer) subject only to the

requirements of section 14(e) of the Act and Regulation 14E (§§ 240.14e–1 through 240.14e-8) thereunder that meets the conditions in paragraph (i)(1) of this section also shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section, to the extent needed under the requirements of Regulation 14E provided the tender offer complies with all other requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (i)(2) of this section:

* * * * *

(2) * * *

(ii) <u>Equal treatment—separate U.S. and foreign offers.</u> Notwithstanding the provisions of paragraph (f)(8) of this section, an issuer or affiliate conducting an issuer tender offer meeting the conditions of paragraph (i)(1) of this section may separate the offer into multiple offers: one offer made to U.S. holders and all holders of American Depositary Receipts representing interests in the subject securities and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. U.S. holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

* * * * *

(v) <u>Suspension of withdrawal rights during counting of tendered securities.</u> The issuer or affiliate may suspend withdrawal rights required under paragraph (f)(2) of this section at the end of the offer and during the period that securities tendered into the offer

are being counted, provided that:

(A) The issuer or affiliate has provided an offer period including withdrawal rights for a period of at least 20 U.S. business days;

(B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the issuer or affiliate is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and

(C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(vi) Early commencement. Notwithstanding the requirements of section 5(a) of the Act (15 U.S.C. 77e(a)), the issuer or affiliate in an exchange offer not subject to this section may solicit tenders before a registration statement is effective as to the security offered to the same extent as would be permitted pursuant to paragraph (e)(2) of this section, so long as no securities are purchased until the registration statement is effective and the tender offer has expired, and the issuer or affiliate provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of section 13(e) of the Act (15 U.S.C. 78m(e)) and paragraph (f)(2)(i) of this section. If a material change occurs in the information published, sent or given to security holders, the issuer or affiliate must comply with the provisions of paragraph (e)(3) of this section in disseminating information about the material change to security holders, including the minimum periods during which the offer must remain open after notice of such change is provided to security holders.

Instructions to paragraph (h)(8) and (i) of this section:

* * * * *

2. * * *

i. Calculate the U.S. ownership as of a date no more than 60 days before the public announcement of the tender offer;

* * * * *

16. Amend § 240.14d-1 by:

a. Revising paragraph (a);

b. Revising paragraph (d) introductory text, paragraphs (d)(2)(ii) and (d)(2)(iv);

c. Adding paragraphs (d)(2)(vi), (d)(2)(vii), (d)(2)(viii), (d)(2)(ix), and (d)(2)(x); and

d. Revising Instructions 2.i., 3.ii., 3.iii., and 3.iv. to the Instructions to paragraphs (c) and (d).

The revisions and additions read as follows:

§ 240.14d-1 Scope of and definitions applicable to Regulations 14D and 14E.

* * * * *

(a) Scope. Regulation 14D (§§ 240.14d–1 through 240.14d–101) shall apply to any tender offer which is subject to section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), including, but not limited to, any tender offer for securities of a class described in that section which is made by an affiliate of the issuer of such class. Regulation 14E (§§ 240.14e–1 through 240.14e–8) shall apply to any tender offer for securities (other than exempted securities) unless otherwise noted therein.

* * * * *

(d) Tier II. A person conducting a tender offer (including any exchange offer) that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, provided that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section. In addition, a person conducting a tender offer subject only to the requirements of section 14(e) of the Act (15 U.S.C. 78n(e)) and Regulation 14E thereunder that meets the conditions in paragraph (d)(1) of the section also shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, to the extent needed pursuant to the requirements of Regulation 14E, provided that the tender offer complies with all requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

* * * * *

(2) * * *

(ii) Equal treatment—separate U.S. and foreign offers. Notwithstanding the provisions of § 240.14d–10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into multiple offers: one offer made to U.S. holders and all holders of American Depositary Receipts representing interests in the subject securities and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. U.S. holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such

foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

* * * * *

(iv) Prompt payment. Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(c). Where payment may not be made on a more expedited basis under home jurisdiction law or practice, payment for securities tendered during any subsequent offering period within 14 business days of the date of tender will satisfy the prompt payment requirements of § 240.14d-11(e). For purposes of this paragraph, a business day is determined with reference to the target's home jurisdiction.

* * * * *

(vi) Length of subsequent offering period. Notwithstanding the provisions of § 240.14d-11, the maximum time period for a subsequent offering period may extend beyond 20 U.S. business days.

(vii) Payment of interest on securities tendered during subsequent offering period. Notwithstanding the requirements of § 240.14d-11(f), the bidder may pay interest on securities tendered during a subsequent offering period, if required under applicable foreign law. Paying interest on securities tendered during a subsequent offering period in accordance with this section will not be deemed to violate § 240.14d-10(a)(2).

(viii) Suspension of withdrawal rights during counting of tendered securities. The bidder may suspend withdrawal rights required under section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)) at the end of the offer and during the period that securities tendered

into the offer are being counted, provided that:

(A) The bidder has provided an offer period including withdrawal rights for a period of at least 20 U.S. business days;

(B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the bidder is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and

(C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(ix) <u>Mix and match elections and the subsequent offering period.</u> Notwithstanding the requirements of § 240.14d-11(b), where the bidder offers target security holders a choice between different forms of consideration, it may establish a ceiling on one or more forms of consideration offered. Notwithstanding the requirements of § 240.14d-11(f), a bidder that establishes a ceiling on one or more forms of consideration offered pursuant to this subsection may offset elections of tendering security holders against one another, subject to proration, so that elections are satisfied to the greatest extent possible and pro rated to the extent that they cannot be satisfied in full. Such a bidder also may separately offset and pro rate securities tendered during the initial offering period and those tendered during any subsequent offering period, notwithstanding the requirements of § 240.14d-10(c).

(x) <u>Early commencement.</u> Notwithstanding the requirements of section 5(a) of the Act (15 U.S.C. 77e(a)), the bidder in an exchange offer not subject to § 240.14d-4(b)

may solicit tenders before a registration statement is effective as to the security offered to the same extent as would be permitted pursuant to § 240.14d-4(b), so long as no securities are purchased until the registration statement is effective and the tender offer has expired, and the bidder provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of § 240.14d-7. If a material change occurs in the information published, sent or given to security holders, the bidder must comply with the provisions of § 240.14d-4(d) in disseminating information about the material change to security holders, including the minimum periods during which the offer must remain open after notice of such change is provided to security holders.

<u>Instructions to paragraphs (c) and (d):</u>

* * * * *

2. * * *

i. Calculate the U.S. ownership as of a date no more than 60 days before the public announcement of the tender offer;

* * * * *

3. * * *

ii. The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States or on the OTC market, as reported to the Financial Industry Regulatory Authority, Inc. over the 12-calendar-month period ending on a date no more than 60 days before public announcement of the offer, exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of the worldwide aggregate trading volume of that class of securities over the same period;

iii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission before the public announcement of the offer indicates that U.S. holders hold more than 10 percent (40 percent in the case of paragraph (d) of this section) of the outstanding subject class of securities; or

iv. The bidder knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of such securities. As an example, for purposes of this Instruction, a bidder is deemed to have reason to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. This example is not intended to be exclusive.

* * * * *

17. Amend §240.14d-100 by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the General Instructions to read as follows:

§ 240.14d-100 Schedule TO. Tender offer statement under section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934.

Schedule TO
Tender Offer Statement under Section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934

* * * * *

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

[ ] Rule 13e-4(i) (Issuer Tender Offer)

[ ] Rule 14d-1(d) (Third Party Tender Offer)

* * * * *

18. Amend § 240.14e-5 by:

a. Removing "and" at the end of paragraphs (b)(9) and (c)(6);

b. Removing the period at the end of paragraphs (b)(10) and (c)(7) and in its place adding "; and"; and

c. Adding paragraphs (b)(11), (b)(12), (c)(8), and (c)(9).

The additions read as follows:

§ 240.14e-5. Prohibiting purchases outside of a tender offer.

* * * * *

(b) Excepted activity. * * *

(11) Purchases or arrangements to purchase pursuant to a foreign tender offer(s). Purchases or arrangements to purchase pursuant to a foreign offer(s) where the offeror seeks to acquire subject securities through a U.S. tender offer and a concurrent or substantially concurrent foreign offer(s), if the following conditions are satisfied:

(i) The U.S. and for eign tender offer(s) meet the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d-1(d);

(ii) The economic terms and consideration in the U.S. tender offer and foreign tender offer(s) are the same, provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign tender offer(s) to U.S. dollars at an exchange rate disclosed in the U.S. offering documents;

(iii) The procedural terms of the U.S. tender offer are at least as favorable as the

terms of the foreign tender offer(s);

(iv) The intention of the offeror to make purchases pursuant to the foreign tender offer(s) is disclosed in the U.S. offering documents; and

(v) Purchases by the offeror in the foreign tender offer(s) are made solely pursuant to the foreign tender offer(s) and not pursuant to an open market transaction(s), a private transaction(s), or other transaction(s); and

(12) Purchases or arrangements to purchase by an affiliate of the financial advisor and an offeror and its affiliates.

(i) Purchases or arrangements to purchase by an affiliate of a financial advisor and an offeror and its affiliates that are permissible under and will be conducted in accordance with the applicable laws of the subject company's home jurisdiction if the following conditions are satisfied:

(A) The subject company is a foreign private issuer as defined in § 240.3b-4(c);

(B) The covered person reasonably expects that the tender offer meets the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d-1(d);

(C) No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States;

(D) The United States offering materials disclose prominently: the possibility of, or the intention to make, purchases or arrangements to purchase subject securities or related securities outside of the tender offer, and if there will be public disclosure of purchases of subject or related securities, the manner in which information regarding such purchases will be disseminated;

(E) There is public disclosure in the United States, to the extent that such information is made public in the subject company's home jurisdiction, of information regarding all purchases of subject securities and related securities otherwise than pursuant to the tender offer from the time of public announcement of the tender offer until the tender offer expires;

(F) Purchases or arrangements to purchase by an offeror and its affiliates must satisfy the following additional condition: the tender offer price will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price; and

(G) Purchases or arrangements to purchase by an affiliate of a financial advisor must satisfy the following additional conditions:

(1) The financial advisor and the affiliate maintain and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of U.S. federal securities laws and regulations through the establishment of information barriers;

(2) The financial advisor has an affiliate that is registered as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a));

(3) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect, or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and

(4) The purchases or arrangements to purchase are not made to facilitate the tender offer.

(ii) The provisions of paragraph (b)(12)(i) of this section shall not apply to risk arbitrage trading by an affiliate of a financial advisor.

(c) Definitions. * * *

(8) Subject company has the same meaning as in § 229.1000 of this chapter.

(9) Home jurisdiction has the same meaning as in the Instructions to paragraphs (c) and (d) of § 240.14d-1.

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

19. The authority citation 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.

* * * * *

20. Amend Form CB (referenced in § 239.800 and § 249.480) by:

a. Removing the line "Filed or submitted in paper if permitted by Regulation S-T Rule 101(b)(8) [ ]" and the corresponding Note on the cover page;

b. Revising General Instruction II.A.(1);

c. Removing General Instruction II.A.(2) and redesignating General Instruction II.A.(3) and (4) as General Instruction II.A.(2) and (3); and

d. Revising General Instructions B and D.

Note – The text of Form CB does not and this amendment will not appear in the Code of Federal Regulations.

Form CB

TENDER OFFER/RIGHTS OFFERING NOTIFICATION FORM

(AMENDMENT NO. ______)

* * * * *

GENERAL INSTRUCTIONS

* * * * *

II. Instructions for Submitting Form

A. (1) Regulation S-T Rule 101(a)(1)(vi) (17 CFR 232.101(a)(1)(vi)) requires a party to submit the Form CB in electronic format via the Commission's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232). For assistance with technical questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 551-8900.

* * * * *

B. When submitting the Form CB in electronic format, the persons specified in Part IV must provide signatures in accordance with Regulation S-T Rule 302 (17 CFR 232.302). When submitting the Form CB in paper in accordance with a hardship exemption, the persons specified in Part IV must sign the original and at least one copy of the Form and any amendments. You must conform any unsigned copies. The specified persons may provide typed or facsimile signatures in accordance with Securities Act Rule 402(e) (17 CFR 230.402(e)) or Exchange Act Rule 12b-11(d) (17 CFR 240.12b-11(d)) as

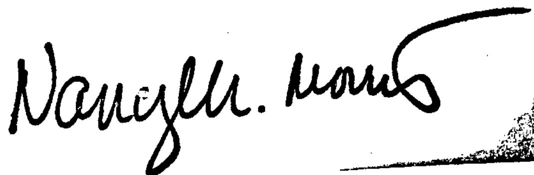
long as the filer retains copies of signatures manually signed by each of the specified persons for five years.

* * * * *

D. If filing in paper pursuant to a hardship exemption, in addition to any internal numbering you may include, sequentially number the signed original of the Form and any amendments by handwritten, typed, printed or other legible form of notation from the first page of the document through the last page of the document and any exhibits or attachments. Further, you must set forth the total number of pages contained in a numbered original on the first page of the document.

* * * * *

By the Commission.



Nancy M. Morris
Secretary

Dated: May 6, 2008

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 6, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13036

In the Matter of National Manufacturing Technologies, Inc., Natural Solutions Corp., Natural Wonders, Inc., Net Nanny Software International, Inc., Netcentives, Inc., and Netcruise.com, Inc., Respondents.	ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents National Manufacturing Technologies, Inc., Natural Solutions Corp., Natural Wonders, Inc., Net Nanny Software International, Inc., Netcentives, Inc., and Netcruise.com, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. National Manufacturing Technologies, Inc. (CIK No. 814427) is a California corporation located in Oceanside, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). National Manufacturing 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 December 31, 2000, which reported a net loss of $213,000 for the prior nine months. As of April 2, 2008, the company's common stock (symbol "NMFG") was quoted on the Pink Sheets, had seven market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

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2. Natural Solutions Corp. (CIK No. 1096594) is a Nevada corporation located in Chesapeake, Virginia with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Natural Solutions 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 January 31, 2002. As of April 2, 2008, the company's common stock (symbol "ICEB") was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

3. Natural Wonders, Inc. (CIK No. 885566) is a Delaware corporation located in Benecia, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Natural Wonders is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 28, 2000, which reported a net loss of $12 million for the prior nine months. On December 17, 2000, Natural Wonders filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of California, and this case was terminated on September 22, 2004. As of April 2, 2008, the company's common stock (symbol "NATWQ") was quoted on the Pink Sheets, had three market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

4. Net Nanny Software International, Inc. (CIK No. 1059020) is a Yukon Territory, Canada corporation located in Vancouver, British Columbia, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Net Nanny 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 June 30, 2001, which reported a net loss of $6 million for the fiscal year ended June 30, 2001. As of April 2, 2008, the company's common stock (symbol "NNSWF") was quoted on the Pink Sheets, had five market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

5. Netcentives, Inc. (CIK No. 1081404) is a Delaware corporation located in San Francisco, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Netcentives is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2001, which reported a net loss of $325,921 for the prior six months. As of April 2, 2008, the company's common stock (symbol "NCNTQ") was quoted on the Pink Sheets, had seven market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

6. Netcruise.com, Inc. (CIK No. 827100) is a New Jersey corporation located in Union, New Jersey with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Netcruise.com 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, 2000, which reported a net loss of $11 million since 1994. As of April 2, 2008, the company's common stock (symbol "NCRU") was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

7. As discussed in more detail above, all of the respondents are delinquent in their periodic filings with the Commission (*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 them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings
In the Matter of National Manufacturing Technologies, Inc.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
National Manufacturing Technologies, Inc.					
	10-KSB	03/31/01	06/29/01	Not filed	82
	10-QSB	06/30/01	08/14/01	Not filed	80
	10-QSB	09/30/01	11/14/01	Not filed	77
	10-QSB	12/31/01	02/14/02	Not filed	74
	10-KSB	03/31/02	07/01/02	Not filed	69
	10-QSB	06/30/02	08/14/02	Not filed	68
	10-QSB	09/30/02	11/14/02	Not filed	65
	10-QSB	12/31/02	02/14/03	Not filed	62
	10-KSB	03/31/03	06/30/03	Not filed	58
	10-QSB	06/30/03	08/14/03	Not filed	56
	10-QSB	09/30/03	11/14/03	Not filed	53
	10-QSB	12/31/03	02/16/04	Not filed	50
	10-KSB	03/31/04	06/29/04	Not filed	46
	10-QSB	06/30/04	08/16/04	Not filed	44
	10-QSB	09/30/04	11/15/04	Not filed	41
	10-QSB	12/31/04	02/14/05	Not filed	38
	10-KSB	03/31/05	06/29/05	Not filed	34
	10-QSB	06/30/05	08/15/05	Not filed	32
	10-QSB	09/30/05	11/14/05	Not filed	29
	10-QSB	12/31/05	02/14/06	Not filed	26
	10-KSB	03/31/06	06/29/06	Not filed	22
	10-QSB	06/30/06	08/14/06	Not filed	20
	10-QSB	09/30/06	11/14/06	Not filed	17
	10-QSB	12/31/06	02/14/07	Not filed	14
	10-KSB	03/31/07	06/29/07	Not filed	10
	10-QSB	06/30/07	08/14/07	Not filed	8
	10-QSB	09/30/07	11/14/07	Not filed	5
	10-QSB	12/31/07	02/14/08	Not filed	2
Total Filings Delinquent	28				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Natural Solutions Corp.					
	10-QSB	04/30/02	06/14/02	Not filed	70
	10-KSB	07/31/02	10/29/02	Not filed	66
	10-QSB	10/31/02	12/15/02	Not filed	64
	10-QSB	01/31/03	03/17/03	Not filed	61
	10-QSB	04/30/03	06/14/03	Not filed	58
	10-KSB	07/31/03	10/31/03	Not filed	54
	10-QSB	10/31/03	12/15/03	Not filed	52
	10-QSB	01/31/04	03/16/04	Not filed	49
	10-QSB	04/30/04	06/14/04	Not filed	46
	10-KSB	07/31/04	10/29/04	Not filed	42
	10-QSB	10/31/04	12/15/04	Not filed	40
	10-QSB	01/31/05	03/17/05	Not filed	37
	10-QSB	04/30/05	06/14/05	Not filed	34
	10-KSB	07/31/05	10/29/05	Not filed	30
	10-QSB	10/31/05	12/15/05	Not filed	28
	10-QSB	01/31/06	03/17/06	Not filed	25
	10-QSB	04/30/06	06/14/06	Not filed	22
	10-KSB	07/31/06	10/29/06	Not filed	18
	10-QSB	10/31/06	12/15/06	Not filed	16
	10-QSB	01/31/07	03/17/07	Not filed	13
	10-QSB	04/30/07	06/14/07	Not filed	10
	10-KSB	07/31/07	10/29/07	Not filed	6
	10-QSB	10/31/07	12/17/07	Not filed	4
	10-QSB	01/31/08	03/17/08	Not filed	1
Total Filings Delinquent	24				
Natural Wonders, Inc.					
	10-K	01/27/01	04/27/01	Not filed	84
	10-Q	04/28/01	06/12/01	Not filed	82
	10-Q	07/28/01	09/11/01	Not filed	79
	10-Q	10/27/01	12/11/01	Not filed	76
	10-K	02/02/02	05/03/02	Not filed	71

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Natural Wonders, Inc.					
	10-Q	05/04/02	06/18/02	Not filed	70
	10-Q	08/03/02	09/17/02	Not filed	67
	10-Q	11/02/02	12/17/02	Not filed	64
	10-K	02/01/03	05/02/03	Not filed	59
	10-Q	05/03/03	06/17/03	Not filed	58
	10-Q	08/02/03	09/16/03	Not filed	55
	10-Q	11/01/03	12/16/03	Not filed	52
	10-K	01/31/04	04/30/04	Not filed	48
	10-Q	05/01/04	06/15/04	Not filed	46
	10-Q	07/31/04	09/14/04	Not filed	43
	10-Q	10/30/04	12/14/04	Not filed	40
	10-K	01/29/05	04/29/05	Not filed	36
	10-Q	04/30/05	06/14/05	Not filed	34
	10-Q	07/30/05	09/13/05	Not filed	31
	10-Q	10/29/05	12/13/05	Not filed	28
	10-K	01/28/06	04/28/06	Not filed	24
	10-Q	04/29/06	06/13/06	Not filed	22
	10-Q	07/29/06	09/12/06	Not filed	19
	10-Q	11/04/06	12/19/06	Not filed	16
	10-K	02/03/07	05/04/07	Not filed	11
	10-Q	04/28/07	06/12/07	Not filed	10
	10-Q	07/28/07	10/26/07	Not filed	6
	10-Q	11/03/07	12/20/07	Not filed	4
Total Filings Delinquent	28				
Net Nanny Software International, Inc.					
	20-F	06/30/02	12/31/02	Not filed	64
	20-F	06/30/03	12/31/03	Not filed	52
	20-F	06/30/04	12/31/04	Not filed	40
	20-F	06/30/05	01/03/06	Not filed	27
	20-F	06/30/06	01/02/07	Not filed	15
	20-F	06/30/07	12/31/07	Not filed	4
Total Filings Delinquent	6				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Netcentives, Inc.					
	10-Q	09/30/01	11/14/01	Not filed	77
	10-K	12/31/01	04/01/02	Not filed	72
	10-Q	03/31/02	05/15/02	Not filed	71
	10-Q	06/30/02	08/14/02	Not filed	68
	10-Q	09/30/02	11/14/02	Not filed	65
	10-K	12/31/02	03/31/03	Not filed	61
	10-Q	03/31/03	05/15/03	Not filed	59
	10-Q	06/30/03	08/14/03	Not filed	56
	10-Q	09/30/03	11/14/03	Not filed	53
	10-K	12/31/03	03/30/04	Not filed	49
	10-Q	03/31/04	05/17/04	Not filed	47
	10-Q	06/30/04	08/16/04	Not filed	44
	10-Q	09/30/04	11/15/04	Not filed	41
	10-K	12/31/04	03/31/05	Not filed	37
	10-Q	03/31/05	05/16/05	Not filed	35
	10-Q	06/30/05	08/15/05	Not filed	32
	10-Q	09/30/05	11/14/05	Not filed	29
	10-K	12/31/05	03/31/06	Not filed	25
	10-Q	03/31/06	05/15/06	Not filed	23
	10-Q	06/30/06	08/14/06	Not filed	20
	10-Q	09/30/06	11/14/06	Not filed	17
	10-K	12/31/06	04/02/07	Not filed	12
	10-Q	03/31/07	05/15/07	Not filed	11
	10-Q	06/30/07	08/14/07	Not filed	8
	10-Q	09/30/07	11/14/07	Not filed	5
	10-K	12/31/07	03/30/08	Not filed	1
Total Filings Delinquent	26				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Netcruise.com, Inc.	*10-KSB*	12/31/00	04/02/01	Not filed	84
	10-QSB	03/31/01	05/15/01	Not filed	83
	10-QSB	06/30/01	08/14/01	Not filed	80
	10-QSB	09/30/01	11/14/01	Not filed	77
	10-KSB	12/31/01	04/01/02	Not filed	72
	10-QSB	03/31/02	05/15/02	Not filed	71
	10-QSB	06/30/02	08/14/02	Not filed	68
	10-QSB	09/30/02	11/14/02	Not filed	65
	10-KSB	12/31/02	03/31/03	Not filed	61
	10-QSB	03/31/03	05/15/03	Not filed	59
	10-QSB	06/30/03	08/14/03	Not filed	56
	10-QSB	09/30/03	11/14/03	Not filed	53
	10-KSB	12/31/03	03/30/04	Not filed	49
	10-QSB	03/31/04	05/17/04	Not filed	47
	10-QSB	06/30/04	08/16/04	Not filed	44
	10-QSB	09/30/04	11/15/04	Not filed	41
	10-KSB	12/31/04	03/31/05	Not filed	37
	10-QSB	03/31/05	05/16/05	Not filed	35
	10-QSB	06/30/05	08/15/05	Not filed	32
	10-QSB	09/30/05	11/14/05	Not filed	29
	10-KSB	12/31/05	03/31/06	Not filed	25
	10-QSB	03/31/06	05/15/06	Not filed	23
	10-QSB	06/30/06	08/14/06	Not filed	20
	10-QSB	09/30/06	11/14/06	Not filed	17
	10-KSB	12/31/06	04/02/07	Not filed	12
	10-QSB	03/31/07	05/15/07	Not filed	11
	10-QSB	06/30/07	08/14/07	Not filed	8
	10-QSB	09/30/07	11/14/07	Not filed	5
	10-KSB	12/31/07	03/30/08	Not filed	1

Total Filings Delinquent 29

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 6, 2008

IN THE MATTER OF **National Manufacturing Technologies, Inc., Natural Solutions Corp., Natural Wonders, Inc., Net Nanny Software International, Inc., Netcentives, Inc., and Netcruise.com, Inc.** **File No. 500-1**	:	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of National Manufacturing Technologies, Inc. because it has not filed any periodic reports since the period ended December 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Natural Solutions Corp. because it has not filed any periodic reports since the period ended January 31, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Natural Wonders, Inc. because it has not filed any periodic reports since the period ended October 28, 2000.

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It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Net Nanny Software International, Inc. because it has not filed any periodic reports since the period ended June 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Netcentives, Inc. because it has not filed any periodic reports since the period ended June 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Netcruise.com, Inc. because it has not filed any periodic reports since the period ended September 30, 2000.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 6, 2008, through 11:59 p.m. EDT on May 19, 2008.

By the Commission.

Nancy M. Morris
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 7, 2008

In the Matter of ABS Group, Inc. (n/k/a The Motion Picture Group, Inc.), Accrue Software, Inc., iAsiaworks, Inc., Premier Laser Systems, Inc., Siskon Gold Corp., and Syquest Technology, Inc. (n/k/a SYQT, 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 ABS Group, Inc. (n/k/a The Motion Picture Group, Inc.), because it has not filed any periodic reports since the period ended June 30, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Accrue Software, Inc., because it has not filed any periodic reports since the period ended December 28, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of iAsiaworks, Inc., because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Premier Laser Systems,

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Inc., because it has not filed any periodic reports since the period ended December 31, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Siskon Gold Corp., because it has not filed any periodic reports since the period ended December 31, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Syquest Technology, Inc. (n/k/a SYQT, Inc.), because it has not filed any periodic reports since the period ended June 30, 1998.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on May 7, 2008, through 11:59 p.m. EDT on May 20, 2008.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 7, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13037

In the Matter of **ABS Group, Inc.,** **Accrue Software, Inc.,** **iAsiaworks, Inc.,** **Premier Laser Systems, Inc.,** **Siskon Gold Corp., and** **Syquest Technology, Inc.** **(n/k/a SYQT, Inc.),** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents ABS Group, Inc., Accrue Software, Inc., iAsiaworks, Inc., Premier Laser Systems, Inc., Siskon Gold Corp., and Syquest Technology, Inc. (n/k/a SYQT, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. ABS Group, Inc. ("ABS Group") (CIK No. 843004) is a Florida corporation located in Los Angeles, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). ABS Group 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 June 30, 1998, which reported a loss of $442,076 for the prior six months. The audit report accompanying ABS Group's Form 10-KSB for the period ended December 31, 1997 included a "going concern" paragraph based on the fact that ABS Group was a development stage company with no significant operating revenue.

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2. Accrue Software, Inc. ("ACRUQ")[1] (CIK No. 1087243) is a Delaware corporation located in Fremont, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). ACRUQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 28, 2002, which reported a net loss of over $5.2 million for the prior nine months. On August 15, 2003, ACRUQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of California that was converted to a Chapter 7 proceeding and terminated on May 4, 2006. On September 23, 2003, the company completed the sale of substantially all of its assets to another company. As of April 25, 2008, the common stock of ACRUQ was quoted on the Pink Sheets and had two market makers. The common stock of ACRUQ had an average daily trading volume of 16,035 shares for the six months ended March 7, 2008.

3. iAsiaworks, Inc. ("IAWK") (CIK No. 1110992) is a void Delaware corporation located in San Mateo, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). IAWK is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2001, which reported a net loss of over $155 million for the prior nine months. On March 7, 2002, the Board of Directors of IAWK authorized the dissolution and wind-up of the issuer's business. As of April 25, 2008, the common stock of IAWK was quoted on the Pink Sheets, had nine market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of IAWK had an average daily trading volume of 4,525 shares for the six months ended March 7, 2008.

4. Premier Laser Systems, Inc. ("PLSIQ") (CIK No. 878543) is a suspended California corporation located in Aliso Viejo, California with Class A common stock and Class B warrants registered with the Commission pursuant to Exchange Act Section 12(g). PLSIQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 1999, which reported a net loss of over $8.3 million for the prior nine months. On March 10, 2000, PLSIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, which was terminated on March 13, 2006. As of April 25, 2008, the common stock of PLSIQ was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of PLSIQ had an average daily trading volume of 21,433 shares for the six months ended March 7, 2008.

5. Siskon Gold Corp. ("SISK") (CIK No. 876459) is a suspended California corporation located in Nevada City, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). SISK is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 1997, which reported a net loss of $17 million for that year. The auditor's report included in SISK's Form 10-KSB for the period ended December 31, 1997 included a "going concern" paragraph based on the cessation of the company's mining activity, write-down of all property, plant, and equipment to net realizable value, and the liquidation of its operating equipment, among

[1] Where applicable, the short form of each issuer's name is also its stock symbol.

other factors. As of April 25, 2008, the common stock of SISK was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of SISK had an average daily trading volume of 19,578 shares for the six months ended March 7, 2008.

6. Syquest Technology, Inc. (n/k/a SYQT, Inc.) ("SYQTQ") (CIK No. 880865) is a void Delaware corporation located in Fremont, California with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). SYQTQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1998, which reported a net loss of $110 million for the prior nine months. On November 17, 1998, SYQTQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of California which was converted to a Chapter 7 proceeding and was still pending as of April 25, 2008. In a press release dated April 22, 1999, SYQTQ announced the sale of substantially all of its U.S. assets and that its common stock had no value. On April 6, 1999, the company changed its name to SYQT, Inc. with the State of Delaware but failed to report that change in periodic filings or record it in the Commission's EDGAR database, as required by Commission rule. As of April 25, 2008, the common stock of SYQTQ was quoted on the Pink Sheets, had eight market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3). The common stock of SYQTQ had an average daily trading volume of 46,100 shares for the six months ended March 7, 2008.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Nancy M. Morris
Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings

In the Matter of ABS Group, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
ABS Group, Inc.					
	10-QSB	09/30/98	11/16/98	Not filed	113
	10-KSB	12/31/98	03/31/99	Not filed	109
	10-QSB	03/31/99	05/17/99	Not filed	107
	10-QSB	06/30/99	08/16/99	Not filed	104
	10-QSB	09/30/99	11/15/99	Not filed	101
	10-KSB	12/31/99	03/30/00	Not filed	97
	10-QSB	03/31/00	05/15/00	Not filed	95
	10-QSB	06/30/00	08/14/00	Not filed	92
	10-QSB	09/30/00	11/14/00	Not filed	89
	10-KSB	12/31/00	04/02/01	Not filed	84
	10-QSB	03/31/01	05/15/01	Not filed	83
	10-QSB	06/30/01	08/14/01	Not filed	80
	10-QSB	09/30/01	11/14/01	Not filed	77
	10-KSB	12/31/01	04/01/02	Not filed	72
	10-QSB	03/31/02	05/15/02	Not filed	71
	10-QSB	06/30/02	08/14/02	Not filed	68
	10-QSB	09/30/02	11/14/02	Not filed	65
	10-KSB	12/31/02	03/31/03	Not filed	61
	10-QSB	03/31/03	05/15/03	Not filed	59
	10-QSB	06/30/03	08/14/03	Not filed	56
	10-QSB	09/30/03	11/14/03	Not filed	53
	10-KSB	12/31/03	03/30/04	Not filed	49
	10-QSB	03/31/04	05/17/04	Not filed	47
	10-QSB	06/30/04	08/16/04	Not filed	44
	10-QSB	09/30/04	11/15/04	Not filed	41
	10-KSB	12/31/04	03/31/05	Not filed	37
	10-QSB	03/31/05	05/16/05	Not filed	35
	10-QSB	06/30/05	08/15/05	Not filed	32
	10-QSB	09/30/05	11/14/05	Not filed	29
	10-KSB	12/31/05	03/31/06	Not filed	25
	10-QSB	03/31/06	05/15/06	Not filed	23
	10-QSB	06/30/06	08/14/06	Not filed	20
	10-QSB	09/30/06	11/14/06	Not filed	17
	10-KSB	12/31/06	04/02/07	Not filed	12
	10-QSB	03/31/07	05/15/07	Not filed	11
	10-QSB	06/30/07	08/14/07	Not filed	8
	10-QSB	09/30/07	11/14/07	Not filed	5
	10-KSB	12/31/07	03/31/08	Not filed	1
Total Filings Delinquent	**38**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Accrue Software, Inc.					
	10-K	03/29/03	06/27/03	Not filed	58
	10-Q	06/28/03	08/12/03	Not filed	56
	10-Q	09/27/03	11/11/03	Not filed	53
	10-Q	12/27/03	02/10/04	Not filed	50
	10-K	03/27/04	06/25/04	Not filed	46
	10-Q	06/26/04	08/10/04	Not filed	44
	10-Q	09/25/04	11/09/04	Not filed	41
	10-Q	12/25/04	02/08/05	Not filed	38
	10-K	03/26/05	06/24/05	Not filed	34
	10-Q	06/25/05	08/09/05	Not filed	32
	10-Q	09/24/05	11/08/05	Not filed	29
	10-Q	12/31/05	02/14/06	Not filed	26
	10-K	03/25/06	06/23/06	Not filed	22
	10-Q	06/24/06	08/08/06	Not filed	20
	10-Q	09/30/06	11/14/06	Not filed	17
	10-Q	12/30/06	02/13/07	Not filed	14
	10-K	03/31/07	06/29/07	Not filed	10
	10-Q	06/30/07	08/14/07	Not filed	8
	10-Q	09/29/07	11/13/07	Not filed	5
	10-Q	12/29/07	02/12/08	Not filed	2
	10-K	12/31/07	03/31/08	Not filed	1
Total Filings Delinquent	21				
iAsiaworks, Inc.					
	10-K	12/31/01	04/01/02	Not filed	72
	10-Q	03/31/02	05/15/02	Not filed	71
	10-Q	06/30/02	08/14/02	Not filed	68
	10-Q	09/30/02	11/14/02	Not filed	65
	10-K	12/31/02	03/31/03	Not filed	61
	10-Q	03/31/03	05/15/03	Not filed	59
	10-Q	06/30/03	08/14/03	Not filed	56
	10-Q	09/30/03	11/14/03	Not filed	53
	10-K	12/31/03	03/30/04	Not filed	49
	10-Q	03/31/04	05/17/04	Not filed	47
	10-Q	06/30/04	08/16/04	Not filed	44
	10-Q	09/30/04	11/15/04	Not filed	41
	10-K	12/31/04	03/31/05	Not filed	37
	10-Q	03/31/05	05/16/05	Not filed	35
	10-Q	06/30/05	08/15/05	Not filed	32
	10-Q	09/30/05	11/14/05	Not filed	29
	10-K	12/31/05	03/31/06	Not filed	25
	10-Q	03/31/06	05/15/06	Not filed	23

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
iAsiaworks, Inc. *(continued)*	*10-Q*	06/30/06	08/14/06	Not filed	20
	10-Q	09/30/06	11/14/06	Not filed	17
	10-K	12/31/06	04/02/07	Not filed	12
	10-Q	03/31/07	05/15/07	Not filed	11
	10-Q	06/30/07	08/14/07	Not filed	8
	10-Q	09/30/07	11/14/07	Not filed	5
	10-K	12/31/07	03/31/08	Not filed	1
Total Filings Delinquent	**25**				
Premier Laser Systems, Inc.					
	10-K	03/31/00	06/29/00	Not filed	94
	10-Q	06/30/00	08/14/00	Not filed	92
	10-Q	09/30/00	11/14/00	Not filed	89
	10-Q	12/31/00	02/14/01	Not filed	86
	10-K	03/31/01	06/29/01	Not filed	82
	10-Q	06/30/01	08/14/01	Not filed	80
	10-Q	09/30/01	11/14/01	Not filed	77
	10-Q	12/31/01	02/14/02	Not filed	74
	10-K	03/31/02	07/01/02	Not filed	69
	10-Q	06/30/02	08/14/02	Not filed	68
	10-Q	09/30/02	11/14/02	Not filed	65
	10-Q	12/31/02	02/14/03	Not filed	62
	10-K	03/31/03	06/30/03	Not filed	58
	10-Q	06/30/03	08/14/03	Not filed	56
	10-Q	09/30/03	11/14/03	Not filed	53
	10-Q	12/31/03	02/17/04	Not filed	50
	10-K	03/31/04	06/29/04	Not filed	46
	10-Q	06/30/04	08/16/04	Not filed	44
	10-Q	09/30/04	11/15/04	Not filed	41
	10-Q	12/31/04	02/14/05	Not filed	38
	10-K	03/31/05	06/29/05	Not filed	34
	10-Q	06/30/05	08/15/05	Not filed	32
	10-Q	09/30/05	11/14/05	Not filed	29
	10-Q	12/31/05	02/14/06	Not filed	26
	10-K	03/31/06	06/29/06	Not filed	22
	10-Q	06/30/06	08/14/06	Not filed	20
	10-Q	09/30/06	11/14/06	Not filed	17
	10-Q	12/31/06	02/14/07	Not filed	14
	10-K	03/31/07	06/29/07	Not filed	10
	10-Q	06/30/07	08/14/07	Not filed	8
	10-Q	09/30/07	11/14/07	Not filed	5
	10-Q	12/31/07	02/14/08	Not filed	2
Total Filings Delinquent	**32**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Siskon Gold Corp.					
	10-QSB	03/31/98	05/15/98	Not filed	119
	10-QSB	06/30/98	08/14/98	Not filed	116
	10-QSB	09/30/98	11/16/98	Not filed	113
	10-KSB	12/31/98	03/31/99	Not filed	109
	10-QSB	03/31/99	05/17/99	Not filed	107
	10-QSB	06/30/99	08/16/99	Not filed	104
	10-QSB	09/30/99	11/15/99	Not filed	101
	10-KSB	12/31/99	03/30/00	Not filed	97
	10-QSB	03/31/00	05/15/00	Not filed	95
	10-QSB	06/30/00	08/14/00	Not filed	92
	10-QSB	09/30/00	11/14/00	Not filed	89
	10-KSB	12/31/00	04/02/01	Not filed	84
	10-QSB	03/31/01	05/15/01	Not filed	83
	10-QSB	06/30/01	08/14/01	Not filed	80
	10-QSB	09/30/01	11/14/01	Not filed	77
	10-KSB	12/31/01	04/01/02	Not filed	72
	10-QSB	03/31/02	05/15/02	Not filed	71
	10-QSB	06/30/02	08/14/02	Not filed	68
	10-QSB	09/30/02	11/14/02	Not filed	65
	10-KSB	12/31/02	03/31/03	Not filed	61
	10-QSB	03/31/03	05/15/03	Not filed	59
	10-QSB	06/30/03	08/14/03	Not filed	56
	10-QSB	09/30/03	11/14/03	Not filed	53
	10-KSB	12/31/03	03/30/04	Not filed	49
	10-QSB	03/31/04	05/17/04	Not filed	47
	10-QSB	06/30/04	08/16/04	Not filed	44
	10-QSB	09/30/04	11/15/04	Not filed	41
	10-KSB	12/31/04	03/31/05	Not filed	37
	10-QSB	03/31/05	05/16/05	Not filed	35
	10-QSB	06/30/05	08/15/05	Not filed	32
	10-QSB	09/30/05	11/14/05	Not filed	29
	10-KSB	12/31/05	03/31/06	Not filed	25
	10-QSB	03/31/06	05/15/06	Not filed	23
	10-QSB	06/30/06	08/14/06	Not filed	20
	10-QSB	09/30/06	11/14/06	Not filed	17
	10-KSB	12/31/06	04/02/07	Not filed	12
	10-QSB	03/31/07	05/15/07	Not filed	11
	10-QSB	06/30/07	08/14/07	Not filed	8
	10-QSB	09/30/07	11/14/07	Not filed	5
	10-KSB	12/31/07	03/31/08	Not filed	1

Total Filings Delinquent **40**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Syquest Technology, Inc. (n/k/a SYQT, Inc.)					
	10-K	09/30/98	12/29/98	Not filed	112
	10-Q	12/31/98	02/16/99	Not filed	110
	10-Q	03/31/99	05/17/99	Not filed	107
	10-Q	06/30/99	08/16/99	Not filed	104
	10-K	09/30/99	12/29/99	Not filed	100
	10-Q	12/31/99	02/14/00	Not filed	98
	10-Q	03/31/00	05/15/00	Not filed	95
	10-Q	06/30/00	08/14/00	Not filed	92
	10-K	09/30/00	12/29/00	Not filed	88
	10-Q	12/31/00	02/14/01	Not filed	86
	10-Q	03/31/01	05/15/01	Not filed	83
	10-Q	06/30/01	08/14/01	Not filed	80
	10-K	09/30/01	12/31/01	Not filed	76
	10-Q	12/31/01	02/14/02	Not filed	74
	10-Q	03/31/02	05/15/02	Not filed	71
	10-Q	06/30/02	08/14/02	Not filed	68
	10-K	09/30/02	12/30/02	Not filed	64
	10-Q	12/31/02	02/14/03	Not filed	62
	10-Q	03/31/03	05/15/03	Not filed	59
	10-Q	06/30/03	08/14/03	Not filed	56
	10-K	09/30/03	12/29/03	Not filed	52
	10-Q	12/31/03	02/17/04	Not filed	50
	10-Q	03/31/04	05/17/04	Not filed	47
	10-Q	06/30/04	08/16/04	Not filed	44
	10-K	09/30/04	12/29/04	Not filed	40
	10-Q	12/31/04	02/14/05	Not filed	38
	10-Q	03/31/05	05/16/05	Not filed	35
	10-Q	06/30/05	08/15/05	Not filed	32
	10-K	09/30/05	12/29/05	Not filed	28
	10-Q	12/31/05	02/14/06	Not filed	26
	10-Q	03/31/06	05/15/06	Not filed	23
	10-Q	06/30/06	08/14/06	Not filed	20
	10-K	09/30/06	12/29/06	Not filed	16
	10-Q	12/31/06	02/14/07	Not filed	14
	10-Q	03/31/07	05/15/07	Not filed	11
	10-Q	06/30/07	08/14/07	Not filed	8
	10-K	09/30/07	12/31/07	Not filed	4
	10-Q	12/31/07	02/14/08	Not filed	2
Total Filings Delinquent	**38**				

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57804 / May 8, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13039

In the Matter of **QUOGUE CAPITAL LLC and WAYNE P. ROTHBAUM,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Quogue Capital LLC and Wayne P. Rothbaum (collectively "Respondents").

II.

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

III.

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

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Respondents

1. **Quogue Capital LLC ("Quogue")** is a New York limited liability company with its principal place of business in New York City. Quogue is not registered with the Commission. During the relevant time period, Quogue only invested the funds of its owner.

2. **Wayne P. Rothbaum ("Rothbaum")**, age 40, is a resident of New York, New York. Rothbaum is the managing member and sole owner of Quogue and he directed Quogue's trading activities.

Summary

3. On four occasions from February 2005 to November 2005, Respondents violated Rule 105 of Regulation M. With respect to each violation, Quogue, at Rothbaum's direction, sold securities short within five business days before the pricing of public offerings and then covered the short positions with securities purchased in the offering. Quogue's profits on these transactions totaled $782,902.

Background

4. At all relevant times, Rule 105 of Regulation M, "Short Selling in Connection with a Public Offering," ("Rule 105") provided, in pertinent part:

> In connection with an offering of securities for cash pursuant to a registration statement ... filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the ... period beginning five business days before the pricing of the offered securities and ending with such pricing. . .

17 C.F.R. § 242.105(a)(1). This five business day or shorter period is referred to herein as the "restricted period." Rule 105 is prophylactic and prohibits the conduct irrespective of the short seller's intent in effecting the short sale.

5. During the relevant period, Quogue and Rothbaum engaged in short selling and covering transactions prohibited under Rule 105 in connection with purchases of securities in public offerings made by Bioenvision, Inc. ("Bioenvision"), Geron Corporation ("Geron"), Cotherix, Inc. ("Cotherix") and Point Therapeutics, Inc. ("Point Therapeutics").

6. After the close of the market on February 2, 2005, Bioenvision priced a follow-on offering of 7,500,000 shares of its common stock at $8.00 per share. The offering was offered to the public through an underwriter on a firm commitment basis. Accordingly, the restricted period was January 27, 2005 through February 2, 2005.

7. At Rothbaum's direction, Quogue sold short a total of 89,269 Bioenvison shares on one day during the restricted period and then covered the restricted period short

position using Bioenvision shares received in the follow-on offering. Quogue's profit on the restricted period short sales was $15,732.

8. After the close of the market on September 15, 2005, Geron priced a follow-on offering of 8,000,000 shares of its common stock at $9 per share. Geron offered the shares to the public through an underwriter on a firm commitment basis. Accordingly, the restricted period was September 9, 2005 through September 15, 2005.

9. At Rothbaum's direction, Quogue sold short a total of 519,661 Geron shares on three days during the restricted period and covered some of the restricted period short sales using Geron shares received in the follow-on offering. Quogue's profit on the restricted period short sales was $614,280.

10. After the close of the Market on October 6, 2005, Cotherix and certain selling shareholders priced a follow-on offering of 4,500,000 shares of its common stock at $13.00 per share. Cotherix offered the shares to the public through an underwriter on a firm commitment basis. Accordingly, the restricted period was September 30, 2005 through October 6, 2005.

11. At Rothbaum's direction, Quogue sold short a total of 92,300 Cotherix shares on two consecutive days during the restricted period and covered the restricted period short position using Cotherix shares received in the follow-on offering. Quogue's profit from the short sales during the restricted period was $70,107.

12. After the close of the market on November 21, 2005, Point Therapeutics priced a follow-on offering of 8,050,000 shares of its common stock at $3.00 per share. Point Therapeutics offered the shares to the public through an underwriter on a firm commitment basis. Accordingly, the restricted period was November 15, 2005 through November 21, 2005.

13. At Rothbaum's direction, Quogue sold short a total of 142,400 Point Therapeutics shares on five consecutive days during the restricted period and covered the restricted period short position using Point Therapeutics shares received in the follow-on offering. Quogue's profit on the restricted period short sales was $82,783.

14. As a result of the conduct described above, Quogue and Rothbaum committed violations of Rule 105.

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 21C of the Exchange Act, it is hereby ORDERED that:

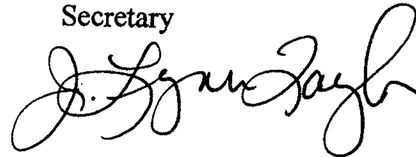
A. Respondent Quogue shall cease and desist from committing or causing any violations, and any future violations of Rule 105 of Regulation M under the Exchange Act; and

B. Respondent Rothbaum shall cease and desist from committing or causing any violations, and any future violations of Rule 105 of Regulation M under the Exchange Act.

C. IT IS FURTHER ORDERED that Respondents shall, jointly and severally, within thirty (30) days of the entry of this Order, pay disgorgement in the amount of $782,902 and prejudgment interest in the amount of $161,154 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 Quogue Capital LLC and Wayne P. Rothbaum as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to John T. Dugan, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02210.

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 8, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13038

In the Matter of American Kiosk Corp., American Motorcycle Corp. (f/k/a Scope Industries, Inc.), Austin's International, Inc., BusinessMall.Com, Inc., CCM Manufacturing Technologies, Inc., and Emerging Markets 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 American Kiosk Corp., American Motorcycle Corp. (f/k/a Scope Industries, Inc.), Austin's International, Inc., BusinessMall.Com, Inc., CCM Manufacturing Technologies, Inc., and Emerging Markets Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. American Kiosk Corp. ("American Kiosk") (CIK No. 1047533) is a Delaware corporation located in Virginia Beach, Virginia with a class of equity securities registered pursuant to Exchange Act Section 12(g). American Kiosk 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 June 30, 2000, which reported a net loss of $239,442 for the prior three months. As of May 6, 2008, the company's common stock (symbol "AKIS") was traded on the over-the-counter markets.

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2. American Motorcycle Corp. (f/k/a Scope Industries, Inc.) ("American Motorcycle") (CIK No. 1119327) is an Idaho corporation located in McKinney, Texas with a class of equity securities registered pursuant to Exchange Act Section 12(g). American Motorcycle is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB Amendment for the period ended September 30, 2000, which reported a net loss of $19,702 for the prior three months. As of May 6, 2008, the company's common stock (symbol "AMCY") was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

3. Austin's International, Inc. ("Austin's) (CIK No. 877406) is a void Delaware corporation located in Fort Lauderdale, Florida with a class of equity securities registered pursuant to Exchange Act Section 12(g). Austin's 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 December 31, 1997, which reported a net loss of $304,098 for the prior three months. On July 18, 1997, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida, and the case was closed on March 31, 1999. As of May 6, 2008, the company's common stock (symbol "AUST") was traded on the over-the-counter markets.

4. BusinessMall.Com, Inc. ("BusinessMall") (CIK No. 0806277) is a revoked Nevada corporation located in Clearwater, Florida with a class of equity securities registered pursuant to Exchange Act Section 12(g). The company 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 June 30, 2000, which reported a net loss of over $11 million for the prior three months. On August 11, 2000, an involuntary Chapter 11 petition was filed against the company in the U.S. Bankruptcy Court for the Middle District of Florida, converted to Chapter 7 on March 2, 2001, and was closed on January 16, 2008.

5. CCM Manufacturing Technologies, Inc. ("CCM") (CIK No. 1100381) is a void Delaware corporation located in Pflugerville, Texas with a class of equity securities registered pursuant to Exchange Act Section 12(g). CCM 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, 2000, which reported a net loss of $541,726 for the prior three months.

6. Emerging Markets Corp. ("Emerging Markets") (CIK No. 1100382) is a merged Delaware corporation located in Castleberry, Florida with a class of equity securities registered pursuant to Exchange Act Section 12(g). Emerging Markets is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed its Form 10-QSB for the period ended September 30, 2002, which reported a net loss of $47,088 for the prior nine months.

B. DELINQUENT PERIODIC FILINGS

7. 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 at their most recent address shown in their most recent filing with the Commission, or did not receive the letters because of their failure to keep an updated address on file with the Commission as required by Commission rules.

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

9. As a result of their failure to file required periodic filings, Respondents failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

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

A. Whether the allegations contained in Section II of this Order are true, and 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 to revoke the registrations of each class of securities registered pursuant to Exchange Act Section 12 of the Respondents identified in Section II.

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

If a Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against 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 each Respondent personally, by certified or registered mail, or by any other means permitted by the Commission's Rules of Practice.

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

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

By the Commission.

Nancy M. Morris
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings
American Kiosk Corp., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
American Kiosk Corp.					
	10-QSB	09/30/00	11/14/00	Not filed	90
	10-KSB	12/31/00	04/02/01	Not filed	85
	10-QSB	03/31/01	05/15/01	Not filed	84
	10-QSB	06/30/01	08/14/01	Not filed	81
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-KSB	12/31/01	04/01/02	Not filed	73
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2

Total Filings Delinquent 30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
American Motorcycle Corp. (f/k/a Scope Industries, Inc.)					
	10-KSB	12/31/00	04/02/01	Not filed	85
	10-QSB	03/31/01	05/15/01	Not filed	84
	10-QSB	06/30/01	08/14/01	Not filed	81
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-KSB	12/31/01	04/01/02	Not filed	73
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2
Total Filings Delinquent	29				
Austin's International, Inc.					
	10-KSB	03/31/98	06/29/98	Not filed	119
	10-QSB	06/30/98	08/14/98	Not filed	117
	10-QSB	09/30/98	11/16/98	Not filed	114

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Austin's International, Inc.					
	10-QSB	12/31/98	02/15/99	Not filed	111
	10-KSB	03/31/99	06/29/99	Not filed	107
	10-QSB	06/30/99	08/16/99	Not filed	105
	10-QSB	09/30/99	11/15/99	Not filed	102
	10-QSB	12/31/99	02/14/00	Not filed	99
	10-KSB	03/31/00	06/29/00	Not filed	95
	10-QSB	06/30/00	08/14/00	Not filed	93
	10-QSB	09/30/00	11/14/00	Not filed	90
	10-QSB	12/31/00	02/14/01	Not filed	87
	10-KSB	03/31/01	06/29/01	Not filed	83
	10-QSB	06/30/01	08/14/01	Not filed	81
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-QSB	12/31/01	02/14/02	Not filed	75
	10-KSB	03/31/02	07/01/02	Not filed	70
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-QSB	12/31/02	02/14/03	Not filed	63
	10-KSB	03/31/03	06/30/03	Not filed	59
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-QSB	12/31/03	02/17/04	Not filed	51
	10-KSB	03/31/04	06/29/04	Not filed	47
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-QSB	12/31/04	02/14/05	Not filed	39
	10-KSB	03/31/05	06/29/05	Not filed	35
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-QSB	12/31/05	02/14/06	Not filed	27
	10-KSB	03/31/06	06/29/06	Not filed	23
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-QSB	12/31/06	02/14/07	Not filed	15
	10-KSB	03/31/07	06/29/07	Not filed	11
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-QSB	12/31/07	02/14/08	Not filed	3
Total Filings Delinquent	40				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
BusinessMall.Com, Inc.					
	10-KSB	09/30/00	11/14/00	Not filed	90
	10-QSB	12/31/00	02/14/01	Not filed	87
	10-QSB	03/31/01	05/15/01	Not filed	84
	10-QSB	06/30/01	08/14/01	Not filed	81
	10-KSB	09/30/01	12/31/01	Not filed	77
	10-QSB	12/31/01	02/14/02	Not filed	75
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-KSB	09/30/02	12/30/02	Not filed	65
	10-QSB	12/31/02	02/14/03	Not filed	63
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-KSB	09/30/03	12/29/03	Not filed	53
	10-QSB	12/31/03	02/17/04	Not filed	51
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-KSB	09/30/04	12/29/04	Not filed	41
	10-QSB	12/31/04	02/14/05	Not filed	39
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-KSB	09/30/05	12/29/05	Not filed	29
	10-QSB	12/31/05	02/14/06	Not filed	27
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-KSB	09/30/06	12/29/06	Not filed	17
	10-QSB	12/31/06	02/14/07	Not filed	15
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-KSB	09/30/07	12/29/07	Not filed	5
	10-QSB	12/31/07	02/14/08	Not filed	3

Total Filings Delinquent 30

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
CCM Manufacturing Technologies, Inc.					
	10-KSB	12/31/00	04/02/01	Not filed	85
	10-QSB	03/31/01	05/15/01	Not filed	84
	10-QSB	06/30/01	08/14/01	Not filed	81
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-KSB	12/31/01	04/01/02	Not filed	73
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2
Total Filings Delinquent	29				
Emerging Markets Corp.					
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Emerging Markets Corp.					
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2

Total Filings Delinquent 21

U.S. SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.
May 8, 2008

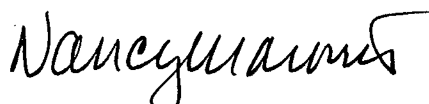
IN THE MATTER OF **American Motorcycle Corp. (f/k/a Scope Industries, Inc.)** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American Motorcycle Corp. (f/k/a Scope Industries, Inc.) because it has not filed any periodic reports since the period ended September 30, 2000.

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 American Motorcycle Corp. (f/k/a Scope Industries, Inc.) is suspended for the period from 9:30 a.m. EDT on May 8, 2008, through 11:59 p.m. EDT on May 21, 2008.

By the Commission.



Nancy M. Morris
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2735 / May 12, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13042

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

I.

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

II.

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

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III.

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

1. From at least July 2005 through at least January 2007, Baldo held himself out as the owner of Freedom Financial, an unregistered investment adviser in Andover, Massachusetts.

2. On January 24, 2008, Baldo pled guilty to one count of investment adviser fraud in violation of Title 15 of the United States Code, Sections 80b-6 and 80b-17; five counts of mail fraud in violation of Title 18 of the United States Code, Section 1341; and five counts of wire fraud in violation of Title 18 of the United States Code, Section 1343, before the United States District Court for the District of Massachusetts, in United States v. John A. Baldo, Criminal No. 07-10060-MLW.

3. The counts of the criminal indictment to which Baldo pled guilty alleged, inter alia, that being an investment adviser, Baldo did by use of means and instrumentalities of interstate commerce, willfully employ devices, schemes, and artifices to defraud; did willfully engage in transactions, practices, and courses of business which operated as a fraud or deceit upon clients and prospective clients; did willfully engage in acts, practices, and courses of business which were fraudulent, deceptive, and manipulative; did falsely represent that he would serve as an investment adviser exercising fiduciary responsibility with respect to client funds entrusted to him and thereafter misapply and misappropriate client funds; and did devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises concerning material matters, by use of the United States mails and means of interstate commerce.

IV.

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

Accordingly, it is hereby ORDERED:

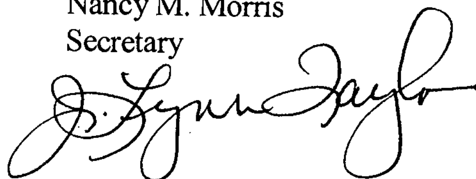
Pursuant to Section 203(f) of the Advisers Act, that Respondent Baldo be, and hereby is barred from association with any investment adviser;

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

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

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release No. IC-28266; File No. S7-37-04]

RIN 3235-AJ31

Definition of Eligible Portfolio Company under the Investment Company Act of 1940

AGENCY: Securities and Exchange Commission (the "Commission").

ACTION: Final rule.

SUMMARY: The Commission is adopting an amendment to a rule under the Investment Company Act of 1940 to more closely align the definition of eligible portfolio company, and the investment activities of business development companies ("BDCs"), with the purpose that Congress intended. The amendment expands the definition of eligible portfolio company to include certain companies that list their securities on a national securities exchange.

EFFECTIVE DATE: [insert date 60 days after publication of the Federal Register].

FOR FURTHER INFORMATION CONTACT: Rochelle Kauffman Plesset, Senior Counsel, Office of Chief Counsel, Division of Investment Management, (202) 551-6840, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5030.

SUPPLEMENTARY INFORMATION: The Commission today is adopting amendments to Rule 2a-46 [17 CFR 270.2a-46] under the Investment Company Act of 1940 [15 U.S.C. 80a].[1]

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[1] The amendments were proposed in Definition of Eligible Portfolio Company under the Investment Company Act of 1940, Investment Company Act Release No. 27539 (Oct. 25, 2006) [71 FR 64093 (Oct. 31, 2006)] ("Reproposing Release").

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I. EXECUTIVE SUMMARY

A BDC is a closed-end investment company that Congress established for the purpose of making capital more readily available to certain types of companies. Under the Investment Company Act ("Investment Company Act" or "Act"), a BDC must invest at least 70 percent of its assets in "eligible portfolio company" securities and certain other securities. Rule 2a-46 defines the term eligible portfolio company to include any company whose securities are not listed on a national securities exchange ("Exchange").[2] When we adopted Rule 2a-46 in 2006, we also requested comment on whether to further expand the definition to include Exchange-listed companies that have (i) less than $75 million in public float or (ii) less than $150 million in market capitalization or less than $250 million in market capitalization.[3] Today we are amending Rule 2a-46 to expand the definition of eligible portfolio company to include Exchange-listed companies that have less than $250 million in market capitalization.

[2] Definition of Eligible Portfolio Company under the Investment Company Act of 1940, Investment Company Act Release No. 27538 (Oct. 25, 2006) [71 FR 64086 (Oct. 31, 2006)] ("Adopting Release").

[3] See Reproposing Release, supra note 1.

II. BACKGROUND

Congress established BDCs as a new category of closed-end investment companies when it enacted the Small Business Investment Incentive Act ("SBIIA") in 1980.[4] Congress intended that BDCs would make capital more readily available to certain types of companies.[5] To accomplish this purpose, the Investment Company Act generally prohibits a BDC from making any investment unless, at the time of the investment, at least 70 percent of its total assets ("70% basket") are invested in securities of certain specific types of companies, including "eligible portfolio companies."[6]

The Investment Company Act defines eligible portfolio company to include any domestic operating company[7] that does not have a class of securities with respect to which a member of an Exchange, broker, or dealer may extend margin credit pursuant to rules promulgated by the Federal Reserve Board under Section 7 of the Securities Exchange Act of 1934 ("Exchange

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[4] Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2274 (1980) (codified at scattered sections of the United States Code).

[5] See generally H.R. Rep. No. 1341, 96th Cong., 2d Sess. 21 (1980) ("House Report").

[6] See Section 2(a)(46) of the Investment Company Act (statutory definition of eligible portfolio company) [15 U.S.C. 80a-2(a)(46)]. See also Section 55(a) of the Investment Company Act (regulating the activities of BDCs) [15 U.S.C. 80a-54(a)]. Among other things, the 70% basket may include securities of eligible portfolio companies purchased in transactions not involving any public offering, securities of eligible portfolio companies already controlled by the BDC without regard to the nature of the offering, and securities of certain financially distressed companies that do not meet the definition of eligible portfolio company and that are purchased in transactions not involving any public offering. See Section 55(a).

[7] Section 2(a)(46) of the Investment Company Act defines eligible portfolio company to include any company that satisfies the criteria set forth in each of Section 2(a)(46)(A) and Section 2(a)(46)(B) in addition to one of the three criteria set forth in Section 2(a)(46)(C). Section 2(a)(46)(A) defines eligible portfolio company to include any company organized under the laws of, and with its principal place of business in, one or more states of the United States. Section 2(a)(46)(B) of the Investment Company Act generally excludes from the definition of eligible portfolio company any company that meets the definition of investment company under Section 3 of the Investment Company Act, or that is excluded from the definition of investment company by Section 3(c) of the Act, but includes as an eligible portfolio company any small BDC that is licensed by the Small Business Administration and that is a wholly-owned subsidiary of a BDC.

Act"):[8] At the time that Section 2(a)(46) was adopted, Congress generally perceived the Federal Reserve Board's definition of "margin security" to be a "rational and objective test for determining whether an issuer has ready access to the securities markets."[9] Nevertheless, Congress recognized that the definition of eligible portfolio company as adopted, and, in particular, the definition's reliance on the Federal Reserve Board's margin rules, might need to be adjusted in the future.[10] Accordingly, Congress specifically gave the Commission rulemaking authority under Section 2(a)(46)(C)(iv) of the Investment Company Act to expand the definition of eligible portfolio company.[11]

Since 1980, the Federal Reserve Board has periodically amended its definition of margin security to increase the types of securities that would fall within that definition under its rules. In 1998, for reasons unrelated to small business capital formation, the Federal Reserve Board

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[8] Section 2(a)(46)(C)(i). See also Section 2(a)(46)(C)(ii) (defines eligible portfolio company to include companies that are controlled by the investing BDC or certain of its affiliates); Section 2(a)(46)(C)(iii) (defines eligible portfolio company to include certain very small companies).

[9] House Report at 31. The House Report also indicated that Section 2(a)(46)(C)(i) was "intended to cover companies which are unable to borrow money through conventional sources or which do not have ready access to the public capital markets." Id. at 30. In 1980, the Federal Reserve Board periodically published lists of each company that had a class of securities that was marginable under its rules. Companies that were not listed as having a class of marginable securities qualified as eligible portfolio companies.

[10] See House Report at 31.

[11] Under Section 2(a)(46)(C)(iv), the term eligible portfolio company includes any issuer that, in addition to meeting the requirements of Sections 2(a)(46)(A) and (B), "meets such other criteria as the Commission may, by rule, establish as consistent with the public interest, the protection of investors, and the purposes fairly intended by the policy and provisions of [the Act]." See House Report at 23 (". . . the Commission is given rulemaking authority to expand the class of eligible portfolio companies, following certain specific standards."). The legislative history of the SBIIA also makes clear that the intent of this provision "is to enable the Commission through the administrative process to broaden, if appropriate, the category of eligible portfolio company." Congress also noted its expectation that "the Commission would institute [rulemaking] proceedings to consider whether the definition of eligible portfolio company can be expanded, consistent with the purpose of the legislation, to increase the flow of capital to small, developing businesses or financially troubled businesses." See House Report at 31. In providing the Commission with rulemaking authority, Congress noted "[a]mong the objective factors which the Commission may consider in [rulemaking] proceedings are the size of such companies, the extent of their public ownership, and their operating history as going concerns and public companies." Id.

amended its definition of margin security to include all equity securities that trade on an Exchange or are listed on the NASDAQ Stock Market, and most debt securities. This amendment had the result of significantly reducing the companies that qualify as eligible portfolio companies under Section 2(a)(46) of the Investment Company Act.[12]

In 2006, we adopted two rules, Rules 2a-46 and 55a-1 under the Act, to address the impact of the Federal Reserve Board's amendment to its definition of margin security on the definition of eligible portfolio company.[13] Rule 2a-46 defines eligible portfolio company to include all domestic operating companies[14] whose securities are not listed on an Exchange.[15] Rule 55a-1 conditionally permits a BDC to continue to invest in any company that qualified as an eligible portfolio company under Rule 2a-46 when the BDC made its initial investment(s) in it, but that subsequently does not meet the definition of eligible portfolio company because it no longer meets the requirements of that rule.[16]

When we adopted Rules 2a-46 and 55a-1, we also proposed to amend Rule 2a-46 to expand the definition of eligible portfolio company to include certain public domestic operating companies that list their securities on an Exchange.[17] This proposal was designed to address

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[12] Securities Credit Transactions; Borrowing By Brokers and Dealers, 63 FR 2805 (1998) (adopting final rule amendment). As a result of these amendments, companies that would have been considered eligible portfolio companies in 1980 may no longer meet that definition. See Definition of Eligible Portfolio Company under the Investment Company Act of 1940, Investment Company Act Release No. 26647 (Nov. 1, 2004) [69 FR 64815 (Nov. 8, 2004)] ("2004 Proposing Release") at nn.19-24.

[13] See Adopting Release, supra note 2.

[14] Rule 2a-46 incorporates the provisions of Sections 2(a)(46)(A) and (B). See supra note 7.

[15] 17 CFR 270.2a-46.

[16] 17 CFR 270.55a-1.

[17] See Reproposing Release, supra note 1.

concerns that part of the rule (proposed in 2004, but not adopted[18]) would be unworkable and too narrow.[19]

In the Reproposing Release, we requested comment on alternatives that would expand the definition of eligible portfolio company to include domestic operating companies with securities listed on an Exchange. We asked whether we should expand the definition to include any such company with (i) a public float of less than $75 million or (ii) market capitalization of less than $150 million or market capitalization of less than $250 million.[20] We explained that the $75 million public float standard incorporates the size-based standard used in Form S-3 and Rule 12b-2 which the Commission has used to delineate between small, unseasoned companies, and larger seasoned companies whose securities are listed on an Exchange.[21] We explained that the market capitalization alternatives are similar to definitions of "micro-cap" company used generally by market participants.[22] We also noted that some who had commented on Rule 2a-46 when it was initially proposed had stated that companies with market capitalizations in this range generally have limited (if any) analyst coverage, have lower trading volume and are owned by fewer institutional investors than companies with higher market capitalizations.[23] These commenters concluded that such companies have difficulty accessing the public capital

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[18] See 2004 Proposing Release, supra note 12 (proposed a definition of eligible portfolio company that would have included certain financially-troubled Exchange-listed companies).

[19] For example, some commenters had stated that the proposed rule would not include some small companies that list their securities on an Exchange but that nevertheless may have difficulties accessing conventional sources of capital and raising additional capital on the public markets. See Reproposing Release, supra note 1 at n.12 and accompanying text.

[20] See Reproposing Release, supra note 1.

[21] See, e.g., Form S-3 [17 CFR 239.13]; Rule 12b-2 under the Exchange Act [17 CFR 240.12b-2].

[22] See Reproposing Release, supra note 1 at nn.38-40 and accompanying text.

[23] Id. at nn.34-43 and accompanying text.

markets.[24]

We received letters from fifteen commenters (including eight BDCs and one legal counsel to BDCs).[25] Fourteen commenters favored the $250 million market capitalization standard.[26] Several commenters specifically noted that companies meeting such a standard "often have difficulty accessing traditional capital sources."[27] Commenters also stated that the $250 million market capitalization standard is similar to what most market participants use to identify micro-cap companies, and that these companies have less analyst coverage, institutional ownership and lower trading volume.[28]

In addition, in support of the $250 million market capitalization standard, one commenter provided information about public companies that have received financing over the past several

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[24] E.g., comments of Williams & Jensen (Feb. 17, 2006); comments of Representatives Sue Kelly and Nydia Velázquez (Jan. 5, 2005) (commenting on the 2004 Proposing Release).

[25] The eight BDCs were Allied Capital Corp., American Capital Strategies Ltd., Apollo Investment Corp., Ares Capital Corp., Gladstone Management, Harris & Harris Group, Inc., MCG Capital Corp. and NGP Capital Resources Company. We also received comments from two trade associations (The Financial Roundtable and U.S. Chamber of Commerce), one legal counsel to BDCs (Williams & Jensen), one investment banker (Ferghana Partners Inc.), one investment adviser (ThinkEquity Partners LLC) and two individuals. These letters are available for inspection in the Commission's Public Reference Room at 100 F Street, NE, Washington, DC 20549 (File No. S7-37-04), and may be viewed at www.sec.gov/rules/proposed/s73704.shtml#27539.

[26] One commenter did not address this issue. Comments of Kathryn Ellis (Nov. 26, 2006). In addition, commenters generally disagreed with the adoption of a public float standard. See infra Section III.B.

Two commenters also suggested that we include a provision that would in the future adjust the standard that we adopt today to reflect inflation. Comments of American Capital Strategies Ltd. (Dec. 24, 2006); comments of Apollo Investment Corp. (Jan. 2, 2007). We did not propose such a provision and therefore have not included it in Rule 2a-46.

[27] See, e.g., comments of Apollo Investment Corp. (Jan. 2, 2007); comments of Gladstone Management (Nov. 2, 2006). See also comments of Allied Capital Management (Dec. 21, 2006) ("Public companies with a market capitalization of up to $250 million . . . often have trouble accessing the traditional capital markets despite the fact that their shares are listed on an exchange.").

[28] See, e.g., comments of Gladstone Management (Nov. 2, 2006); comments of American Capital Strategies Ltd. (Dec. 24, 2006); comments of Apollo Investment Corp. (Jan. 2, 2007).

years and the types of financing that they have received.[29] Specifically, the commenter submitted information regarding public companies that were able to access the public markets, either by engaging in initial public offerings or by issuing follow-on equity and debt financing.[30] The commenter also provided information regarding the public companies that had obtained capital through private investment transactions.[31] In addition, the commenter provided information regarding the average institutional leveraged loan size and average high yield issuance size.[32] Based on this information, the commenter concluded that companies with less than $250 million market capitalization are having difficulty accessing traditional capital sources.[33] Accordingly, the commenter urged the Commission to adopt the $250 million market capitalization standard.[34]

III. DISCUSSION

A. Rule 2a-46(b)

After carefully considering the comments received in response to both the Reproposing Release and the 2004 Proposing Release, we are amending Rule 2a-46 to include new paragraph (b).[35] Rule 2a-46(b) expands the definition of eligible portfolio company to include any domestic operating company that has a class of securities listed on an Exchange and that has a

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[29] Comments of Williams & Jensen (Apr. 19, 2007, May 30, 2007). This commenter also provided information regarding the investment practices of BDCs. The commenter, focusing on five of the largest BDCs, provided a description of each BDC's investment focus, the number of companies in each BDC's portfolio, and the number of individual investments each BDC made that was greater than $100 million. The commenter also provided the average revenue of the portfolio companies that are held by four BDCs. Comments of Williams & Jensen (May 30, 2007).

[30] Comments of Williams & Jensen (Apr. 19, 2007).

[31] Comments of Williams & Jensen (May 30, 2007).

[32] Id.

[33] Comments of Williams & Jensen (Apr. 19, 2007, May 30, 2007).

[34] Comments of Williams & Jensen (Feb. 17, 2006, Apr. 19, 2007, May 30, 2007).

[35] We are also designating the current text of Rule 2a-46 as paragraph (a) of the rule.

market capitalization[36] of less than $250 million (calculated using the price at which the company's common equity is last sold, or the average of the bid and asked prices of the company's common equity, in the principal market for such common equity) on any day in the 60-day period immediately before the BDC's acquisition of its securities.[37] We believe that the new rule is consistent with the public interest, the protection of investors and the purposes fairly intended by the policy and provisions of the Investment Company Act.

B. Use of Standard Based on Market Capitalization

As discussed above, one of the alternatives that we proposed used a public float standard, and the options proposed in the other alternative used a market capitalization standard.[38] We have decided to adopt a market capitalization standard for the reasons discussed below. For purposes of Rule 2a-46(b), market capitalization is the aggregate value of a company's outstanding voting and non-voting equity securities.[39] In contrast, a company's public float is a company's market capitalization minus the aggregate market value of common equity held by the company's affiliates.[40]

We requested comment on whether it would be burdensome for a BDC to determine a company's eligible portfolio company status if the standard is based on public float rather than

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[36] A company's market capitalization for purposes of the rule is the aggregate market value of the company's outstanding voting and non-voting common equity securities. See, e.g., Reproposing Release, supra note 1 at n.16.

[37] Rule 2a-46(b). This method of calculating market capitalization was used in both of the proposed market capitalization alternatives in the reproposal. See Reproposing Release, supra note 1 at n.16. We received no comment on this method, and we are adopting it as proposed.

We note that the method of calculating market capitalization is stated solely for purposes of determining a company's qualification as an eligible portfolio company. A BDC is required to value its interests in portfolio companies for purposes of calculating the BDC's net asset value consistent with Section 2(a)(41) of the Investment Company Act.

[38] See supra note 20 and accompanying text.

[39] See supra note 36.

[40] See, e.g., Reproposing Release, supra note 1 at n.16.

market capitalization.[41] Adopting a public float standard in Rule 2a-46(b) would have imposed burdens that are not present in other Commission rules that incorporate such a standard. These other Commission rules typically are rules in which a company is responsible for calculating its own public float to determine its eligibility in connection with certain registration or reporting requirements.[42] Section 55 of the Investment Company Act, however, effectively requires a BDC to determine whether a target company qualifies as an eligible portfolio company before investing in it as part of the BDC's 70% basket.[43] Consequently it is the BDC, rather than the target company, that must determine whether a target company meets the definition of eligible portfolio company under Rule 2a-46(b).

Accordingly, although several commenters stated that both public float and market capitalization are good indicators of whether a company is small and unseasoned, all commenters who addressed this issue preferred a market capitalization standard.[44] Commenters stated that information about a company's market capitalization is readily available through third-party sources, while information about a company's public float is not.[45] Commenters generally explained that, in order for a BDC to calculate a company's public float, as proposed, it would have to determine the number of shares owned by the company's affiliates, which is information not readily available on a current basis through third-party sources.[46] The BDC therefore would

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[41] Id. at text following n.51.

[42] See supra note 21.

[43] Section 55(a) of the Investment Company Act.

[44] See, e.g., comments of American Capital Strategies Ltd. (Dec. 24, 2006); comments of Gladstone Management (Nov. 2, 2006); comments of Apollo Investment Corp. (Jan. 3, 2007).

[45] See, e.g., id.

[46] See, e.g., comments of American Capital Strategies Ltd. (Dec. 24, 2006); comments of Ares Capital Corp. (Jan. 2, 2007). Although Exchange Act reporting companies are required to disclose their public float on the cover of Form 10-K [17 CFR 249.310], the form requires a filer to disclose its public float as of the last business day of the filer's most recently completed second fiscal quarter. Because Rule 2a-

have to communicate with possible target companies to determine whether they would qualify under the definition of eligible portfolio company before making any investment decision.

Commenters argued that requiring BDCs to determine a company's public float within the requirements of the proposed rule would place an unnecessary burden on BDCs and thereby impede appropriate investment activity.[47] In contrast, under the adopted market capitalization standard, a BDC may use information obtained from third parties to assist it in determining whether a possible investment target is an eligible portfolio company. In this regard, we note that under the adopted market capitalization standard, a BDC may use information obtained from independent third parties to assist it in determining whether a possible target company is an eligible portfolio company without communicating with the target company directly. In light of these burdens and the general public availability of information regarding a company's market capitalization, we agree with commenters that a market capitalization standard is appropriate for purposes of Rule 2a-46.

C. Dollar Level of Standard

We are adopting new Rule 2a-46(b) to define eligible portfolio company to include any company that is listed on an Exchange with market capitalization of less than $250 million. The new standard, consistent with legislative intent, broadens the definition of eligible portfolio company.[48] We estimate that, based on January 31, 2008 data, 6,062 companies, representing 61.3% (6,062/9,883) of all public domestic operating companies, qualify as eligible portfolio

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46(b) defines an eligible portfolio company to be a company that meets the requisite size standard on any day in the 60-day period immediately before the BDC's acquisition of the company's securities, the public float information on a company's Form 10-K always would have been outdated for purposes of the proposed public float alternative.

[47] See, e.g., comments of American Capital Strategies Ltd. (Dec. 24, 2006).

[48] Supra note 11. As discussed above, the $250 million market capitalization standard is a level similar to what most market participants generally view to be "micro-cap" companies, a term used to identify small public companies. See Reproposing Release, supra note 1 at nn.38-40 and accompanying text.

companies under Rule 2a-46(a). We further estimate that 1,649 Exchange-listed companies qualify as eligible portfolio companies under Rule 2a-46(b).[49] Accordingly, we estimate that 7,711 companies, representing 78% (7,711/9,883) of all public domestic operating companies qualify as eligible portfolio companies under Rule 2a-46 as amended.

In the Reproposing Release, we noted a general concern raised by commenters in response to the 2004 Proposing Release[50] that companies with market capitalization up to $300 million are followed by fewer analysts, have lower institutional ownership and have lower trading volume than companies at higher levels of market capitalization.[51] These commenters concluded that companies having market capitalization below that amount may have more difficulty accessing public capital. We generally agreed that there may be some correlation between the size of a company, based on these factors, and the ability of a company to access public capital.[52] We specifically requested comment on whether any of the alternative standards would better align the definition of eligible portfolio company with the purpose that Congress intended when it adopted the SBIIA.

Commenters universally favored the $250 million market capitalization standard. Commenters argued that companies with market capitalization of less than $250 million often have difficulty accessing traditional forms of capital and that adoption of the standard thus would

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[49] We note that our estimates reflect only companies with less than $250 million market capitalization whose securities are listed on Nasdaq, the New York Stock Exchange ("NYSE") and the American Stock Exchange ("Amex").

[50] Supra note 12.

[51] Comments of Representatives Sue Kelly and Nydia Velázquez at n.12 (Jan. 5, 2005); comments of Williams & Jensen (Feb. 17, 2006). These commenters also referred to analysis prepared by our Office of Economic Affairs ("OEA") in connection with Securities Offering Reform. See memorandum dated December 3, 2004 ("OEA Memorandum") attached to comments of Williams & Jensen (Feb. 17, 2006), infra note 58.

[52] See Reproposing Release, supra note 1 at text following n.36.

be consistent with Congressional intent.[53] One commenter also provided information regarding the limited number of follow-on offerings of equity and debt securities by Exchange-listed companies and stated that this information "clearly demonstrates that the vast majority of companies with market capitalizations of $250 million or less . . . have significantly limited access" to the public equity and debt markets.[54] This commenter also argued that market participants that provide public capital are not servicing the needs of these companies.[55]

Most commenters responding to the alternatives proposed in the Reproposing Release also argued that companies with less than $250 million market capitalization have difficulty accessing public capital because generally these companies are followed by fewer analysts, have lower institutional ownership and lower trading volume than larger companies.[56] One commenter specifically noted that companies with less than $250 million market capitalization "have spotty analyst coverage at best, . . . few or no institutional investors, and . . . thin trading volumes" and that "these are characteristics of companies that would not in today's market have ready access to public capital."[57] This commenter referred to information developed by our Office of Economic Analysis ("OEA") about those factors that were prepared for purposes other than this rulemaking.[58]

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[53] E.g., comments of Allied Capital Management (Dec. 21, 2006); comments of Apollo Investment Corp. (Jan. 2, 2007).

[54] See comments of Williams & Jensen (Apr. 19, 2007).

[55] Comments of Williams & Jensen (May 30, 2007).

[56] See, e.g., comments of Gladstone Management (Nov. 2, 2006); comments of Apollo Investment Corp. (Jan. 2, 2007); comments of Ares Capital Corp. (Jan. 2, 2007).

[57] Comments of Williams & Jensen (Apr. 19, 2007).

[58] The commenter had attached to its comment letter statistics that were prepared in connection with the Final Report of the Advisory Committee on Smaller Public Companies. See Background Statistics: Market Capitalization & Revenue of Public Companies, August 1, 2005, at Table 7 (Analyst Coverage and Institutional Holdings by Market Capitalization), attached to comments of Williams & Jensen (Apr. 19, 2007). This commenter had attached to a prior comment letter an earlier memorandum prepared by

As we stated in the Reproposing Release, we believe that there is some correlation between analyst coverage, institutional ownership and trading volume and the ability of a company to access public capital.[59] Based on the comments we received, and our review of those factors with respect to companies with less than $250 million market capitalization, we believe that a distinction can be made with respect to a company's ability to access public capital at $250 million market capitalization. OEA has considered this information and determined that fewer than 50% of companies with market capitalizations of less than $250 million are followed by more than two analysts and that these companies generally have lower institutional ownership and are more thinly traded than larger companies.

Moreover, in the Reproposing Release we requested comment on whether adoption of a $250 million market capitalization standard would result in BDCs focusing their investment activities in companies at the higher end of the standard to the detriment of smaller companies.[60] Commenters responded that adoption of a $250 million market capitalization standard would not have this result, with some arguing further that larger companies do not necessarily present a more attractive investment in comparison to smaller companies.[61] Commenters also argued that historically, BDCs have not invested in larger non-public companies at the expense of smaller

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OEA that sets forth data regarding analyst coverage, institutional ownership and average daily trading for publicly traded companies between 1997 and 2003. See OEA Memorandum dated December 3, 2004 attached to comments of Williams & Jensen (Feb. 17, 2006) (exhibit entitled "SEC Data Demonstrates Lack of Market Following for Companies with Market Capitalizations of $300 million or Less"). OEA prepared this memorandum in connection with the Securities Offering Reform rulemaking. See Securities Offering Reform, Securities Act Release No. 8591 (July 19, 2005) [70 FR 44722 (Aug. 3, 2005)].

[59] See Reproposing Release, supra note 1 at n.37 and accompanying text.

[60] See id. at n.47 and accompanying text. We requested comment on this issue in response to a comment made by one commenter to the 2004 Proposing Release. This commenter raised the concern that BDCs might not provide financing for smaller Exchange-listed companies if the Commission adopts a standard higher than $100 million market capitalization. See comments of Capital Southwest Corp. (Dec. 28, 2004).

[61] See, e.g., comments of MCG Capital Corp. (Dec. 27, 2006); comments of American Capital Strategies Ltd. (Dec. 24, 2006).

non-public companies, and that there is no reason to suggest that this would occur in the context of public companies.[62] In light of these comments, we are persuaded that our adoption of the $250 million market capitalization standard is not likely to result in BDCs focusing their investment activity on larger companies to the detriment of smaller companies.

Accordingly, we conclude that adoption of the $250 million market capitalization standard is an appropriate standard for purposes of the amended rule and we believe that it is consistent with the public interest, the protection of investors and the purposes fairly intended by the policies and provisions of the Investment Company Act.[63]

IV. COST-BENEFIT ANALYSIS

We are sensitive to the costs and benefits that result from our rules. In the Reproposing Release we requested public comment and specific data regarding the costs and benefits of reproposed Rule 2a-46(b). As discussed below, we received one comment regarding the Commission's estimate of the companies that would benefit from the reproposed rule.[64]

A. Benefits

Rule 2a-46(b) more closely aligns the definition of eligible portfolio company, and the investment activities of BDCs, with the purpose that Congress intended. Specifically, Rule 2a-

[62] See comments of Harris & Harris Group (Jan. 3, 2007); comments of ThinkEquity Partners LLC (Dec. 6, 2006).

[63] We are persuaded that our adoption of the $250 million market capitalization standard is not inconsistent with our other rules that distinguish between smaller and larger companies because of the different purposes of these rules. For example, Form S-3 incorporates a $75 million public float standard (in addition to other factors) to identify those companies about which sufficient information is publicly available to allow them to take advantage of our integrated disclosure system. See Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, Securities Act Release No. 8878 (Dec. 19, 2007) [72 FR 73534 (Dec. 27, 2007)]; Simplification of Registration for Primary Securities Offerings, Securities Act Release No. 6943 (July 16, 1992) [57 FR 32461 (July 22, 1992)]. In contrast, Rule 2a-46(b) incorporates a $250 million market capitalization standard to identify companies that are having difficulty accessing public capital and may benefit from greater access to BDC financing.

[64] Comments of Williams & Jensen (Apr. 19, 2007).

46(b) expands the definition of eligible portfolio company to include any domestic operating company with a class of securities listed on an Exchange that has a market capitalization of less than $250 million.

Many public companies that are included as eligible portfolio companies under Rule 2a-46(b) may need capital for continued development and growth, but, notwithstanding that their securities are listed on an Exchange, may find it difficult to raise capital through additional offerings or borrow money through other sources. By amending the definition of eligible portfolio company to include these companies, such companies will benefit because of the expanded sources of capital from which the companies may seek to obtain financing. Increased competition among capital providers will benefit shareholders of companies seeking capital.

Rule 2a-46(b) also benefits BDCs by expanding the universe of investments that BDCs may include as part of their 70% basket. This will allow BDCs to make additional investments to companies that qualify as eligible portfolio companies under the rule, which in turn could benefit BDC shareholders. Rule 2a-46(b) also benefits BDCs by addressing the uncertainty caused by changes in the margin rules in the operation of BDCs.

In the Reproposing Release, OEA estimated, using June 30, 2006 data, that there were a total of 1,562 domestic operating companies whose securities were listed on Nasdaq, the NYSE and Amex that have a market capitalization of less than $250 million. At that time OEA estimated that 6,041 domestic operating companies that qualified as eligible portfolio companies under Rule 2a-46 as initially adopted. Accordingly, OEA calculated that 7,603 companies, representing 77.2% (7,603/9,845[65]) of public domestic operating companies, would qualify as eligible portfolio companies if the $250 million market capitalization standard was adopted.

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[65] See infra note 69.

Using January 31, 2008 data, OEA estimates that there were a total of 1,649 domestic operating companies whose securities were listed on Nasdaq, the NYSE and the Amex that have a market capitalization of less than $250 million. OEA further estimates that approximately 6,062 companies qualify as eligible portfolio companies under Rule 2a-46, as initially adopted (now Rule 2a-46(a)). Accordingly, OEA calculates that 7,711 companies, representing 78% percent (7,711/9,883[66]) of public domestic operating companies, qualify as eligible portfolio companies under amended Rule 2a-46.

OEA reached its estimates by first calculating the number of companies whose securities were listed on Nasdaq, the NYSE and the Amex. OEA then deducted from this estimate all foreign companies, investment companies and companies that are excluded from the definition of investment company by Section 3(c) of the Investment Company Act (because both Section 2(a)(46) of the Investment Company Act and Rule 2a-46 exclude these types of companies from the definition of eligible portfolio company), and corrected for cases where individual companies had multiple classes of securities listed. OEA then determined the number of companies that had a market capitalization of less than $250 million.[67] Using the same methodology, OEA determined the number of companies that qualify as eligible portfolio companies under Rule 2a-46(a).[68] OEA then calculated the total number of eligible portfolio companies and the percentage of the total public domestic operating companies that would qualify as eligible portfolio companies under amended Rule 2a-46.[69]

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[66] Id.

[67] See supra note 49.

[68] See Adopting Release, supra note 2 at text preceding n.31.

[69] OEA estimated the total number of public domestic operating companies by calculating the number of companies whose securities were listed on Nasdaq, the NYSE and the Amex, in addition to those companies whose securities were trading through the over-the-counter bulletin board and on Pink Sheets LLC, correcting these figures for cases where individual companies had multiple classes of securities

As noted above, one commenter stated that the Reproposing Release overstated the percentage of companies that would benefit under Rule 2a-46, as amended by the reproposed rule.[70] The commenter noted, however, that regardless of whether or not the Commission overstated the percentage of companies, "the percentage in and of itself adds little analytical weight in describing which public companies need access to capital . . . ." The commenter concluded that "we believe that there is no precise percentage of public companies that can or should be targeted . . . ."[71] While the commenter agreed that foreign companies, investment companies and most companies that are excluded from the definition of investment company by Section 3(c) of the Investment Company Act are excluded from qualifying as eligible portfolio companies under the Investment Company Act, the commenter suggested that these companies should still be included as part of the total number of public companies. Thus, the commenter suggested that the benefits of the rule should be calculated by comparing the total number of companies that would be eligible portfolio companies under the rule to the total number of public companies.

As discussed previously, Section 2(a)(46) excludes from the definition of eligible portfolio companies foreign companies, investment companies and most companies that are excluded from the definition of investment company by Section 3(c). Therefore, in determining the benefits of Rule 2a-46 as amended for purposes of this analysis, we believe that it is appropriate to compare the number of companies that meet the definition of eligible portfolio

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listed, and then removing from these figures foreign companies, investment companies, and companies that are excluded from the definition of investment company by Section 3(c).

[70] Williams & Jensen (Apr. 19, 2007).

[71] Id.

company under the rule with the number of companies that are not statutorily precluded from being treated as eligible portfolio companies.

This commenter also argued that public companies listed on the OTC Bulletin Board with market capitalizations of between $0 and $25 million should be excluded from OEA's calculations.[72] The commenter explained that although these companies qualify as eligible portfolio companies, "they are not likely to seek or be seriously considered appropriate investments for a BDC."[73] OEA's calculations are intended to show the number of all companies that would fall within the definition of eligible portfolio company under Rule 2a-46(b), however, regardless of whether any particular company or size of company would be seriously considered by a BDC for investment purposes. Accordingly, we have not recalculated the numbers and percentages stated above to reflect the commenter's view.

B. Costs

We received no comments on the potential costs of our adoption of the new standard. Although Rule 2a-46(b) might impose certain administrative compliance costs on BDCs, it is our understanding that these costs are similar to the types of compliance costs that a BDC currently undertakes when it invests in a company. Specifically, a BDC will need to determine, prior to investing in a company, if the company has a class of securities listed on an Exchange and whether that company's market capitalization was less than $250 million as of a date within 60 days prior to the date of the BDC's investment. Costs in obtaining this information, however, will be minimal because information about the market capitalization of companies is readily available from third-party sources. Finally, we anticipate that Rule 2a-46(b) will impose only minimal, if any, costs on portfolio companies.

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[72] Id.

[73] Id.

V. CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 2(c) of the Investment Company Act mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.[74] In the Reproposing Release, we requested comment on our analysis of the impact of Rule 2a-46(b) on efficiency, competition and capital formation. As discussed in Section II of this Release, commenters generally supported expanding the definition to include Exchange-listed companies with less than $250 million market capitalization because of their belief that these companies often have difficulty accessing capital.[75] Some commenters also argued that expanding the rule to include Exchange-listed companies with less than $250 million market capitalization would allow BDCs to compete with other capital providers, and that such competition would benefit shareholders of companies seeking capital.[76] We have decided to amend Rule 2a-46 to expand the definition of eligible portfolio company to include Exchange-listed companies that have a market capitalization of less than $250 million.

Rule 2a-46(b) is designed to promote efficiency, competition and capital formation. Efficiency will be enhanced because Rule 2a-46(b) expands the definition of eligible portfolio company so as to allow BDCs to compete with other entities that provide capital to certain companies. Competition for financing may result in lower cost capital for current funding needs or may replace higher cost capital previously issued, which could potentially allow companies

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[74] 15 U.S.C. 80a-2(c).

[75] See supra note 27 and accompanying text.

[76] See, e.g., comments of Williams & Jensen (Apr. 19, 2007); comments of Apollo Investment Corp. (Jan. 2, 2007).

desiring capital to take on additional or different investment projects. Thus, Rule 2a-46(b) will promote a more efficient allocation of capital. Rule 2a-46(b) in our view also will promote efficiency by providing a workable test for determining whether a company is an eligible portfolio company.

We also believe Rule 2a-46(b) will promote competition. Rule 2a-46(b) allows BDCs more easily to compete with other capital providers, and such competition benefits shareholders of BDCs, companies receiving the capital and shareholders of companies receiving capital. The market for private equity and debt investments can be highly competitive. Since their establishment, BDCs have competed with various sources of capital, including private equity funds (including venture capital funds), hedge funds, investment banks and other BDCs, to provide financing to certain companies. We believe that Rule 2a-46(b) will encourage such competition. Such competition also benefits the qualifying companies in need of capital and their shareholders because such companies can more readily consider BDCs as a source of financing. To the extent that BDCs provide either additional or less expensive capital to these companies, those companies may be more competitive in the marketplace.

Finally, we believe that Rule 2a-46(b) may promote capital formation. BDC investments represent additional capital to companies. By expanding the definition of eligible portfolio company, Rule 2a-46(b) may result in additional capital investments by BDCs. We estimate that a total of 1,649 public domestic operating companies would qualify as eligible portfolio companies under Rule 2a-46(b). The rule provides greater access to public capital by increasing these companies' access to BDC financing.

VI. PAPERWORK REDUCTION ACT

The Commission has determined that Rule 2a-46 as amended does not involve a

collection of information pursuant to the provisions of the Paperwork Reduction Act [44 U.S.C. 3501 et seq.].

VII. FINAL REGULATORY FLEXIBILITY ANALYSIS

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 604. It relates to Rule 2a-46(b) under the Investment Company Act. An Initial Regulatory Flexibility Analysis ("IRFA") was prepared in accordance with 5 U.S.C. 603 and was published in the Reproposing Release.[77]

A. Reasons for and Objectives of the Amendment

As described previously in this Release, Rule 2a-46(b) more closely aligns the definition of eligible portfolio company, and the investment activities of BDCs, with the purpose that Congress intended. Specifically, Rule 2a-46(b) will expand the definition of eligible portfolio company to include any domestic operating company with a class of securities listed on an Exchange that has a market capitalization of less than $250 million. These companies may need BDC financing for continued growth and development, but, notwithstanding the fact that their securities are listed on an Exchange, may find it difficult to raise additional capital in new offerings or borrow money through other conventional sources.

B. Significant Issues Raised by Public Comment

When the Commission reproposed Rule 2a-46(b), comment was requested on the reproposal and the accompanying IRFA. None of the comment letters specifically addressed the IRFA.

C. Small Entities Subject to the Rule

Rule 2a-46(b) will affect BDCs and companies that qualify as small entities under the

[77] Reproposing Release supra note 1 at Section VII.

Regulatory Flexibility Act. For purposes of the Regulatory Flexibility Act, a BDC is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[78] As of June 2007, there were 73 BDCs, of which 43 were small entities. A company other than an investment company is a small entity under the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year.[79] We estimate there are approximately 20 Exchange-listed companies that may be considered small entities.[80]

As discussed in this Release, Rule 2a-46(b) is intended to benefit certain companies that need capital for continued development and growth, but may be unable to borrow money through conventional sources despite their securities being listed on an Exchange. Rule 2a-46(b) will also benefit BDCs, including those that are small entities, by expanding the number of companies that BDCs may include as part of their 70% basket. Because none of the comment letters specifically addressed the IRFA, we continue to believe that those BDCs and companies that are small entities for purposes of the Regulatory Flexibility Act would not be disproportionately affected by the amended rule.

D. Reporting, Recordkeeping and Other Compliance Requirements

Rule 2a-46(b) will not impose any new reporting or recordkeeping requirements on BDCs or on companies. It also will impose only minimal, if any, compliance requirements on portfolio companies.

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[78] 17 CFR 270.0-10.

[79] 17 CFR 230.157; 17 CFR 240.0-10.

[80] We noted in the Reproposing Release that at that time we calculated that there were approximately 2,500 companies, other than investment companies, that may be considered small entities. See Reproposing Release supra note 1 at text following n.72. This figure inadvertently included companies whose securities are not listed on an Exchange. Rule 2a-46(b), however, only pertains to companies whose securities are listed on an Exchange. As discussed above, we estimate that there are only approximately 20 Exchange-listed companies that may be considered small entities.

Rule 2a-46(b) will impose minimal compliance requirements on BDCs, including small entities. A BDC would need to determine, prior to investing in a company, if the company has a class of securities listed on an Exchange and whether that company's market capitalization was less than $250 million as of a date within 60 days prior to the date of the BDC's investment. We anticipate that the costs associated with obtaining this information would be minimal because such information is readily available from third-party sources. Furthermore, it is our understanding that these costs are similar to the types of compliance costs that a BDC currently undertakes when it invests in an issuer.

E. Commission Action to Minimize Adverse Impact on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. Alternatives in this category would include: (1) establishing different compliance or reporting standards that take into account the resources available to small entities; (2) clarifying, consolidating, or simplifying the compliance requirements for small entities; (3) the use of performance rather than design standards; and (4) exempting small entities from the coverage of the rules, or any part thereof.

Establishing different compliance or reporting requirements for small entities would not be appropriate under Rule 2a-46(b). Rule 2a-46 will not impose any reporting requirements on BDCs or on companies. It will also not impose any compliance requirements on portfolio companies. Rule 2a-46(b) will, however, impose some compliance requirements on BDCs that are intended to ensure that BDCs invest primarily in certain types of companies. These requirements should, however, impose only minimal burdens on BDCs.

We believe that clarifying, consolidating or simplifying the compliance requirements for

small entities would be inappropriate. As discussed above, Rule 2a-46(b) will not impose any compliance requirements on portfolio companies. As noted, Rule 2a-46(b) will impose some compliance requirements on BDCs, which we believe will impose minimal burdens on BDCs. These requirements are designed to ensure that BDCs will invest in companies in accordance with the rule.

We believe that using performance rather than design standards would add unnecessary complexity. Rule 2a-46(b) provides a clear, bright-line, workable test for determining whether a company is an eligible portfolio company. A standard based on performance could be unduly complicated and cause further uncertainty to BDCs, including those that are small entities, when determining whether a company is an eligible portfolio company. Likewise, the use of a performance standard would bring uncertainty to companies in determining whether they meet the definition of eligible portfolio company.

Finally, we believe that it would be inappropriate to exempt BDCs that are small entities from the coverage of Rule 2a-46(b). Rule 2a-46(b) should benefit BDCs and companies, including those that are small entities, by expanding the definition of eligible portfolio company to include certain companies whose securities are listed on an Exchange. Exempting BDCs and companies that are small entities from the amended rule would be contradictory to the purpose of this rulemaking.

VIII. STATUTORY AUTHORITY

We are amending Rule 2a-46 pursuant to our rulemaking authority under Sections 2(a)(46)(C)(iv) and 38(a) of the Investment Company Act.

List of Subjects in 17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

IX. TEXT OF RULE

For reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is to be amended as follows:

PART 270--RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

1. The authority citation for Part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a-1 et seq., 80a-34(d), 80a-37, and 80a-39, unless otherwise noted.

* * * * *

2. Revise § 270.2a-46 to read as follows:

§ 270.2a-46 Certain issuers as eligible portfolio companies.

The term eligible portfolio company shall include any issuer that meets the requirements set forth in paragraphs (A) and (B) of section 2(a)(46) of the Act (15 U.S.C. 80a-2(a)(46)(A) and (B)) and that:

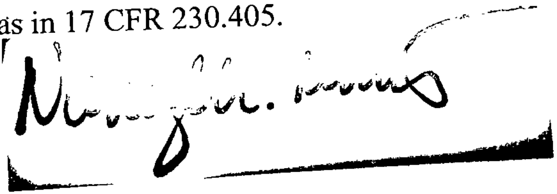
(a) Does not have any class of securities listed on a national securities exchange; or

(b) Has a class of securities listed on a national securities exchange, but has an aggregate market value of outstanding voting and non-voting common equity of less than $250 million. For purposes of this paragraph:

(1) The aggregate market value of an issuer's outstanding voting and non-voting common equity shall be computed by use of 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 acquisition of its securities by a business development company; and

(2) Common equity has the same meaning as in 17 CFR 230.405.

By the Commission.



Nancy M. Morris
Secretary

May 15, 2008

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57835 / May 19, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12275

In the Matter of

WILLIAM B. DEAKINS,

Respondent.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

On April 25, 2006, the Securities and Exchange Commission ("Commission") instituted administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against William B. Deakins ("Respondent" or "Deakins").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.B.1 below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

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III.

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

A. RESPONDENT

1. From February 2002 through February 2004, Deakins was a proprietary trader and an employee at A.B. Watley, Inc. ("Watley"). For some or all of the time in which he engaged in the conduct underlying the information described below, Deakins was a registered person associated with Watley, a broker-dealer registered with the Commission. Deakins held Series 7, Series 24, Series 55, and Series 63 licenses. Deakins, 37 years old, is a resident of Dobbs Ferry, New York.

B. RESPONDENT'S CRIMINAL PLEA

1. On March 16, 2006, Deakins pleaded guilty to conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, a felony. *United States v. Deakins*, 1:06-cr-00163 (ILG), United States District Court for the Eastern District of New York.

2. The count of the criminal information in the case in which Deakins pleaded guilty alleged, inter alia, that Deakins conspired to carry out a fraudulent scheme whereby Deakins, among others, obtained material, non-public information from a registered representative at Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") concerning large orders by Merrill Lynch's customers to purchase and sell securities. After receiving this information, Deakins executed trades prior to the execution of these large orders, in anticipation of the movement in price that the larger trades were likely to cause. In furtherance of the conspiracy, Deakins and others with whom Deakins worked committed and caused to be committed the making of cash payments to the Merrill Lynch registered representative in exchange for providing such information.

IV.

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

Accordingly, it is hereby ORDERED:

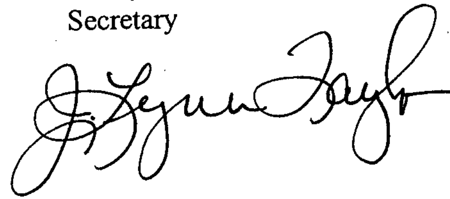
Pursuant to Section 15(b)(6) of the Exchange that Respondent Deakins be, and hereby is barred from association with any broker or dealer.

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

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

By the Commission.

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57840 / May 20, 2008

Admin. Proc. File No. 3-12668

In the Matter of the Application of

JAMES GERARD O'CALLAGHAN

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE – REVIEW OF DISCIPLINARY PROCEEDING

Trading for Account in which Member Exercised Discretion

Conduct Inconsistent with Just and Equitable Principles of Trade

Member of national securities exchange violated federal securities laws and exchange rules when he executed trades in an account over which he had investment discretion. Held, exchange's findings of violations are sustained, but proceeding is remanded for reconsideration of sanctions.

APPEARANCES:

Andrew Goodman and Robert Carrillo, of Garvey Schubert Barer, for James G. O'Callaghan.

Virginia J. Harnish and W. Kwame Anthony, for NYSE Regulation, Inc.

Appeal filed: June 26, 2007
Last brief filed: October 3, 2007

Document 22 of 46

I.

James Gerard O'Callaghan, a member of the New York Stock Exchange, Inc. ("NYSE" or "Exchange") and an independent floor broker, appeals from NYSE disciplinary action. The NYSE found that, between December 2000 and October 2001 ("the relevant period"), while on the floor of the Exchange, O'Callaghan violated Section 11(a) and Rule 11a-1 of the Securities Exchange Act of 1934, 1/ as well as NYSE Rules 90(a), 95(a), and 476(a)(6), 2/ by executing trades for an account over which he had investment discretion that was maintained at Wall Street Discount Corporation ("Wall Street Discount"), an "upstairs," or off-the-floor, member organization. The account belonged to LDL Trading, Inc. (hereinafter "the LDL account"), a New Jersey corporation, and traded securities for the benefit of Patrick Zente, O'Callaghan's father-in-law, and members of Zente's family. 3/ The NYSE censured O'Callaghan, fined him $30,000, and suspended him for three months from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. We base our findings on an independent review of the record. For the reasons set forth more fully below, we sustain the NYSE's findings of violations but remand the proceeding for reconsideration of the sanctions.

II.

O'Callaghan entered the securities industry in 1969 and became a member of the NYSE in 1973. He has been employed on the floor of the Exchange for more than thirty years. In 1997, he formed an independent floor brokerage firm, which he operated as a sole proprietorship until 2003, when he converted the firm to a limited liability company. As an independent floor broker, O'Callaghan primarily executes orders initiated through other NYSE members. 4/

1/ 15 U.S.C. § 78k(a); 17 C.F.R. § 240.11a-1. Section 11(a) and Rule 11a-1, with certain exceptions not relevant here, make it unlawful for a floor broker to trade for an account in which the broker has an interest or over which the broker exercises investment discretion. These provisions are designed to prevent floor brokers from exploiting short-term trading information and opportunities not available to persons who are not on the floor and members of the general public. D'Alessio v. SEC, 380 F.3d 112, 113-14 (2d Cir. 2004).

2/ See NYSE Rules 90(a) & 95(a) (prohibiting floor brokers from engaging in proprietary and discretionary trading); NYSE Rule 476(a)(6) (prohibiting conduct inconsistent with just and equitable principles of trade).

3/ Zente was LDL's principal and controlling shareholder. O'Callaghan's two sisters-in-law were also shareholders.

4/ An independent floor broker is an agent who executes orders on the exchange floor, typically for other members or brokerage firms. For his services, the independent floor

(continued...)

A. O'Callaghan's Discretionary Trading for the LDL Account

Former Wall Street Discount branch manager Joseph Pilovsky, who handled the LDL account, testified that Zente first opened the LDL account at Wall Street Discount in 2000. At that time, Zente informed Pilovsky that O'Callaghan and O'Callaghan's chief clerk and compliance officer, Frank Ali, 5/ would have discretion to trade for the LDL account. Pursuant to a written Trading Authorization form dated November 8, 2000, Zente, through LDL, authorized O'Callaghan and Ali to exercise investment discretion in the LDL account.

Pilovsky also testified that Zente did not place orders for the LDL account. 6/ Pilovsky related that he and another broker, Vincent Thomas, 7/ regularly received reports of executions for the LDL account from O'Callaghan or Ali, without first receiving any orders from Zente. Upon receiving those reports, Pilovsky and Thomas completed order tickets to memorialize those trades and credit them to the LDL account. While Thomas received most of the reports of trade executions and Ali placed most of the telephone calls reporting executions, 8/ "a handful of

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4/ (...continued)
broker receives a negotiated commission. In the Matter of New York Stock Exch., Inc., Securities Exchange Act Rel. No. 41574 (June 29, 1999), 70 SEC Docket 153, 155.

5/ Ali was charged as a co-respondent in this proceeding, but before the hearing, entered into a stipulation of facts with the Exchange. Without admitting or denying guilt, Ali consented to a censure, five-year bar from functioning in a compliance or supervisory capacity, and agreement to cooperate based on his participation in an improper trading arrangement and failure to discharge his compliance duties. Frank Joseph Ali, Exchange Hearing Panel Decision 05-4 (Jan. 13, 2005), available at http://www.nyse.com. Ali did not testify at the hearing.

6/ Zente did not testify at the hearing. In his answer to the charges and in his opening statement, O'Callaghan asserted that Zente was too sick to testify. However, Pilovsky disputed this characterization of Zente. Pilovsky testified that Zente had visited Wall Street Discount's offices six weeks before the hearing and did not appear to be sick.

7/ At the time of the hearing, Thomas was no longer in the securities industry. Thomas did not testify at the hearing.

8/ O'Callaghan seeks to minimize Pilovsky's knowledge about Thomas' dealings with Ali. Pilovsky testified that he knew when Thomas received calls from Ali because he sat next to Thomas on the trading desk. Pilovsky could overhear Thomas' "confrontations" with Ali about his and O'Callaghan's practice of reporting trade executions without calling in customer orders.

times" Pilovsky received calls directly from O'Callaghan. 9/ Pilovsky stated that no one, other than O'Callaghan or Ali, gave trading instructions for the LDL account. He added that Wall Street Discount never sent any customer orders to O'Callaghan for execution. 10/

According to Pilovsky, Wall Street Discount's upstairs order tickets identified the instances in which O'Callaghan or Ali reported the execution of a trade even though no customer order had been placed. During the relevant period, Wall Street Discount's practice was to time-stamp an upstairs order ticket twice, first on the left-hand side when it received a customer order to buy or sell stock, and then on the right-hand side when it received a report of execution of the order. At that time, it took at least five minutes to execute a trade. As a result, there usually was a several minute gap between the first and second time-stamps. However, when O'Callaghan or Ali called Wall Street Discount to report the execution of a trade for which Wall Street Discount had not received a customer order, the upstairs order ticket had "double time-stamps," meaning two time-stamps that were only seconds apart. For example, in a January 26, 2001, trade involving O'Callaghan's purchase of 3,500 shares of Lucent Technologies, Inc. ("LU"), the upstairs order ticket had time-stamps at 11:25:11 a.m. and 11:25:13 a.m. Attached to the upstairs order ticket was a stub labeled "Phone Order Entered," indicating that O'Callaghan or Ali called Wall Street Discount to report the execution of the trade. Pilovsky testified that the fact that the two time-stamps on the upstairs order ticket were only seconds apart indicated that he did not receive a customer order first and then a report of execution. Rather, Pilovsky received only one telephone call from O'Callaghan or Ali reporting the execution of the trade, at which time he "clocked" the upstairs order ticket "in and out" so that it would have two time-stamps.

Pilovsky testified that he complained "numerous times" to O'Callaghan and Ali about their failure to call in customer orders before calling in reports of executions. 11/ Pilovsky stated that, "[a]fter quite a bit of time and frustration, not really getting anywhere," he approached Wall Street Discount's president to discuss the situation. The president advised Pilovsky to inform O'Callaghan and Ali that, in the future, Wall Street Discount would transmit all of their orders to

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9/ O'Callaghan admitted in July 2002 sworn on-the-record testimony that, in some instances, he personally called Wall Street Discount to report trades instead of Ali.

10/ Pilovsky testified that Wall Street Discount sent customer orders for execution either to SuperDOT, the NYSE's automated order routing system, or to certain floor brokers associated with Wall Street Discount's clearing firm, Investec Ernst & Company.

11/ At the hearing, O'Callaghan denied that anyone at Wall Street Discount complained to him or Ali.

SuperDOT for execution. Pilovsky communicated this to Ali. From that point forward, Pilovsky recounted, all orders for the LDL account were executed electronically through SuperDOT. 12/

NYSE investigator Michael Dalton, who conducted the investigation of O'Callaghan's trading for the LDL account, analyzed a sample of 159 (out of more than 700) LDL trades, using O'Callaghan's floor tickets, Wall Street Discount's upstairs order tickets, and NYSE reports showing the times of O'Callaghan's trade executions as captured by the NYSE's systems. 13/ Based on his analysis, Dalton found that O'Callaghan's floor booth tickets were almost always time-stamped before the first time-stamps on Wall Street Discount's order tickets, indicating that the trades originated on the exchange floor. Dalton explained that, "in the normal course of events, if a trade is coming from a customer and . . . routed through an upstairs order room, you would see it time-stamped . . . in the upstairs order room, . . . then relayed to the floor and . . . subsequently time-stamped on the floor." Dalton also found that nearly every execution time written on O'Callaghan's floor tickets preceded the upstairs time-stamps, further indicating that the trades originated on the floor and substantiating Pilovsky's testimony that O'Callaghan executed the trades before calling Wall Street Discount. Dalton further found that many of Wall Street Discount's order tickets had "double time-stamps," indicating again that O'Callaghan originated and executed the same trades for the LDL account.

To illustrate his findings, Dalton testified about O'Callaghan's purchase of 3,500 shares of LU on January 26, 2001 (previously discussed in Pilovsky's testimony), and O'Callaghan's subsequent sale of those shares on the same date. In this pair of trades, O'Callaghan had Ali time-stamp a floor ticket at 11:03 a.m. for the purchase of the shares, and executed the purchase in two transactions: 2,500 shares at 11:05 a.m. and 1,000 shares at 11:07 a.m., all at 17 7/16 per share. Eighteen minutes later, O'Callaghan or Ali reported the trade to Wall Street Discount, which double time-stamped an upstairs order ticket at 11:25:11 a.m. and 11:25:13 a.m. At the same time, Ali time-stamped a floor ticket at 11:25 a.m. to sell the 3,500 LU shares, and O'Callaghan executed the sale at 11:25 a.m. at 17 9/16 per share. O'Callaghan or Ali then reported the trade to Wall Street Discount's brokers, who double time-stamped an upstairs order ticket at 11:26:21 a.m. and 11:27:25 a.m. In Dalton's view, these and the other trade records made it "quite clear" that the trades for the LDL account were initiated and, in many cases, executed on the exchange floor by O'Callaghan before the trades were reported to and time-stamped by Wall Street Discount.

12/ Pilovsky did not provide specific dates of his conversations with Wall Street Discount's president and Ali. It appears that those conversations occurred towards the end of the relevant period because, after that time, O'Callaghan and Ali no longer called Wall Street Discount with reports of executions, although they continued to call in with orders to buy or sell stock.

13/ The 159 LDL trades were set forth in a chart, admitted into evidence, that showed comparisons of each trade.

Dalton testified that, from December 2000 to March 2001, O'Callaghan was "buying and selling the same amount of shares each day, day trading, and in most instances ending with a flat position." In March 2001, the NYSE commenced an investigation of O'Callaghan's floor trading after it triggered alerts in the Exchange's surveillance systems. 14/ In October 2001, the NYSE notified O'Callaghan in writing of its investigation. Dalton testified that O'Callaghan stopped trading for the LDL account around this time. Dalton calculated that, between December 2000 and March 2001, O'Callaghan generated $44,600.50 in profits from his trading in the LDL account. 15/

B. O'Callaghan Admits Exercising Investment Discretion in the LDL Account

In July 2002, O'Callaghan appeared before the NYSE and gave sworn on-the-record testimony. In that testimony, O'Callaghan stated that it was "probably [his] idea" to obtain trading authority in the LDL account. O'Callaghan believed that the November 8, 2000, Trading Authorization signed by Zente enabled him to buy or sell as much stock for the LDL account as he wanted, at whatever price he chose, so long as he acted "prudently." He also believed that the November 8, 2000, Trading Authorization enabled him to effect trades for the LDL account without communicating with Zente. O'Callaghan stated that Zente learned about transactions in the LDL account from the confirmation statements that he received in the mail.

O'Callaghan admitted that he exercised investment discretion in the LDL account. He testified in his 2002 on-the-record testimony and at the 2005 hearing that he started executing trades for the LDL account in 2000 in order to save Zente money on the commissions charged by floor brokers for trade executions. 16/ O'Callaghan also testified that he loaned funds to Zente

14/ Dalton stated that the NYSE's surveillance systems "monitor[] short-term trading, either buying and selling or selling and buying, where there's . . . either a market impact trade or a series of market impact trades in between the opening and closing of the position." By "market impact trade" Dalton meant "any trade that would move the market one way or another." The NYSE's surveillance systems "kicked out" or flagged approximately sixty trades effected by O'Callaghan that occurred on nineteen separate trade dates between December 2000 and March 2001.

15/ Although O'Callaghan claimed that the LDL account lost money, he did not support this claim with evidence of any losses.

16/ The record shows that O'Callaghan saved Zente around twenty-five dollars for each trade that he executed for the LDL account.

for deposit into the LDL account. 17/ He affirmed that he knew those funds would be deposited into the LDL account. He did not receive interest or repayment of the loans.

C. O'Callaghan Offers Several Explanations for his Trading in the LDL Account

O'Callaghan offered several explanations for his trading in the LDL account. In his 2002 on-the-record testimony, O'Callaghan testified that he would call Ali from the exchange floor where particular stocks traded and instruct Ali to get upstairs order tickets from Wall Street Discount's brokers to buy or sell those stocks, after which he would execute the trades. Also in his 2002 on-the-record testimony, O'Callaghan was asked about his March 7, 2001 purchase of 1,000 IBM shares for the LDL account. O'Callaghan admitted that he would have been on the floor by the post where IBM was trading; that he would have initiated the trade by directing Ali, with whom he was in "constant contact" through broker-to-booth headsets, to get a time-stamped Wall Street Discount upstairs order ticket to buy 1,000 shares of IBM; that Ali would have called Wall Street Discount's brokers and told them to "clock a ticket for 1,000 shares of IBM"; and that he would have executed the trade.

In the same 2002 on-the-record testimony, O'Callaghan testified that Wall Street Discount had "a list of stocks that [were] okayed to trade," meaning there was a group of stocks approved by Zente for trading in the LDL account. 18/ He believed that stocks such as IBM and LU were on the list, although neither he nor Ali had a copy of the list. O'Callaghan testified that he could trade the stocks that were on the list and, based on the amount of buying power in the account, he would decide how many shares to buy or sell. O'Callaghan claimed that he always had a time-stamped upstairs order ticket from Wall Street Discount before he executed a trade. O'Callaghan professed to have "no idea" why his floor booth tickets were time-stamped before the corresponding Wall Street Discount upstairs order tickets.

Later in the NYSE's investigation, O'Callaghan asserted in a 2003 letter from counsel that Zente initiated all orders for the LDL account. 19/ O'Callaghan repeated this assertion in his

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17/ O'Callaghan testified that he loaned Zente $30,000 in September 2001 and additional funds before ($16,000) and after ($25,000) the relevant period. Dalton testified that during the relevant period the account was worth approximately $80,000 to $100,000.

18/ By contrast, Pilovsky testified that he was "absolutely not" aware of a list of stocks that could be traded for the LDL account. Dalton testified that his investigation revealed no evidence of any list of stocks but that, even if there were such a list, "a list of a number of stocks is not an order."

19/ In the same letter, O'Callaghan's counsel also asserted that all orders for the LDL account were "buy minus-sell plus" orders that were proper under NYSE Rule 95. NYSE Rule 13 defines a "buy minus" order as an order to buy a stated amount of stock provided that the (continued...)

answer to the August 2004 Charge Memorandum and at the 2005 hearing. During the 2005 hearing, O'Callaghan stated that each morning, Ali would call Wall Street Discount's upstairs trading desk to find out if there were any orders from Zente. O'Callaghan stated that there were orders most mornings and that he would execute those orders if he was not busy. However, the trade records showed that no more than six of the 159 trades analyzed by Dalton had upstairs order tickets with time-stamps before the market opened. The rest of the trades occurred throughout the trading day.

Also during the 2005 hearing, O'Callaghan admitted that he initiated some trades for the LDL account, but stated that those trades were executed electronically through SuperDOT. He denied executing any orders for the LDL account that he had initiated. He affirmed that he knew that the on-floor trading rules prohibited floor brokers from initiating and executing the same trades on the exchange floor, and that his own firm's compliance manual made it clear that such trading was improper. At one point during the 2005 hearing, O'Callaghan testified that an unidentified person at Wall Street Discount was exercising investment discretion in, and entering orders for, the LDL account. As noted previously, Pilovsky testified that Wall Street Discount did not send any customer orders to O'Callaghan for execution.

An Exchange Hearing Panel observed that O'Callaghan's 2002 on-the-record testimony and 2005 hearing testimony contradicted each other. The Hearing Panel stated that it found O'Callaghan's hearing testimony "lacking in credibility" and "not supported by other testimony or documentary evidence."

19/ (...continued)
price to be obtained is not higher than the last sale if the last sale was a "minus" or "zero minus" tick, and is not higher than the last sale minus the minimum fractional change in the stock if the last sale was a "plus" or "zero plus" tick. A "sell plus" order is defined as an order to sell a stated amount of a stock provided that the price to be obtained is not lower than the last sale if the last sale was a "plus" or "zero plus" tick, and is not lower than the last sale plus the minimum fractional change in the stock if the last sale was a "minus" or "zero minus" tick. See also Peter Martin Toczek, 51 S.E.C. 781, 782 n.5 (1993) (discussing "plus tick" and "zero plus tick").

Dalton testified that, even if O'Callaghan had been pursuing a buy minus-sell plus strategy, he still would have had to obtain a time-stamped order ticket from Wall Street Discount before the execution of any buy minus or sell plus order. Dalton also testified that he investigated this explanation of O'Callaghan's trading but found no evidence to support it. Moreover, none of the witnesses, including O'Callaghan, mentioned a buy minus/sell plus strategy in on-the-record testimony.

D. Expert Testimony on Rules Governing Floor Trading

The NYSE's expert Brendan Dowd testified that a floor broker could not generate an order on the exchange floor, determine which stock, or the amount of stock, to purchase for a customer, determine the size of an order based on the buying power in the account, or determine whether a trade should be a purchase or sale. The customer had to make those decisions.

When presented with a hypothetical example of trading, Dowd stated that a floor broker could not make an investment decision for an account in which he had a discretionary trading agreement, instruct his clerk to obtain a time-stamped ticket from an upstairs trading desk, and then execute the trade:

Q: Suppose a member is on the floor out in the crowd. He's in the crowd and he sees a lot of buy interest, say he's in the IBM crowd . . . . He decides that it would be good to buy 10,000 shares of IBM for his customer account in which he has a discretionary trading agreement. He tells his clerk, through a broker to booth headset, that he would like a ticket to purchase 10,000 shares of IBM for this customer account. He tells his clerk make sure you get a clocked ticket in the booth and make sure you get a clocked ticket with the upstairs order desk. The tickets are clocked in the booth and they are clocked upstairs. Then he goes ahead and he executes that order to buy 10,000 shares of IBM for his customer. In your opinion, is a member permitted to do that on the floor of the Exchange?

A: No . . . . Because an order has to be placed off-floor . . . . [T]he broker can call the upstairs trading desk and the upstairs trading desk through [its] clearing firm can enter the order, but it has to be executed by a non-affiliated broker. In other words, he can put it in the [Super]DOT system, he can give it to somebody else, but he cannot execute it himself. 20/

Dowd was asked how a floor broker could place an order for an account in which he had investment discretion without violating the on-floor trading rules. Dowd testified that the floor broker would have to place the discretionary order with an upstairs trading desk, which would then transmit the order to either SuperDOT or an unaffiliated floor broker for execution, thereby precluding the floor broker from exploiting his time and place advantages by executing the order himself:

20/ An "off the floor" order is an order that is not initiated on the exchange floor. Dalton testified that, under Exchange rules, an order transmitted to the upstairs office of a brokerage firm is an off-floor order if it is executed through facilities regularly used for the execution of customer orders. See generally NYSE Rule 112 (discussing orders initiated "off the floor").

Q: . . . Suppose a member on the floor . . . executes an agreement that grants him investment discretion to trade for a customer account. Again, suppose he wants to utilize that investment discretion in conformity with Exchange guidelines and rules. Is there any way that a broker can do that?

A: Yes . . . . Again, it comes to off-floor entry of orders. If in fact he would like to place an order, he can call the clearinghouse, enter the order, and, again, have the order transmitted down to a non-affiliated broker for execution.

Q: So the member is not permitted to execute orders in which he's vested with investment discretion?

A: No. He can use the [Super]DOT system, he can use a retail broker. There are different ways to do it, but, no, the broker cannot execute the order for that account.

Q: What do you think are the reasons that a member is not allowed to exercise discretion and execute orders on the floor of the Exchange on behalf of a customer?

A: Because I believe it gives that account an unfair advantage over the public . . . . Obviously on the trading floor we are privy to a lot of information, and . . . by executing an order in that way you're giving your customer an unfair advantage, and it also puts the public at a disadvantage. It undermines the integrity of the marketplace.

Dowd opined that the rules governing on-floor trading were well-known to members, and that members were responsible for complying with those rules.

O'Callaghan's expert David Sobel gave similar testimony. When asked if there was anything wrong with a floor broker initiating an order on the exchange floor and then executing that order himself, Sobel stated, "Oh, absolutely . . . . [Y]ou can't create an order and execute it on the floor." Sobel testified that, by contrast, it was "perfectly legal" for a broker to initiate an order and then transmit the order to an upstairs firm for execution by an unrelated floor broker or SuperDOT because, in that case, the broker "might be creating the order, but he's not executing the order." 21/

21/ See, e.g., 17 C.F.R. § 240.11a2-2(T) (permitting members, subject to certain enumerated conditions, to effect transactions for discretionary accounts using an unaffiliated member to execute the transactions on an exchange floor); see also Securities Transactions by Members of Nat'l Sec. Exchs., Exchange Act Rel. No. 15533 (Jan. 29, 1979), 16 SEC Docket 854, 858 n.25 (stating that automated execution systems operated by an exchange, (continued...)

III.

Exchange Act Section 11(a) and Exchange Act Rule 11a-1 prohibit a floor broker from trading for an account over which the broker exercises investment discretion. The record shows that O'Callaghan exercised investment discretion in the LDL account. The November 8, 2000, Trading Authorization signed by Zente authorized O'Callaghan to trade for the LDL account. O'Callaghan admitted that he was vested with and exercised investment discretion in the LDL account by virtue of that Trading Authorization. The record shows that O'Callaghan executed trades that he initiated while on the exchange floor. O'Callaghan admitted in his 2002 on-the-record testimony that he would stand at posts on the exchange floor where certain stocks traded and, without any customer orders having been sent to him, initiate trades by directing Ali to obtain time-stamped order tickets from Wall Street Discount's upstairs brokers. O'Callaghan admitted that he then would execute the trades.

Former Wall Street Discount branch manager Pilovsky's testimony provides additional evidence that O'Callaghan engaged in improper discretionary trading. Pilovsky testified that Zente never placed any orders for the LDL account and that Wall Street Discount never sent any customer orders to O'Callaghan for execution. Pilovsky also testified that O'Callaghan or Ali regularly reported to Wall Street Discount trades that had already been executed, although no customer orders had been placed. Pilovsky further testified that Wall Street Discount's order tickets clearly identified those trades that O'Callaghan both originated and executed because the order tickets had double time-stamps that were often only seconds apart. 22/

NYSE investigator Dalton's testimony and the trade records constitute further evidence of O'Callaghan's improper discretionary trading. Dalton testified, and the trade records showed, that O'Callaghan initiated and, in many cases, executed trades for the LDL account before reporting those trades to Wall Street Discount. Wall Street Discount, in turn, would time-stamp order tickets twice in succession, to conform to its practices.

21/ (...continued)
such as the NYSE's SuperDOT, satisfy Rule 11a2-2(T)'s independent execution requirement).

22/ On appeal, O'Callaghan claims that the time-stamp discrepancies were due, alternatively, to malfunctioning clocks, human error, or "altered" upstairs order tickets. O'Callaghan states that he does not "ask the Commission to resolve these credibility issues, but only to find that the Exchange's repeated and unjustifiable delays deprived O'Callaghan of his constitutional and statutory rights to make these challenges at [the] hearing." As set forth infra at page 16, we have found that there were no unreasonable delays and that O'Callaghan received a fair hearing before the Exchange.

In his defense, O'Callaghan offered multiple theories of how trades were effected for the LDL account -- that Zente initiated orders and sent them to either O'Callaghan or SuperDOT for execution, that O'Callaghan initiated orders based on a list of stocks that could be traded at his discretion, or that someone at Wall Street Discount had investment discretion and initiated orders for the LDL account. However, O'Callaghan offered no evidence to substantiate any of those theories. O'Callaghan did not produce the list he referenced in his testimony, and Pilovsky denied that such a list existed. 23/ O'Callaghan could have called his father-in-law, Zente, as a fact witness, but he failed to do so. Although, as noted previously, O'Callaghan asserted that Zente was too sick to testify at the hearing, Pilovsky testified that he saw Zente several weeks before the 2005 hearing and that Zente did not appear to be sick. O'Callaghan states in his reply brief that Zente would not have remembered "which specific orders he gave four years before the hearing," but Zente could have refuted Pilovsky's testimony that he did not enter any orders for the LDL account.

Instead of calling Zente or any other fact witness, O'Callaghan testified in his own defense. As indicated, the Hearing Panel found that his hearing testimony was not credible. We give deference to the Panel's credibility findings. 24/ We conclude that O'Callaghan engaged in improper discretionary trading in the LDL account. By executing trades that he had initiated for the LDL account while on the trading floor, O'Callaghan exploited the time and place advantages that he and other floor brokers have, such as the ability to "execute decisions faster than public investors." 25/ The NYSE's findings that O'Callaghan violated Exchange Act Section 11(a), Exchange Act Rule 11a-1, and NYSE Rules 90(a), 95(a), and 476(a)(6) are sustained.

IV.

O'Callaghan contends that, in various respects, the NYSE denied him due process and otherwise failed to give him a fair hearing. Although constitutional due process requirements

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23/ We agree with the NYSE that, even if LDL had compiled a list of "approved" stocks, that list would not constitute a substitute for an individual order. See David M. Levine, Exchange Act Rel. No. 48760 (Nov. 7, 2003), 81 SEC Docket 2303, 2315 & n.26 (stating that entries on a list did not constitute orders), petition denied, 407 F.3d 178 (3d Cir. 2005).

24/ Credibility determinations of an initial fact finder are entitled to considerable weight and deference because they are based on hearing the witnesses' testimony and observing their demeanor. Arthur James Niebauer, Exchange Act Rel. No. 54384 (Aug. 30, 2006), 88 SEC Docket 2728, 2737 n.36 & cases cited therein.

25/ Securities Transactions by Members of Nat'l Sec. Exchs., Exchange Act Rel. No. 14563 (Mar. 14, 1978), 14 SEC Docket 430, 433.

generally do not apply to self-regulatory organizations, such as the NYSE, 26/ the NYSE is required to provide fair procedures for disciplining members. 27/ We find that the NYSE provided fair procedures in this case.

An Exchange Hearing Panel conducted a hearing over several sessions from February 2005 to May 2005. O'Callaghan testified in his own defense, called an expert in his case-in-chief, and cross-examined the Exchange's witnesses. In addition, both parties adduced into evidence numerous exhibits, including the transcript of O'Callaghan's 2002 sworn on-the-record testimony, his floor booth records, and the corresponding Wall Street Discount upstairs order tickets for the trades that were the subject of the Charge Memorandum.

O'Callaghan claims that the NYSE failed to give him a fair hearing because it did not obtain his floor booth tape recordings, which would have demonstrated that he did not engage in improper discretionary trading. At the hearing, O'Callaghan testified that he subscribed to a telephone service from a third-party vendor, IPC. As part of that subscription, O'Callaghan paid an additional fee to have his telephone conversations recorded. O'Callaghan understood that the tapes were preserved by IPC for a one-year period. When O'Callaghan needed to obtain a tape recording of a conversation, Ali would get it for him, usually within seven hours of making the request.

O'Callaghan testified that, in October 2001, he told Dalton and another NYSE employee that his floor booth telephone lines were taped and that they should listen to those tapes. However, Dalton testified that O'Callaghan never mentioned the existence of any tapes. As noted previously, the Hearing Panel did not credit O'Callaghan's hearing testimony. The tapes

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26/ See, e.g., Desiderio v. NASD, 191 F.3d 198, 206-07 (2d Cir. 1999) (NASD is not a state actor, and constitutional requirements generally do not apply to it), cert. denied, 531 U.S. 1069 (2001); Mark H. Love, Exchange Act Rel. 49248 (Feb. 13, 2004), 82 SEC Docket 686, 692 n.13 (NASD proceedings are not state actions and therefore they are not subject to constitutional requirements).

The United States Supreme Court, in Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001), held that a private party not otherwise subject to the Fifth Amendment may be deemed to have engaged in state action sufficient to give rise to constitutional protections when there is such a "close nexus between the State and the challenged action" that the seemingly private behavior "may be fairly treated as that of the State itself." Id. at 295. O'Callaghan does not present, and our de novo review of the record does not reveal, any facts tending to show that there was the kind of cooperation or interaction between the NYSE and the government that would justify a finding that the NYSE engaged in state action. Thus, we reject O'Callaghan's claim that constitutional due process requirements applied to this disciplinary proceeding.

27/ 15 U.S.C. § 78f(b)(7).

were available through the third-party vendor, IPC. O'Callaghan, by his own admissions, could have obtained the tapes, yet failed to do so. 28/ He admitted that he did not request the tapes from IPC in October 2001 when the Exchange notified him of the investigation; that he did not request the tapes from IPC in discovery; and that he did not refer to the existence of the tapes during his 2002 on-the-record testimony with Dalton. 29/ Instead, O'Callaghan waited until the 2005 hearing to raise the matter of the tapes when they were no longer available to corroborate or refute his claims. 30/

O'Callaghan claims that the NYSE failed to give him a fair hearing because of its delay in investigating and prosecuting the charges against him. As discussed, O'Callaghan's improper trading began in December 2000 and ended in October 2001. The NYSE notified O'Callaghan that he was under investigation in October 2001, and O'Callaghan testified before the Exchange in July 2002. In August 2004, the NYSE filed the Charge Memorandum that instituted this proceeding, and a hearing on the charges commenced in February 2005. In these circumstances, we find no unreasonable delay. Moreover, O'Callaghan has not made the required showing of prejudice resulting from a delay. 31/

28/ See Robert Thomas Clawson, 56 S.E.C. 584, 595 & n.25 (2003) (stating that it is the respondent's obligation to marshal all evidence in his defense), petition denied, 2005 WL 2174637 (9th Cir. 2005) (unpublished opinion).

29/ O'Callaghan claims that the NYSE never advised him of the trade dates at issue, and therefore made it "impossible" for him to review the tape recordings. However, at his 2002 on-the-record testimony, O'Callaghan was questioned about certain trades, and O'Callaghan knew that the NYSE was focused on his LDL trades. While O'Callaghan states in his brief that, in October 2001, he knew only that an "initial investigation" had been commenced, O'Callaghan could have acted at that time to preserve the tapes.

30/ O'Callaghan claims that Wall Street Discount had recorded telephone lines and that the NYSE should have obtained those recordings as well. The record contains no evidence to substantiate this claim. Pilovsky testified generally that Wall Street Discount once had a dictaphone reel-to-reel but that it no longer existed. Pilovsky did not testify that his and Thomas' conversations with O'Callaghan were recorded or that such recordings existed at the time that the NYSE conducted its investigation.

31/ Robert W. Armstrong, III, Exchange Act Rel. No. 51920 (June 24, 2005), 85 SEC Docket 3011, 3037 & n.79; see, e.g., Stephen Michael Sohmer, Exchange Act Rel. 49052 (Jan. 12, 2004), 81 SEC Docket 4066 (holding no prejudicial delay where respondents' two sets of misconduct ended in June and November 1997, respectively, they were notified in January 1999 that they were under investigation, one respondent's testimony was taken in November 2000, and respondents were charged in February 2002); Anthony A. Adonnino, 56 S.E.C. 1273, 1292-93 (2003) (holding no prejudicial delay when

(continued...)

O'Callaghan claims that the NYSE failed to give him a fair hearing because of certain alleged ex parte communications made by a Hearing Panel member to O'Callaghan during the hearing. The record shows that, on May 20, 2005, the Panel announced its findings and set May 24, 2005, as the date for the penalty argument. On May 24, 2005, O'Callaghan's counsel filed a motion for a mistrial based on those alleged ex parte communications. The motion alleged that, on February 7, 2005, after the first two hearing sessions, the member stated, "Round 1 for you"; after the April 12, 2005, hearing session, he stated, "Keep doing what you're doing. Everything is going fine"; and on May 6, 2005, after another hearing session, he stated, "Why did you testify? You shouldn't have testified." 32/

The Hearing Officer called the Panel member to the stand and questioned him under oath. The Panel member testified that he said, "Round one is over," not "Round one for you"; that he said, "Long night," not "Keep doing what you're doing, everything is going fine"; and that he did not make the third statement attributed to him. In denying the motion for a mistrial, the Hearing Officer determined that there was no evidence of bias or prejudgment, and that the Panel's prior credibility findings against O'Callaghan could not be ignored in evaluating his allegations. We see no prejudice to O'Callaghan resulting from the Panel member's participation in the 2005 hearing. 33/ We find, based on an independent review of the record, that O'Callaghan received a fair hearing. In addition, our de novo review affords O'Callaghan "ample protection from any claimed partiality or bias." 34/

31/ (...continued)
respondents were charged in September 1999 for two sets of misconduct that ended in May 1996 and July 1997, respectively), aff'd, 111 Fed. Appx. 46 (2d Cir. 2004).

32/ Noting that all of the alleged ex parte communications occurred weeks, if not months, before the Panel announced its findings of violations, the Hearing Officer asked O'Callaghan's counsel when he first became aware of those alleged communications. Counsel replied, "yesterday."

33/ See, e.g., Robert Fitzpatrick, 55 S.E.C. 419, 431-32 (2001) (finding no evidence of impermissible bias by hearing panel member where there was no allegation that panel member, even if he made the statement at issue, formed his opinion on the basis of anything other than the case that respondent presented to the hearing panel), petition denied, 63 Fed. Appx. 20 (2d Cir. 2003) (unpublished opinion).

34/ David C. Ho, Exchange Act Rel. No. 54481 (Sept. 22, 2006), 88 SEC Docket 3194, 3202, aff'd, 2007 U.S. App. LEXIS 9882 (7th Cir. Apr. 18, 2007) (unpublished opinion).

V.

We review sanctions imposed by the NYSE to determine whether they are excessive, oppressive, or impose an unnecessary or inappropriate burden on competition. 35/ The appropriate sanctions in a case depend on the particular facts and circumstances and cannot be determined by comparison with action taken in other cases. 36/

On the record before us, we are unable to evaluate the propriety of the NYSE's sanctions imposed against O'Callaghan, particularly the three-month suspension. Courts have held that a suspension from securities trading should serve a remedial purpose to protect the public, rather than as punishment for the offender. 37/ As the Second Circuit stated in McCarthy v. SEC, "[i]t is familiar law that the purpose of expulsion or suspension from trading is to protect investors, not to penalize brokers." 38/

While the NYSE stated that it found O'Callaghan's violations to be "serious," it also found that there were mitigating factors, such as the fact that "little or no harm" resulted from O'Callaghan's misconduct and that there was "no gain" to O'Callaghan because he took no fees for his trading. Nevertheless, in considering the deterrent value of a suspension, the Exchange stated:

> Respondent is a $2 broker, not a specialist or a broker for a large wire house. If Respondent is not there to service his clients, they will find new brokers to handle their trades. A specialist or wire house broker could easily have a job to come back to after three months. Respondent will likely have to rebuild his business. The financial and business impact on a $2 broker of a three month suspension has the potential to be catastrophic and terminal. This represents a serious deterrent to other similarly situated brokers. (Emphasis supplied.)

35/ 15 U.S.C. § 78s(e)(2).

36/ See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973).

37/ See, e.g., Paz Sec., Inc. v. SEC, 494 F.3d 1059, 1065 (D.C. Cir. 2007); McCarthy v. SEC, 406 F.3d 179, 188-89 (2d Cir. 2005).

38/ McCarthy, 406 F.3d at 188.

The Exchange described the impact of a three-month suspension on O'Callaghan as potentially "catastrophic and terminal," but failed to explain how the suspension would protect the trading public from further harm. 39/ The McCarthy court made it clear that no "ritualistic incantation" regarding remedial effect is required, but that "[s]ome explanation addressing the nature of the violation and the mitigating factors presented in the record of each case" must be made. 40/ The absence of any such explanation by the NYSE suggests that the suspension was inappropriately punitive and thus excessive or oppressive.

In its brief, the Exchange represents that, in January 2006, after the misconduct at issue, the NYSE brought a new Charge Memorandum alleging that, in or about January 2004, O'Callaghan engaged in acts detrimental to the NYSE's interest or welfare by surreptitiously obtaining a confidential list of other floor brokers' customers from an NYSE employee. O'Callaghan was also charged with failing to supervise the activities of his firm's employees. In April 2007, the NYSE amended the Charge Memorandum to allege additional violations against O'Callaghan's firm. A hearing was set for November 2007, but the record does not indicate the current status of those charges, and we have not considered them in our disposition of this proceeding.

The Exchange, while recognizing that O'Callaghan has yet to have a hearing on the new charges, argues that "[l]eaving O'Callaghan on the [t]rading [f]loor in the face of a new Charge Memorandum, after he has been found guilty of illegal trading, poses a risk of substantial harm to the public." The Exchange contrasts O'Callaghan's position with that of the petitioner in McCarthy, who had been operating lawfully on the exchange floor for nine years after his violative conduct. In light of our remand, we do not address this argument. The NYSE should address the relevance of this issue, if any, in the first instance, on remand.

Consequently, we remand the proceeding to give the NYSE an opportunity to reconsider the sanctions imposed against O'Callaghan in accordance with this opinion. On remand, the NYSE should address the protective interests to be served by removing O'Callaghan from the floor, the mitigating factors presented in the record, and any other factors related to whether a

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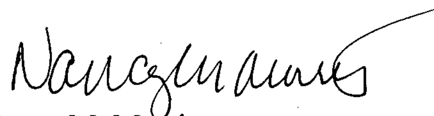
39/ While the Exchange considered the deterrent effect of a three-month suspension on other similarly situated brokers, general deterrence by itself is not sufficient justification for the suspension, although it is a relevant factor. See McCarthy, 406 F.3d at 189.

40/ Id. at 190.

suspension is appropriately remedial and not punitive. At the conclusion of the Exchange's proceedings, if he is aggrieved, O'Callaghan will have the right to file an application for review of the Exchange's decision with us pursuant to Exchange Act Section 19(d)(2) and our Rule of Practice 420. 41/ We do not intend to suggest any view on the outcome of the Exchange's consideration of these questions.

An appropriate order will issue. 42/

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



Nancy M. Morris
Secretary

41/ 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420.

42/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57840 / May 20, 2008

Admin. Proc. File No. 3-12668

In the Matter of the Application of

JAMES GERARD O'CALLAGHAN

For Review of Disciplinary Action Taken by the

NEW YORK STOCK EXCHANGE, INC.

ORDER SUSTAINING IN PART AND REMANDING IN PART

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

ORDERED that the findings of violations made by the New York Stock Exchange, Inc. against James Gerard O'Callaghan be, and they hereby are, sustained; and it is further

ORDERED that the sanctions imposed by the New York Stock Exchange, Inc. against James Gerard O'Callaghan be, and they hereby are, vacated; and it is further

ORDERED that the proceeding be, and it hereby is, remanded to the New York Stock Exchange, Inc. for reconsideration of sanctions in accordance with this opinion.

By the Commission.

Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57839 / May 20, 2008

Admin. Proc. File No. 3-12874

In the Matter of the Application of ROBERT M. RYERSON c/o Saul Roffe, Esq. Stark & Stark, P.C. 993 Lenox Drive Lawrenceville, NJ 08648 For Review of Action Taken by NASD	ORDER GRANTING MOTION TO DISMISS PETITION FOR REVIEW

Robert M. Ryerson, a former associated person of an NASD member firm, has applied for review of disciplinary action taken against him by NASD. 1/ NASD has moved to dismiss Ryerson's petition for review. For the reasons discussed below, we grant NASD's motion.

I.

On April 22, 2004, NASD filed a complaint against Ryerson alleging that he engaged in private securities transactions in violation of NASD Rules 3040 and 2110, improperly paid commissions to a non-NASD member in violation of NASD Rule 2110, and failed to provide timely on-the-record testimony to NASD staff in violation of NASD Rules 8210 and 2110. Ryerson answered the complaint, generally denied the allegations of misconduct, and requested a hearing. An NASD Hearing Panel conducted a two-day hearing in October 2004 at which

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1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before that date, we will use the designation NASD when applicable.

Document 23 of 46

Ryerson confronted and cross-examined adverse witnesses and presented his own case and witnesses.

On January 24, 2005, the Hearing Panel issued its decision in which it found that Ryerson had committed the violations alleged. The Hearing Panel imposed (1) a two-year suspension in all capacities, a $230,000 fine, and an order that Ryerson requalify in all capacities for his improper private securities transactions and (2) a fifteen business-day suspension and a $5,000 fine for his improper payment of commissions to a non-NASD member. 2/ The Hearing Panel also ordered that Ryerson pay costs. The Hearing Panel decision ordered that "Respondent's fines and costs shall become due and payable upon his re-entry into the securities industry."

Ryerson filed a timely appeal of the Hearing Panel decision with the National Adjudicatory Council ("NAC"). The NAC issued its decision on August 3, 2006. The NAC decision generally affirmed the Hearing Panel's findings of violations, sanctions, and imposition of costs. 3/ Unlike the Hearing Panel decision, the NAC decision did not condition Ryerson's payment of monetary sanctions on his re-entry into the securities industry. Instead, the NAC opinion stated that, pursuant to NASD Procedural Rule 8320, "the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment."

The August 3, 2006 cover letter transmitting the NAC decision to Ryerson stated, among other things, that Ryerson had thirty days from receipt of the NAC decision to file any application for review with the Commission. The cover letter further stated that the "NAC's orders in the enclosed decision to pay fines and costs will be stayed pending appeal. If you do not appeal the NAC's decision to the SEC, you may pay these amounts after the 30-day period for appeal to the SEC has passed."

Ryerson did not seek Commission review of the NASD action within thirty days of receiving the decision. He also did not pay NASD the fines and costs ordered in the NAC decision after expiration of the appeal period. NASD sent Ryerson a letter dated November 13, 2006 seeking payment of fines and costs totaling $239,178.26. Ryerson's counsel sent NASD a letter dated November 27, 2006 stating that the NAC decision "did not amend" the part of the Hearing Panel decision that conditioned Ryerson's payment of monetary sanctions upon

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2/ The Hearing Panel also imposed a one-year suspension and a $10,000 fine for Ryerson's failure to provide timely on-the-record testimony. The National Adjudicatory Council set this sanction aside.

3/ See supra note 2.

Ryerson's re-entry into the securities industry and that therefore he was not required to pay the fines and costs.

NASD sent Ryerson two more letters dated January 19, 2007 and July 11, 2007 reiterating its request for payment of fines and costs. Ryerson did not respond to the January 19, 2007 letter but sent a letter to NASD dated July 18, 2007 again stating that he was not required to pay the fines and costs unless and until he re-entered the securities industry. NASD sent Ryerson a letter dated September 20, 2007 stating that the NAC decision superseded the Hearing Panel decision and ordered payment of fines and costs upon request. The September 20, 2007 letter also noted that NASD had earlier notified Ryerson that he had thirty days to appeal the NAC decision with the Commission but that Ryerson had not done so.

On October 19, 2007, more than a year after the NAC issued its decision, Ryerson filed a petition with the Commission requesting that we "reverse" the NAC decision and "stay the collection efforts" of NASD. Specifically, Ryerson requests that we 1) enter an order finding that the NAC decision is void for vagueness, 2) reverse the NAC decision, 3) enter an order affirming the condition precedent to payment of fines and costs as set forth in the Hearing Panel decision, and 4) stay NASD's collection efforts pending resolution of his appeal. On November 20, 2007, NASD filed a motion to dismiss Ryerson's petition pursuant to Rule 154 of the Commission's Rules of Practice. 4/

II.

A. Request to Review Final Disciplinary Sanction

Pursuant to Section 19(d)(2) of the Securities Exchange Act of 1934 5/ and Commission Rule of Practice 420(b), 6/ an applicant must file with the Commission a petition for review of a determination of a self-regulatory organization with respect to a final disciplinary sanction within thirty days after the notice of the determination is filed with the Commission and received by the applicant. It is undisputed that Ryerson failed to file his petition for review within the requisite period.

4/ 17 C.F.R. § 201.154.

5/ 15 U.S.C. § 78s(d)(2).

6/ 17 C.F.R. § 201.420(b).

Ryerson notes that Exchange Act Section 19(d)(2) allows us to accept petitions for review "within such longer period as [the Commission] may determine." 7/ We have stated that "'parties to administrative proceedings have an interest in knowing when decisions are final and on which decisions their reliance can be placed.'" 8/ Accordingly, Rule of Practice 420(b) provides that we will not extend the thirty-day period absent a showing of extraordinary circumstances. 9/ Here, we do not find extraordinary circumstances that would persuade us to consider Ryerson's untimely petition for review.

Ryerson filed a petition for review over fourteen months after the NAC issued its decision. He states that he did not understand until recently that there is a difference of opinion between him and NASD as to when the monetary sanctions are due. He asserts that this misunderstanding is caused by a "'latent ambiguity' in the relationship" between the statements made regarding the timing of payment in the Hearing Panel decision and the NAC decision. Ryerson argues that the two decisions "speak with one voice" and "conform with one another" such that a reasonable person would interpret the NAC decision as preserving the condition precedent to payment of the fines and costs contained in the Hearing Panel decision. Ryerson also asserts that the NAC order with respect to payment of fines and costs is vague.

Ryerson's argument that the NAC decision must somehow be interpreted in light of the condition precedent to his payment of fines and costs contained in the Hearing Panel decision is

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7/ 15 U.S.C. § 78s(d)(2).

8/ Lance E. Van Alstyne, 53 S.E.C. 1093, 1098 n.10 (1998) (quoting Nequoia Ass'n, Inc. v. U.S. Dep't. of Interior, 626 F. Supp. 827, 836 (D. Utah 1985)); accord Warren B. Minton, 55 S.E.C. 1170, 1179 n.20 (2002) (citing Van Alstyne, 53 S.E.C. at 1098 n.10).

9/ See Adoption of Amendments, Exchange Act Rel. No. 49412 (Mar. 12, 2004), 82 SEC Docket 1744, 1749 & n.30 ("The Commission is adopting its proposed change to Rule 420(b) to make clear that an appeal from self-regulatory organization action must be filed within 30 days, absent a showing of extraordinary circumstances. This standard is consistent with prior Commission precedent.") (citing Van Alstyne, 53 S.E.C. at 1099); 17 C.F.R. § 201.420(b) ("The Commission will not extend this 30-day period, absent a showing of extraordinary circumstances."); Larry A. Saylor, Exchange Act Rel. No. 51949 (June 30, 2005), 85 SEC Docket 3118, 3124-25 (finding that applicant had not made the "necessary showing of 'extraordinary circumstances'" regarding the filing of an untimely petition for review); Minton, 55 S.E.C. at 1179 ("We find that Minton has failed to demonstrate any extraordinary circumstances that would justify accepting his application for review. . . ."); Van Alstyne, 53 S.E.C. at 1099 ("In the interests of finality, only under extraordinary circumstances will we authorize the filing of a late appeal from an SRO action that is subject to the Section 19(d)(1) filing requirement.").

without merit. NASD Procedural Rule 9348 gives the NAC the power to "affirm, modify, reverse, increase or reduce any sanction." We have emphasized repeatedly that "'it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review.'" 10/ The NAC decision did not condition Ryerson's payment of the monetary sanctions upon his re-entry into the securities industry. The NAC observed that the sanctions were payable pursuant to NASD Rule 8320 and that the registration of an associated person could be summarily revoked for non-payment. We recognize that Ryerson was not associated at the time. However, the cover letter attached to the copy of the NAC decision that was mailed to Ryerson was further notice to Ryerson that the NAC expected payment absent an appeal; it stated that payment of the monetary sanctions would be stayed only if he filed a petition for review within thirty days.

If Ryerson had any doubt about whether NASD interpreted the NAC decision differently, NASD's letter dated November 13, 2006 was evidence that it believed that Ryerson was obligated to pay the monetary sanctions within ten business days and put Ryerson on notice that NASD interpreted the NAC decision differently than he did. While Ryerson's counsel expressed disagreement with NASD's position, NASD sent Ryerson another letter in January demanding payment. Ryerson did not respond.

Despite this demand for payment of the monetary sanctions, Ryerson allowed more time to elapse, during which NASD sent him letters in July and September 2007 seeking payment of the monetary sanctions, before filing his petition for review in October 2007. Ryerson explains that he did not file a petition for review immediately following his receipt of NASD's November 13, 2006 letter because he (1) expected that his responses to the NASD letters in November 2006 and July 2007, in which he asserted that he was not obligated to pay the monetary sanctions upon demand, would resolve the matter or prompt discussion and (2) "did not wish to undergo the time and expense" of the current petition until now. His tactical decision to proceed by sending the two letters to NASD, rather than "undergo the time and expense" of a timely-filed petition for review, does not constitute extraordinary circumstances that justify hearing his late-filed petition.

10/ E.g., Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3126 & n.26 (quoting Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17), appeal filed, No. 07-15736 (11th Cir. Dec. 13, 2007); see also Chris Dinh Hartley, 57 S.E.C. 767, 776 (2004) ("[I]t is the NAC's conclusions that are before us for review, not those of the Hearing Panel."); NASD Code of Procedure Rule 9349(c) (providing that the NAC decision constitutes the final disciplinary action that is subject to review by the Commission).

Ryerson argues that his due process rights are being violated and that NASD's collection attempts are an unconstitutional taking of property. As Ryerson concedes, however, it is well settled that NASD generally is not a state actor and, therefore, the constitutional protections he asserts are inapplicable to this proceeding. 11/ Ryerson's claim that NASD's procedures were unfair to him also is without merit. As Ryerson observes, NASD is required to provide fair procedures for the disciplining of members pursuant to Exchange Act Sections 15(A)(b)(8) and 15(A)(h)(1) and the NASD Code of Procedure. 12/ The fairness of an NASD disciplinary proceeding depends on whether it was conducted in accordance with NASD's rules and whether NASD implemented its procedures fairly. 13/ Ryerson received adequate notice of the complaint, which contained sufficient detail to apprise him of the charges he faced. NASD conducted a hearing on the record at which Ryerson was given the opportunity to, and did, confront and cross-examine adverse witnesses and present his own case and witnesses. Ryerson received the decisions of the Hearing Panel and the NAC and was informed of his right to appeal each decision.

Ryerson argues that NASD is not applying its rules fairly because it ignored his attempts to resolve this matter and, "in delaying as much as seven months between letters, allowed Petitioner to believe that [NASD], after looking at the decision, accepted his interpretation." We question the reasonableness of Ryerson's belief when, after his counsel wrote NASD in November, NASD sent another letter to Ryerson in January again demanding payment. Ryerson failed to respond to this letter.

11/ See, e.g., Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3153-55 (noting the well-settled case law holding that NASD is generally not a state actor and finding that applicant failed to demonstrate otherwise in his particular case); Frank P. Quattrone, Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155, 2162-63 n.20 ("We note that our cases as well as federal court opinions hold consistently that NASD disciplinary proceedings are not state action.") (citing D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002); E. Magnus Oppenheim & Co., Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 480 n.15.).

12/ See 15 U.S.C. §§ 78*o*-3(b)(8) and (h)(1); NASD Manual at 7301 (2006).

13/ See Robert J. Prager, Exchange Act Rel. No. 51974 (July 6, 2005), 85 SEC Docket 3413, 3433 (concluding that respondent received a fair hearing and noting NASD's determinations that the Hearing Panel proceeding was conducted in accordance with NASD's procedures and that those procedures were implemented fairly).

Ryerson cites to our decision in David L. Turnipseed, 14/ to support his argument that we could accept a late-filed appeal. Turnipseed preceded the amendments to Rule 420(b) making clear that we would accept an untimely appeal only in extraordinary circumstances. In any event, in Turnipseed, we found that applicant filed his petition only twenty days late and that NASD did not apply its rules in a fair manner where it attempted to bind applicant to an offer of settlement for more than one year without resolution after NASD staff had assured him that a settlement would result in prompt resolution of the matter. 15/ Here, NASD's repeated demands for payment of the fines and costs did not cause the fourteen-month delay between the issuance of the NAC decision and the filing of the petition before us. Rather, the record demonstrates, and Ryerson admits, that his delay in filing his petition for review resulted from his deliberate choice not to appeal the NAC decision even after he learned that NASD interpreted the decision differently than he did.

Ryerson further claims that NASD "cannot apply the fine" until he becomes associated with a member firm because NASD Rule 8310 only permits the imposition of a sanction upon a person associated with a member firm. However, NASD had jurisdiction over Ryerson for two years following the termination of his registration on June 5, 2002, filed the complaint within that period, and was therefore permitted to impose sanctions. 16/ We find that Ryerson's claim that NASD treated him unfairly in this disciplinary proceeding is without merit and does not justify his late-filed appeal.

Ryerson also requests relief under Federal Rule of Civil Procedure 60(b), which provides that a court may relieve a party from a final judgment, order, or proceeding if it is no longer equitable that the judgment should have prospective application or for any other reason justifying relief from the operation of the judgment. However, we have held that the Federal Rules of Civil

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14/ 48 S.E.C. 689 (1987).

15/ Turnipseed, 48 S.E.C. at 691-92.

16/ See Eliezer Gurfel, 54 S.E.C. 56, 60-61 (1999) (finding that NASD had jurisdiction over applicant where NASD filed complaint within two years of applicant's termination of registration and sustaining NASD's imposition of sanctions); Art. V, Sec. 4 of NASD's By-Laws (2006) (providing, among other things, that a person whose association with a member has been terminated and is no longer associated with any member of NASD shall continue to be subject to the filing of a complaint under the NASD Rules based upon conduct that commenced prior to the termination, and that any such complaint shall be filed within two years after the effective date of termination of registration); NASD Rules 8310(a) and 8330 (providing that after compliance with applicable rules, sanctions may be imposed and costs may be assessed).

Procedure do not apply to administrative proceedings. 17/ Under certain circumstances, the Federal Rules of Civil Procedure provide helpful guidance, such as when issues are not directly addressed by our Rules of Practice. 18/ As discussed above, however, Rule of Practice 420 is the "exclusive remedy" for seeking an extension of the thirty-day appeal period and provides that we will allow the filing of a late petition for review of a determination of a self-regulatory organization with respect to a final disciplinary sanction only under extraordinary circumstances.

We find that Ryerson has failed to demonstrate any extraordinary circumstances that would justify accepting his petition for review.

B. Stay Request

Ryerson requests that we stay NASD's collection efforts pending his appeal. Given that we have determined to dismiss Ryerson's late-filed petition for review, his request that we stay NASD's collection efforts pending his appeal is moot. Moreover, to the extent that Ryerson seeks to have us stay NASD's collection efforts generally, he has failed to establish that we have jurisdiction to undertake such action. Under Exchange Act Section 19(d)(1), 19/ we have the authority to review any action in which NASD (1) imposes a final disciplinary sanction on any person; (2) denies membership or participation to any applicant; (3) prohibits or limits access to services offered by any of its members; or (4) bars any person from becoming associated with a member. Ryerson's complaint about the collection efforts is a collateral attack on the underlying

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17/ See Jay Alan Ochanpaugh, Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2662 n.24 ("The Federal Rules of Civil Procedure do not apply in administrative proceedings.") (citing Matos v. Hove, 940 F. Supp. 67, 72 (S.D.N.Y. 1996) (citation omitted)); John A. Carley, Exchange Act Rel. No. 50954 (Jan. 3, 2005), 84 SEC Docket 2317, 2318 n.6 ("[W]e have held repeatedly that our proceedings are not governed by the Federal Rules of Civil Procedure.") (citing Putnam Inv. Mgmt., Admin. Proc. File No. 3-11317 (Apr. 7, 2004), 2004 WL 885245, at *2); cf. Russell Ponce, 54 S.E.C. 804, 824 n.54 (2000), aff'd, 345 F.3d 722 (9th Cir. 2003).

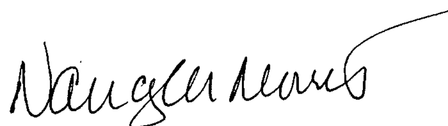
18/ See Putnam Inv. Mgmt., 2004 WL 885245, at *2 ("The Federal Rules of Civil Procedure do not govern administrative proceedings before the Commission, but they often provide helpful guidance in resolving issues not directly addressed by the Commission's Rules of Practice.") (citation omitted); cf. Ochanpaugh, 88 SEC Docket at 2662 n.24 (noting that the Commission can be guided by the principles of the Federal Rules in certain circumstances and that those circumstances were not applicable to the proceeding) (citing Carl L. Shipley, 45 S.E.C. 589, 595 n.16 (1974)).

19/ 15 U.S.C. § 78s(d)(1).

disciplinary action. 20/ NASD's efforts to collect payment of the monetary sanctions do not fall within any of these enumerated categories and, therefore, we lack the authority to stay its collection efforts.

Accordingly, IT IS ORDERED that the motion of NASD to dismiss this review proceeding be, and it hereby is, granted.

By the Commission.



Nancy M. Morris
Secretary

20/ Saylor, 85 SEC Docket at 3121-23 (rejecting applicant's collateral attack on underlying disciplinary action); Minton, 55 S.E.C. at 1176 (same).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57846 / May 21, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2831 / May 21, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13043

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

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.4 below, which are admitted, Respondent

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

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

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consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Michael Resnick, age 46, was at the relevant time a certified public accountant licensed to practice in the State of Maryland. Resnick served as Chief Financial Officer of U.S. Foodservice, Inc. ("USF") in its Columbia, Maryland headquarters. Resnick joined USF in 2000, and served as Director of Internal Audit until his promotion to CFO in late 2001. He was terminated by USF in 2003.

2. Royal Ahold (Koninklijke Ahold N.V.) ("Ahold") is a publicly-held company organized in the Netherlands with securities that, at the relevant times, were registered with the Commission pursuant to Section 12(b) of the Exchange Act. Ahold's common stock traded in the United States on the New York Stock Exchange under the symbol AHO as evidenced by American Depositary Receipts.

3. At the relevant times, USF, a foodservice and distribution company with headquarters in Columbia, Maryland, was a wholly-owned subsidiary of Ahold.

4. On May 16, 2008, a final judgment was entered against Resnick, permanently enjoining him from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder, in the civil action entitled Securities and Exchange Commission v. Michael Resnick, Civil Action Number 05-cv-1254 (CBB), in the United States District Court for the District of Maryland.

5. The Commission's complaint alleged, among other things, that Ahold's net income for fiscal years 2001 and 2002 was materially overstated by approximately $700 million in Commission filings and other public announcements as a result of a fraud at USF in which Resnick was a participant. The Complaint further alleged that Resnick made or directed others to make entries, including releases of reserves and accruals, in USF's books and records that he knew, or was reckless in not knowing, were false, without basis in fact, and did not comply with Generally Accepted Accounting Principles.

IV.

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

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

By the Commission.

Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57857 / May 23, 2008

Admin. Proc. File No. 3-12693

In the Matter of the Application of SCHON-EX, LLC c/o John R. Hewitt, Esq. McCarter & English, LLP 245 Park Avenue New York, NY 10167 For Review of Disciplinary Action Taken by NYSE REGULATION, INC.

OPINION OF THE COMMISSION

REGISTERED SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDINGS

Violation of Exchange Rules

Submission of Inaccurate Trading Data

Failure to Adhere to Principles of Good Business Practice

Failure to Establish and Maintain Adequate Supervisory Procedures

Member firm of registered securities exchange submitted inaccurate electronic trading data to the exchange and failed to have in place a system to verify the accuracy of its electronic trading data before it was submitted to the exchange. Held, exchange's findings of violations and sanction are sustained.

APPEARANCES:

John R. Hewitt, of McCarter & English, LLP, for Schon-Ex, LLC.

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Susan Light, Suzanne Elovic, Howard L. Kneller, and Donald C. Sullivan, for Financial Industry Regulatory Authority, Department of Enforcement, on behalf of NYSE Regulation, Inc.

Appeal filed: July 12, 2007
Last brief received: October 18, 2007

I.

Schon-Ex, LLC ("Schon-Ex" or the "Firm"), a member of the New York Stock Exchange LLC ("NYSE" or the "Exchange") appeals from NYSE disciplinary action. 1/ The Exchange found that Schon-Ex violated NYSE Rules 410A and 401 2/ by providing inaccurate trading data of "short sale" transactions through electronic "blue sheet" submissions in response to NYSE requests for such data. 3/ The Exchange further found that Schon-Ex violated NYSE Rule 342 as

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1/ On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation were transferred to NASD, and the expanded NASD changed its name to the Financial Industry Regulatory Authority. See Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the disciplinary action here was taken before the NYSE-NASD consolidation of regulatory operations, we continue to use the designation "NYSE" in this opinion.

2/ NYSE Rule 410A provides, in relevant part, that a "member . . . shall submit [certain specified] . . . trade data elements . . . in such automated format as may be prescribed by the Exchange from time to time, in regard to such transaction or transactions as may be subject of a particular request for information made by the Exchange." In addition, Rule 410A©) directs that, "[i]n addition to the above trade data elements, a member . . . shall submit such other information in such automated format as may be prescribed by the Exchange, as may from time to time be required." NYSE Rule 401 requires that a member "shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs."

3/ Blue sheets (so-called because of the traditional blue paper in which such records were reported and maintained prior to their conversion to an electronic format) are documents in an automated format that are generated by self-regulatory organization ("SRO") members, at the request of the Commission and the SROs, of certain customer and proprietary trading information. See Exchange Act Rel. No. 25859 (June 27, 1988), 41 SEC Docket 398. This information includes, among other data, "customers' names and addresses; trade dates, settlement dates, and whether the transactions were purchases or sales; and the stock symbol, number of shares, and purchase or sale price." United States v. Reifler, 446 F.3d 65, 122 (2d Cir. 2006). See generally Exchange Act Rel. No. 44494 (continued...)

a result of the Firm's inadequate written supervisory procedures relating to its blue sheet submissions. 4/ Based on these findings of violation, the NYSE censured Schon-Ex and fined it $300,000. We base our findings on an independent review of the record.

II.

The relevant facts are largely undisputed and concern efforts by Schon-Ex to respond to blue sheet requests made by the NYSE between 2002 and 2004.

A. Schon-Ex provides execution services for NYSE and American Stock Exchange listed securities for its much larger affiliate, Schonfeld Securities, LLC, a clearing firm ("Schonfeld"). 5/ According to Schon-Ex's chief executive officer ("CEO"), James Nardone, the Firm's employees were also "joint-employees" of Schonfeld "in their daily functions and responsibilities." Thus, Nardone was also CEO of Schonfeld and Schon-Ex's compliance officer, Annemarie Cichy, also served in that capacity for Schonfeld.

When Schon-Ex became a member of the NYSE in June 2002, it arranged, through Schonfeld, with ADP Financial Information Services, Inc. ("ADP"), which provides trade data processing services to Exchange members, to file the Firm's electronic blue sheets with regulators. Under that arrangement, Schon-Ex provided ADP with data, including the Firm's trading in

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3/ (...continued)
(June 29, 2001), 75 SEC Docket 1034 (discussing the reasons for, history of, and rules governing, the submission of electronic blue sheets). A November 16, 1992 Exchange memo to members states that blue sheet submissions must indicate whether a trade is a "long" or "short" sale -- the type of data entry involved in this proceeding, as discussed below. See n.6, infra.

4/ NYSE Rule 342 mandates that members provide reasonable supervision and "appropriate supervisory control" over their employees and the members' activities, including "delegat[ing] to qualified principals or employees responsibility and authority for supervision and control of each office, department or business activity, . . . provid[ing] for appropriate procedures of supervision and control . . . [and] establish[ing] a separate system of follow-up and review to determine that the delegated authority and responsibility is being properly exercised."

5/ Both Schon-Ex and Schonfeld are owned by The Schonfeld Group, LLC. According to Schon-Ex's brief, the Firm currently has seven employees, although its chief executive officer testified that, in January 2006, it had twenty employees. As of June 30, 2006, according to the Firm's FOCUS (Financial and Operational Combined Uniform Single) Report, Schon-Ex had total assets of nearly $2.8 million and ownership equity of $1.65 million after the Firm set aside $300,000 to cover payment of the fine imposed by the NYSE. Schonfeld has over 850 employees and generated over $115 million in revenues in 2005.

NYSE-listed securities. Among other things, ADP prepared electronic blue sheets with the data and, upon request, transmitted it on Schon-Ex's behalf to regulatory authorities, including the NYSE, that had requested it from Schon-Ex.

Cichy testified that, during the period at issue, no one at the Firm checked ADP's blue sheet submissions for accuracy. According to Cichy, the Firm "had no specific written procedures" regarding the verification of blue sheet data because the Firm "had no reason or no red flag at that point in time." Nardone stated that the Firm "had a procedure in place to verify that the orders were entered [into Schon-Ex's computer systems] as sell shorts . . . [that] order tickets indicated sell shorts [and that] the traders . . . uploaded the [information] as a sell short." Nardone further testified that this was the only verification procedure the Firm had during the period at issue. Nardone conceded that, although a copy of the transmission would be sent to the Firm by ADP, the Firm did not customarily review the data, as formatted by ADP, before ADP transmitted it to the Exchange.

B. In March 2004, staff in the Exchange's Division of Market Surveillance asked the Firm to provide blue sheets for its trading in the securities of Martha Stewart Living Omnimedia Inc. ("Martha Stewart"). The staff was investigating apparent "weakness in the price of the stock" in anticipation of a criminal jury verdict against a senior executive of the company and wanted data regarding contemporaneous short selling by Schon-Ex. According to John Kroog, a senior Exchange official who supervised the Martha Stewart investigation, upon comparing the electronic blue sheets submitted by ADP on Schon-Ex's behalf with internal NYSE databases, NYSE staff discovered that the Firm's blue sheets erroneously identified "short" sales executed by the Firm as "long" sales. 6/ According to the Exchange, it "uncovered this systemic error in April of 2004 during an investigation into Blue Sheet practices at numerous firms."

On April 23, 2004, NYSE staff notified the Firm that its blue sheets conflicted with the Exchange's records of Schon-Ex's short sales in Martha Stewart stock. NYSE staff requested that

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6/ A "long" sale is the sale of a security that the seller owns. 13 Andrews Sec. Litig. & Reg. Rep. 16 n.2. The term "short sale" means "any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller." 17 C.F.R § 242.200(a). As we explained in Short Sales, Exchange Act Rel. No. 50103 (July 28, 2004), 83 SEC Docket 1492:

> In order to deliver the security to the purchaser, the short seller will borrow the security, typically from a broker-dealer or an institutional investor. The short seller later closes out the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owned, and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security or in a related security.

the Firm provide a listing of all accounts that sold Martha Stewart short through the Firm during the period from March 1 through March 5, 2004, along with the specifics of each transaction. Schon-Ex provided this information on April 30, 2004. The April 30 submission showed that the Firm executed 146 Martha Stewart short sale transactions during the period. ADP had misidentified approximately 100 out of the 146 transactions as long sales on Schon-Ex's original submission.

After the Firm informed ADP of the disparity, ADP tested its system and "confirmed" that short sales were not being properly reported. Nardone subsequently stated in an e-mail to ADP that the Firm's blue sheets "obviously are incorrect" and explained to ADP that there was "a regulatory issue" involved. 7/ On June 3, 2004, the Firm informed the Exchange about this ADP system problem, acknowledging that the Firm's blue sheets "did not properly reflect the short sale code on accounts."

Schon-Ex attempted to get ADP to correct the error. However, ADP was slow to address the problem, despite repeatedly assuring the Firm that the problem would be quickly corrected -- assurances that Schon-Ex relayed to the Exchange. Nardone acknowledged during his testimony that ADP was dilatory in fixing the problem. Nardone testified that he spoke to "the customer service people who service our account" and the account manager, Peter Stoll, about the problem. However, Nardone further testified that he did not raise the issue of ADP's delay with anyone at ADP senior to Stoll. 8/

In a November 9, 2005 letter, Schon-Ex informed the Exchange that, between June 2002 and October 2004, the Firm submitted 84 blue sheets that "incorrectly reported the short sales in the [affected] accounts as long sales." 9/ According to a chart included with the November 9, 2005 letter, 64 of these erroneous blue sheets were submitted before NYSE alerted Schon-Ex to the problem with the Martha Stewart blue sheet submission, and 20 were submitted by Schon-Ex

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7/ Nardone testified that he had explained to ADP's representative in the summer of 2004 that "there is a regulatory issue [and that] . . . [i]t wasn't us requesting a pretty report, it had to be fixed for the purposes of the Stock Exchange reporting."

8/ Neither the Firm nor Schonfeld (which Nardone also headed) considered terminating their relationship with ADP because, Nardone testified, "[t]hey support our books and records . . . [and] have too much infrastructure with the regulatory agencies that we cannot support."

9/ Schon-Ex included with this letter a table summarizing these inaccurate blue sheets. According to Cichy, the Martha Stewart trades were not included in the summary because, she surmised, "that was the one that created the problem and they [NYSE] were aware of it," although she stated that she did not know for certain why they were not included.

subsequent to that notification. 10/ Cichy stated that the Firm did not adopt procedures for the purpose of ensuring the accuracy of its blue sheet submissions until May 2005 -- more than a year after the Exchange had first notified the Firm of the problem and after the Firm had been informed that it was subject to an Exchange investigation regarding its blue sheet submissions.

Exchange official Kroog testified that, if a trade is misidentified in the blue sheets as a long sale when, in fact, it is actually a short sale, the error could escape the staff's attention. For example, in the Martha Stewart investigation, initially the staff was "primarily focused on short sale activity" and not on long sales. Kroog added that the staff did not identify the extent of the Firm's blue sheet errors for at least two years because the staff "wasn't looking for such discrepancies," and "relied on [Schon-Ex] to provide accurate information." Kroog described blue sheets as "the foundation" of certain Exchange investigations, including short sale investigations. Kroog noted that electronic blue sheets permit the staff to "create certain databases" to assist in analyzing data on "trade date, time of day," as well as "last name [and] geographic concentrations," and to "compare that against . . . other databases."

Schon-Ex's expert witness, Peter J. Chepucavage, testified that, even though the Exchange is able to obtain trading data from its order-entry system, the blue sheet data system is "very important" because it enables the Exchange and other regulators to "make the digestion of the information easier and more manageable." Chepucavage explained that, although the Exchange could conduct its analysis without utilizing the blue sheet data by consolidating its internal information manually, that would have been "a big task" and noted that "the blue sheets are designed as a uniform technological assistance" to aid the regulators in evaluating the trading information. However, Chepucavage stated that, in his opinion, the Firm's erroneous April 2004 blue sheet submission "did not have a significant impact" on the Exchange's Martha Stewart investigation because, according to Chepucavage, "based on what [he had] read in the record and heard . . . [at the hearing], . . . the staff had the necessary information to investigate Schoenfeld" from the data generated by its own internal order-entry system.

Kroog testified that, because of the repeated delays in ADP's resolving the reporting error, the Exchange asked the Firm to identify manually "accounts that sold short." In November 2004, the Firm began providing the Exchange with the requested data manually. 11/ While, Kroog explained, the manual submission of requested data was preferable to the erroneous electronic submissions of the Firm, it was nevertheless only an "interim fix" since the data was not automated. It is unclear exactly when ADP fixed the error. Schon-Ex now asserts that the error

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10/ NYSE's charge memorandum also noted that Schon-Ex submitted, through ADP, 58 erroneous blue sheets to Commission staff, all caused by the same ADP coding error. However, the Exchange did not base its findings of violations on them.

11/ The Firm also manually provided data for trades that had occurred prior to this time. The Exchange does not allege that the Firm submitted any inaccurate blue sheet reports to it after October 2004.

was corrected in February 2005, but earlier had stated, in communications with the NYSE, that the problem was not "completely corrected and test verified" until May 2005. However, Schon-Ex continued to submit its data manually until May 2005.

C. On January 27, 2006, the NYSE Division of Enforcement instituted this proceeding. On June 7, 2006, the Division moved for summary judgment on the question of Schon-Ex's liability for the violations alleged in the complaint, i.e., violations of Exchange Rules 410A, 401 and 342 based on its submission of inaccurate blue sheets and inadequate supervisory procedures related to those submissions. Although Schon-Ex asserted, in its response to the Division's motion, that it "conformed in all material respects with the [Exchange's] requirements" at issue, it did not challenge the facts underlying the Exchange's allegations, i.e., that the Firm had incorrectly reported short sales as long and had no procedures to monitor the accuracy of the trading data ADP submitted on its behalf. The Hearing Panel granted the Division's motion and held a hearing regarding the appropriate sanction. The Hearing Panel censured the Firm and fined it $300,000. On June 6, 2007, the NYSE Regulation, Inc. Board of Directors issued a decision affirming the decision of the Hearing Panel in all respects. This appeal followed.

III.

Schon-Ex does not dispute the Exchange's findings of violation and expressly admits in its brief to us, as it did before the Exchange, that its "Blue Sheet Reporting error occurred from June 2002 to February 2005, and resulted in 84 erroneous Blue Sheet Reports being sent to the NYSE." The record supports these admissions. It contains written summaries of the erroneous blue sheet submissions and hard copies of those submissions, which originally were transmitted by ADP electronically. We thus find that the Firm violated Rule 410A based on the inaccurate blue sheets submitted to the Exchange.

The record also includes evidence, in the form of testimony by the Firm's president and compliance officer, regarding Schon-Ex's lack of procedures designed to ensure that its blue sheet transmissions were accurate. This evidence supports the Exchange's findings that Schon-Ex submitted inaccurate blue sheet reports and that, during the period at issue, the Firm did not maintain adequate supervisory procedures relating to blue sheet submissions. Although Schon-Ex does not deny that it lacked procedures to ensure the accuracy of the blue sheet information transmitted on its behalf by ADP and does not expressly challenge the Exchange's findings that, as a result, it violated Rule 342, it states that it "believes that its procedures were effective." In support of this assertion, it notes that all of the data it supplied to ADP was correct and that the errors at issue were caused by ADP. We find that Schon-Ex violated Rule 342 based on the Firm's lack of procedures and controls, during the period at issue, to verify that ADP's submissions, on the Firm's behalf, were accurate.

We further believe that the evidence, establishing Schon-Ex's repeated failure to submit accurate blue sheet data over a multi-year period, supports the Exchange's finding that the Firm failed to adhere to principles of good business practice in the conduct of its business affairs. We consequently sustain the NYSE's finding that the Firm violated Rule 401.

IV.

Schon-Ex challenges the amount of the fine that the Exchange imposed. According to Schon-Ex, the fine "is palpably disproportionate to the violation and is without justification in light of the facts of this case." The Firm asks that we either "reduce the fine to an amount that is proportionate to the facts and violation" or "remand the case" back to the Exchange.

Our review of the sanctions imposed by the NYSE is governed by Section 19(e)(2) of the Securities Exchange Act of 1934. 12/ Section 19(e)(2) provides that we will sustain NYSE's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition, in which case we "may cancel, reduce, or require the remission of such sanction." 13/

When evaluating whether a sanction imposed by the NYSE is excessive or oppressive, we "address[] the nature of the violation and the mitigating factors presented in the record." 14/ In determining whether the sanction is appropriately remedial and not excessive and punitive, we look at, among other relevant factors, "[t]he seriousness of the offense, the corresponding harm to the trading public, the potential gain to the broker for disobeying the rules, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to the offending broker and others." 15/ We also have considered factors identified in an October 2005 Information Memo from the Exchange to NYSE members "regarding the factors considered by the Enforcement Division in determining sanctions." 16/ These include the nature and extent of the misconduct, resulting harm, prior disciplinary record, and the effectiveness of the compliance controls involved. Based on the foregoing, and as discussed below, we have determined that the sanctions are remedial and are not excessive or oppressive.

12/ 15 U.S.C. § 78s(e)(2).

13/ Schon-Ex does not claim, and we do not find, that NYSE's action imposed an unnecessary or inappropriate burden on competition.

14/ PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005)).

15/ McCarthy, 406 F.3d at 190. We note that, although deterrence is not, by itself, sufficient justification for imposing a sanction, "it may be considered as part of the overall remedial inquiry." Id. at 189; PAZ Sec., Inc., 494 F.3d at 1066.

16/ Factors Considered by the New York Stock Exchange Division of Enforcement in Determining Sanctions, Info. Memo No. 05-77 (Oct. 7, 2005), available at http://www.nyse.com.

A. Schon-Ex argues that the relevant factors identified by the courts and by the Exchange itself support a much smaller fine. It asserts that the data submission "error was not significant" because Exchange staff "already had the short sale information" from Schon-Ex's original trade entry -- a fact that Exchange official Kroog acknowledged during the hearing. 17/ Schon-Ex points out that the blue sheets were accurate "except the one field relating to short sales that was then unnecessary," because the NYSE already had that data. Schon-Ex further notes that the Exchange's Hearing Panel observed that "the harm that Enforcement alleged was caused by Schon-Ex should not weigh heavily in assessing [a] penalty." 18/

Although the record is unclear about the extent to which the Firm's blue sheet errors impeded the Martha Stewart investigation or other Exchange investigations, we nevertheless view Schon-Ex's misconduct as significant. 19/ We have previously observed that the utilization of the electronic blue sheet format enables Exchange staff to "review and analyze blue sheet information more rapidly and effectively" and "significantly improve[s] the ability of the [Exchange] to conduct [its] market surveillance and monitoring responsibilities . . . ." 20/ As noted, NYSE official Kroog described blue sheets as "the foundation" of Exchange investigations and emphasized that the electronic blue sheet format helps the staff to search through the data more quickly and effectively. Schon-Ex's expert witness, Chepucavage, also testified to the importance

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17/ As discussed above, NYSE official Kroog testified that the Exchange initially obtained the short sale trading data from the Exchange's own internal order-entry system, which monitors trading by Exchange members.

18/ Although the Exchange's Division of Enforcement had contended that Schon-Ex's erroneous submissions had impeded the Martha Stewart investigation, the Hearing Panel rejected Enforcement's contention, concluding that "these impediments seemed vague and unquantified."

19/ While the Hearing Panel did not fully accept Enforcement's claims of harm resulting from Schon-Ex's erroneous submissions, it nevertheless imposed the $300,000 fine at issue. The Hearing Panel found that Schon-Ex's "failure to detect the problem in the first place and, once it became aware of the errors, to take timely and effective action to get its vendor to implement a solution suggested that Respondent did not take the matter seriously enough." According to the Panel, "the fine imposed must be sufficient to ensure that Respondent, as well as other firms in similar circumstances, will be more diligent and pro-active in the future." As indicated in the discussion below, we share the Hearing Panel's concerns.

20/ Exchange Act Rel. No. 25859 (June 27, 1988), 41 SEC Docket 398, 399-400. As we have noted, "the sheer bulk of the information that often results from such [blue sheet] requests can make analysis of blue sheet information by the surveillance staffs of the Exchanges difficult and time consuming, particularly where they must manually review records involving a large number of transactions, firms and accounts." Id. at 399.

of the blue sheet data system in enabling the Exchange to evaluate the trading information more effectively.

Here, the erroneous data submissions occurred over several years, involved numerous blue sheet reports, and continued for several months after Exchange staff notified the Firm about the problem. Schon-Ex evidenced an apparent lack of urgency in resolving the matter. Although Schon-Ex claims that it did all that it could to get ADP to remedy the problem promptly, it admittedly failed to raise the matter with any ADP personnel higher than Schon-Ex's account executive or take other action that might have impressed upon ADP the seriousness of the matter. The Firm also could have begun manually submitting the blue sheet data much sooner than it did and not waited several months for the Exchange to make this request. 21/

Although we, like the NYSE, acknowledge the Firm's subsequent efforts to revise its procedures to detect errors, its failure to have such procedures in place earlier facilitated at least 84 erroneous submissions. Moreover, the Firm did not revise its blue sheet oversight procedures for over a year after learning of the problem and acted only after being notified that it was subject to an enforcement investigation related to its blue sheet submissions.

B. Schon-Ex also complains that, in setting sanctions for Schon-Ex, the Hearing Panel considered settled proceedings with 20 different NYSE members. These settled proceedings involved allegations of erroneous electronic blue sheet submissions and inadequate internal controls. Schon-Ex insists "they have no precedence in this matter." Schon-Ex further contends that, because these settled cases were resolved without any hearing, the settled cases are of doubtful value because these cases do not contain enough information about the settling firm, the precise nature of the violation, or mitigating factors to provide a meaningful comparison. Schon-Ex asserts that these settled cases were clearly used as precedent in setting Schon-Ex's fine.

NYSE procedures expressly direct that, "[i]n arguing penalty, the parties may cite to prior NYSE disciplinary decisions," and these procedures do not distinguish between settled and contested disciplinary actions. We have recognized that it may be appropriate for an SRO to review settled precedent "as one of many guideposts" to determine the appropriate sanction,

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21/ Schon-Ex complains that the Exchange "did nothing to assist or guide Schon-Ex in correcting" the problem. ADP, however, was not an Exchange member nor subject to Exchange jurisdiction. Moreover, we have repeatedly held that members and their associated persons "cannot shift their burden of compliance" to the SRO. Richard F. Kresge, Exchange Act Rel. No. 55988 (June 29, 2007), 90 SEC Docket 3072, 3086-87 and n.33 (quoting B.R. Stickle & Co., 51 S.E.C. 1022, 1025 (1994)); see also Nazmi C. Hassanieh, 52 S.E.C. 87, 90-91 n.13 (1994) (rejecting defense, in failure to cooperate proceeding, that SRO "failed to take reasonable steps to locate" respondent by contacting his former attorney).

particularly where, as here, the SRO had no published sanction guidelines. 22/ Moreover, the Hearing Panel did not treat the settled decisions as binding or having precedential value. Indeed, as Schon-Ex notes, the Hearing Panel expressly rejected this assertion in its opinion. 23/

The record shows that the Hearing Panel examined the settled cases carefully to determine their relevance to this case. It appears that these settled cases were developed during the same investigation that led to the Schon-Ex inquiry, and they were all resolved less than eight months prior to the Schon-Ex penalty hearing. The Hearing Panel reviewed each of the stipulations entered in these settled cases, and asked questions about the facts of the cases, relevant precedents and the proposed penalties during hearings attended by counsel for the Firm and Enforcement. 24/ The Hearing Panel rejected the applicability of those settlements where

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22/ See Arthur James Niebauer, Exchange Act Rel. No. 54384 (Aug. 30, 2006), 88 SEC Docket 2728, 2740 & n.46 (noting approvingly in upholding NYSE's sanction determination that the sanctions imposed fell within the range of sanctions imposed in five settled cases for violations of comparable NYSE trading rules); see also David Wong, 55 S.E.C. 602, 614 (2002) (finding it appropriate for American Stock Exchange to consider a settled case, among numerous other factors, in assessing a sanction).

Schon-Ex cites to certain administrative and court decisions that, it asserts, held that settled cases have no precedential value. See, e.g., Office of Consumers' Counsel v. FERC, 783 F.2d 206, 235 (D.C. Cir. 1986) (holding that a settled administrative disciplinary matter "will not establish principles or precedent or control future proceedings or otherwise 'settle issues'" because the "essence of a settlement agreement [is] that the participants can agree on an end result without necessarily agreeing upon the reasoning, data, analyses or principles which led to the agreement"). However, the decisions cited by Schon-Ex do not hold that a self-regulatory organization may not use settled cases as one factor, among others, in determining an appropriate sanction, as the Hearing Panel did here.

23/ The Hearing Panel stated:

> [W]hile settled cases are not binding on a Hearing Panel, they can provide 'a useful starting point' in determining a reasonable range of sanctions. See Info Memo 05-77 at 2. Of course, a trier of fact must always base its decision on the particular facts and circumstances of the case before it.

24/ We note in this connection that parties that settle disciplinary proceedings often receive less severe sanctions than those who do not. See Phlo Corp., Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1113 n.84 (noting that "the rationale for the imposition of lower sanctions in settled proceedings is, at least in part, that settlement lets the Commission avoid time-consuming adversary proceedings and the concomitant expenditure of staff resources"); Philip A. Lehman, Exchange Act Rel. No. 54660 (Oct.

(continued...)

the highest fine ($500,000) was imposed, finding that, unlike the respondents in those cases, Schon-Ex did not make inaccurate representations to the NYSE that the problem had been corrected or misreport several different types of data. On the other hand, the panel did not find that Schon-Ex self-reported its errors to the NYSE or expended significant resources to correct its problems so as to bring itself into compliance within a reasonable time, as had occurred in those cases in which the lowest ($150,000) fine had been assessed. 25/

C. Schon-Ex and its predecessor entities have been subject to three prior disciplinary actions. 26/ In the most serious of these matters, in 2002, a Schon-Ex predecessor entity, Major League Securities, LLC, consented to findings that its "supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations," in connection with improper loans made by an executive officer to persons who used these funds to open accounts at the predecessor entity. Pursuant to that settlement, the predecessor entity agreed to pay a fine of $225,000. Another matter, settled in 2000, involved books and records failures on the part of another predecessor entity, Major League Securities Inc., 27/ in which the firm consented to findings that it had "failed to make and keep order memoranda" concerning a number of separate securities transactions, "failed to record the time of execution" with respect to other transactions, and "failed to prepare, maintain, and enforce adequate written supervisory procedures." As part of that settlement, the firm agreed to pay a fine of $15,500. The third matter resulted in a summary fine of $5,000 imposed in July 2004

24/ (...continued)
27, 2006), 89 SEC Docket 536, 550 (pointing out that sanctions imposed in settled proceedings may understate the sanctions imposed in litigated cases "because settled sanctions reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversarial litigation"); Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996) (noting that "respondents who offer to settle may properly receive lesser sanctions than they otherwise might have received based on pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings") (citation omitted). Thus, we do not believe that Schon-Ex suffered from having its sanctions compared to those in similar settled proceedings.

25/ One member of the three member hearing panel would have imposed a fine in the "five-figure range" on the grounds that the violations in this case were not significant and did not affect a large number of trades or accounts and that such a lower amount would have been sufficient to achieve the goal of deterrence. However, it is the final decision of the Exchange that we review. The NYSE Board affirmed the Hearing Panel majority, making that majority view the final decision of the Exchange.

26/ Schon-Ex does not assert that the disciplinary history of its predecessors should not be imputed to it.

27/ It is unclear from the record when Major League Securities Inc. changed its name to Major League Securities, LLC.

under NYSE Rule 476A in connection with Schon-Ex's submission of inaccurate account indicators. 28/

Schon-Ex also asserts that the Exchange improperly considered disciplinary history involving its affiliate, Schonfeld, in sanctioning the Firm. 29/ Although we believe that it was not improper for the Hearing Panel to consider Schonfeld's disciplinary history in light of the clear overlap in personnel and other ties between the two affiliated firms, we nevertheless have not considered Schonfeld's misconduct in assessing the appropriateness of the sanction imposed by the Exchange. We view the Firm's own prior disciplinary history, independent of Schonfeld's, as serious and of a similar nature to that found here, which provides additional justification for the sanctions imposed.

D. Schon-Ex argues that the Exchange erred in not treating its misconduct under the "minor rule violation" provisions of NYSE Rule 476A and imposing a fine of only $5,000, as provided for under that rule. Rule 476A(a) provides that, "[i]n lieu of commencing a formal disciplinary proceeding . . . the Exchange may . . . impose a fine, not to exceed $5,000, on any member . . . for any violation the Exchange shall have determined is minor in nature [emphasis added]." Rule 476A(e) further states that "the Exchange shall be free, whenever it determines that any violation is not minor in nature, to proceed under Rule 476 [i.e., commence a formal disciplinary proceeding] rather than under this Rule." Rule 476A thus clearly grants the Exchange the discretion to determine whether Schon-Ex's violation of Rule 410A should be treated as a minor rule violation or the subject of formal disciplinary procedures.

We agree with the Exchange that formal disciplinary proceedings were warranted by the large number of erroneous submissions over a two-year period in violation of Rule 410A. Moreover, the NYSE alleged violations of rules relating to supervisory procedures and compliance with good business practices, and NYSE rules do not provide for violations of these rules to be considered as minor rule violations.

28/ In its order, NYSE advised Schon-Ex of its right to contest the determination. It is unclear from the record whether Schon-Ex paid the fine or contested the decision.

29/ According to the Firm, Schon-Ex and Schonfeld "are two distinct entities that have different businesses, different registrations and different SROs" and, "[t]herefore, the disciplinary history of Schonfeld should not have been considered in evaluating the sanctions against Schon-Ex." Schon-Ex points out that, while it is a "NYSE registered broker-dealer, whose sole business is to execute listed securities for Schonfeld and its customers," Schonfeld is "an NASD member firm [that acts as an] executing and clearing broker [and] also conducts a DVP institutional business and a conduit stock loan business."

E. Schon-Ex further complains that the Exchange improperly considered Schonfeld's assets in determining a sanction. It observes that one of the sanctioning factors noted by the Exchange in its 2005 Information Memo is the size of the firm and that Schon-Ex's small size should weigh in favor of a lesser sanction. Schon-Ex argues that it was "a small firm of 7 employees" and that the fine imposed against it is excessive given its small size. According to Schon-Ex, the fine amounts to one-sixth of its entire net capital.

While we believe that it was not unreasonable for the Hearing Panel to consider the combined financial resources of Schon-Ex and Schonfeld given the overlap of the two companies' businesses, operations and key employees, we conclude that, even excluding Schonfeld's resources and looking only to Schon-Ex's financial position, the amount of the fine was neither excessive nor oppressive. Schon-Ex has not established that payment of the fine threatens its business. Indeed, Schon-Ex has presented no evidence to support its contentions that the payment of the fine would "work an excessive and punitive result" or cause the "destruction" of its business. 30/ Accordingly, we do not find Schon-Ex's small size and limited resources to be a mitigating factor warranting a lesser penalty.

****

In sum, the Firm's violations, in the nature and extent of its erroneous submissions, in its failure to timely remedy the problem, and in the inadequacies of its procedures in preventing or detecting the problem in the first place, warrant a substantial sanction. Under all the circumstances, we believe that the sanction imposed by the NYSE provides an appropriate level of deterrence -- both to Schon-Ex and to other firms that are required to supply similar data to regulators -- to encourage NYSE members to make every reasonable effort to ensure that their

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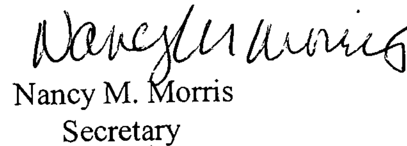
30/ See McCarthy, 406 F.3d at 190 (holding that mitigating facts and circumstances existed "from which a compelling argument can be made that suspending McCarthy now will not serve remedial interests and will work an excessive and punitive result -- namely, the destruction of the brokerage practice McCarthy has built during several years of rule-abiding trading").

submissions are accurate and that this kind of systemic problem is not repeated. 31/ By so doing, we believe that the sanction furthers important objectives of the self-regulatory system, is neither excessive nor oppressive, and, therefore, satisfies the remedial requirements of the Exchange Act. 32/

An appropriate order will issue. 33/

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



Nancy M. Morris
Secretary

31/ Id. at 189.

32/ PAZ Sec., Inc., 494 F.3d at 1065-66.

33/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57857 / May 23, 2008

Admin. Proc. File No. 3-12693

In the Matter of the Application of

SCHON-EX, LLC
c/o John R. Hewitt, Esq.
McCarter & English, LLP
245 Park Avenue
New York, NY 10167

For Review of Disciplinary Action Taken by

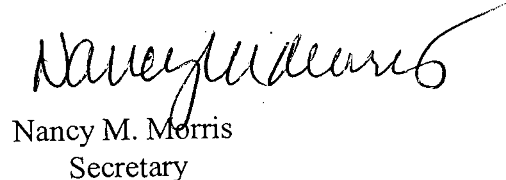
NYSE REGULATION, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES EXCHANGE

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

ORDERED that the disciplinary action taken by NYSE Regulation, Inc. against Schon-Ex, LLC be, and it hereby is, sustained.

By the Commission.



Nancy M. Morris
Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57855 / May 23, 2008

Admin. Proc. File No. 3-12208

In the Matter of KEVIN HALL, CPA c/o William R. Baker III Latham & Watkins, LLP 555 Eleventh Street NW, Suite 1000 Washington, DC 20004-1304 and ROSEMARY MEYER, CPA c/o Gary F. Bendinger Howrey LLP 170 South Main, Suite 400 Salt Lake City, UT 84101	ORDER DENYING MOTIONS FOR SUMMARY AFFIRMANCE

On January 15, 2008, an administrative law judge issued a decision dismissing an administrative proceeding against respondents Kevin Hall, CPA, and Rosemary Meyer, CPA ("Respondents"), who served respectively as engagement partner and senior manager for the 1999 audit by KPMG LLP ("KPMG") of the financial statements of US Foodservice, Inc. ("USF"), a food service and distribution company. On February 6, 2008, the Commission's Division of Enforcement (the "Division") filed a petition for review of the law judge's decision. On February 5, 2008, and March 13, 2008, Hall and Meyer respectively moved for summary affirmance by the Commission of the law judge's decision. 1/ The Division filed a consolidated response to these motions. We have determined to deny Respondents' motions.

1/ Meyer also filed a Motion for Permission to Refile Motion for Summary Affirmance of Initial Decision and Memorandum of Points and Authorities in Support of Motion. We grant this motion.

Document 26 of 46

Rule of Practice 102(e) permits us to censure or deny, permanently or temporarily, the privilege of appearing or practicing before us to persons found to have engaged in improper professional conduct. 2/ As applied to persons licensed as accountants, "improper professional conduct" includes the following:

> (A) Intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards; or
>
> (B) Either of the following two types of negligent conduct:
>
> > (1) A single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.
> >
> > (2) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission. 3/

The Order Instituting Proceedings ("OIP"), issued by the Commission on February 16, 2006, alleges that Respondents engaged in improper professional conduct within the meaning of Rule 102(e) in connection with the audit of the financial statements of USF for its 1999 fiscal year and with the interim review for the second quarter of its fiscal year 2000. The OIP charges that Respondents failed to comply with Generally Accepted Auditing Standards ("GAAS") by unreasonably: (i) failing to exercise due professional care; (ii) failing to maintain an attitude of professional skepticism; (iii) failing to obtain sufficient competent evidentiary matter; (iv) substituting management representations for competent evidence; (v) failing to properly design and conduct audit confirmation procedures; and (vi) failing to require material adjustment to interim financial statements during their review engagement.

Among other things, the OIP alleges that USF engaged in a scheme to overstate the operating income reported in its financial statements, which were audited by KPMG and included in USF's filings with the Commission, by booking certain prepayments of income known as promotional allowances ("PAs") as received before they had been earned. The OIP further alleges, with respect to the 1999 audit, that, although Respondents identified the valuation, existence, and completeness of promotional income and receivables as a critical audit objective requiring heightened scrutiny and found numerous instances where USF recognized PA income when it should not have, Respondents nevertheless failed to recognize, or refused to act upon, these and other "red flags" they found.

2/ 17 C.F.R. § 201.102(e).

3/ 17 C.F.R. § 201.102(e)(1)(iv).

With respect to the interim review, the OIP alleges that Respondents were aware that USF had to pay substantial penalties under a supply contract if minimum purchase requirements were not met, that Respondents knew that USF paid $15 million in penalties during the first two quarters of fiscal year 2000 and was likely to continue incurring penalties under the contract, and that Respondents nevertheless allowed USF to avoid expensing the payments and failed to require USF to assess its exposure to a contingent liability under the contract.

The law judge held that Respondents' conduct did not violate GAAS. She held that the procedures that Respondents planned and executed in connection with both the 1999 audit and the interim review were appropriate and that Respondents' failure to make additional inquiries or employ other procedures was not unreasonable. She further held that, even if Respondents did violate GAAS, their conduct was not reckless or highly unreasonable. 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. 4/ 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. 5/

Respondents claim that summary affirmance is warranted. They assert that the Initial Decision embodies no important questions of law or policy that the Commission needs to address. Instead, Respondents contend, the Initial Decision merely presents a straightforward application of the evidence presented to the auditing standards applicable at the time. Respondents assert that the law judge specifically identified the auditing standards at issue, and that the law judge found, "after an exhaustive review of the evidence," that Respondents met those standards.

In opposition to Respondents' motions, the Division emphasizes that the auditor's responsibilities under GAAS are of critical importance to the Commission. The Division contends that this proceeding involves basic concepts of GAAS. The Division claims that the law judge misapplied or ignored fundamental concepts of GAAS and longstanding Commission precedent. 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

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4/ 17 C.F.R. § 201.411(e)(2).

5/ Id.

have a right to full consideration of those matters." 6/ Summary affirmance is appropriate when it is clear that "submission of briefs by the parties will not benefit us in reaching a decision." 7/

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 the proper application of GAAS to the conduct at issue. The questions posed by the Division's petition for review involve important matters regarding an auditor's fundamental responsibilities under GAAS. 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 Respondents' motions. Our denial of the motions should not be construed as suggesting any view as to the outcome of this case.

Accordingly, it is ORDERED that the motions for summary affirmance by Kevin Hall, CPA, and Rosemary Meyer, CPA, be, and they hereby are, denied.

By the Commission.

Nancy M. Morris
Secretary

6/ Richard Cannistraro, 53 S.E.C. 388, 389 n.3 (1998); see also Terry T. Steen, 52 S.E.C. 1337, 1338 & n.2 (1997) (denying summary affirmance and noting that Division did not assert "compelling reasons" that would justify such affirmance).

7/ 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, 484 (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"); Salvatore F. Sodano, Exchange Act Rel. No. 56961 (Dec. 13, 2007), __ SEC Docket __, __ & n.6 (applying Cannistraro and Lowry in order denying motion for summary affirmance).

FOIA

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No.57864 / May 23, 2008

Admin. Proc. File No. 3-12519

In the Matter of

IMPAX LABORATORIES, INC.
c/o Blank Rome LLP
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

OPINION OF THE COMMISSION

SECTION 12(j) PROCEEDING

Grounds for Remedial Action

Failure to Comply with Periodic Filing Requirements

Company failed to file periodic reports in violation of Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13. Held, it is necessary and appropriate for the protection of investors to revoke the registration of the company's securities.

APPEARANCES:

Michael Joseph, Joseph O. Click, and Joseph N. Cordaro, of Blank Rome LLP, for Impax Laboratories, Inc.

Paul W. Kisslinger, Neil J. Welch, Jr., and David S. Frye, for the Division of Enforcement.

Appeal filed: May 23, 2007
Last brief received: August 6, 2007
Oral argument: May 5, 2008

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I.

Impax Laboratories, Inc. ("Impax" or "the Company") appeals from an administrative law judge's decision finding that the Company had violated Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13 thereunder 1/ by failing to file its required quarterly and annual reports for any period after September 30, 2004 and, on that basis, revoking the registration of the Company's common stock. 2/ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. 3/

II.

Introduction. Impax, a Delaware corporation, develops, manufactures, and distributes pharmaceutical products. Impax's common stock is registered with the Commission pursuant to

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1/ Exchange Act Section 13(a) requires issuers of securities registered pursuant to Exchange Act Section 12 to file periodic and other reports with the Commission in accordance with rules established by the Commission. 15 U.S.C. § 78m(a). Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers to file annual reports with the Commission, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires issuers to file quarterly reports with the Commission.

2/ The Order Instituting Proceedings against Impax also instituted proceedings against several other parties pursuant to Exchange Act Section 12(j) for failure to file required quarterly and annual reports. Telynx, Inc. and Discovery Zone, Inc. 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 Telynx, Inc., Securities Exchange Act Rel. No. 55250 (Feb. 7, 2007), 89 SEC Docket 3218; Order Making Findings and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 as to Discovery Zone, Inc., Exchange Act Rel. No. 55690 (May 2, 2007), 90 SEC Docket 1612. The law judge in this proceeding revoked the registration of each class of securities registered pursuant to Exchange Act Section 12 of Cosmetic Center, Inc., Donlar Biosyntrex Corp., Donlar Corp., and Phoenix Waste Services Company, Inc. after finding those parties in default for failure to file an answer and participate in the prehearing conference for which they had notice. See Order Making Findings and Revoking Registrations by Default as to Cosmetic Ctr., Inc., Donlar Biosyntrex Corp., Donlar Corp., and Phoenix Waste Servs. Co., Exchange Act Rel. No. 55278 (Feb. 12, 2007), 89 SEC Docket 3308.

3/ Commission 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. Commissioner Casey conducted the required review.

Exchange Act Section 12(g). 4/ Impax admits that it has not filed its quarterly and annual reports for any period after September 30, 2004, as alleged in the Order Instituting Proceedings ("OIP").

Circumstances Surrounding Impax's Reporting Failures. Impax represents that its ability to cure its delinquencies and make current filings depends on circumstances surrounding the identification of an appropriate revenue recognition accounting policy applicable to transactions executed pursuant to the June 27, 2001 profit-sharing agreement between Teva Pharmaceuticals Curacao, N.V. ("Teva") and Impax ("the Agreement"). Teva is the United States subsidiary of Teva Pharmaceuticals Industries, Ltd., a pharmaceutical company headquartered in Israel. The Agreement provides, among other things, for Impax to develop and manufacture certain generic products that Teva would market; Teva to lend Impax $22 million and purchase $15 million of Impax's common stock; Impax to repay the loan with shares of Impax common stock at Impax's option; interest and principal forgiveness to occur under certain circumstances; Impax to repurchase a portion of its shares for nominal consideration when a specified milestone had been achieved; and the parties to share specified regulatory and patent-litigation expenses.

In early 2004, Impax began to ship to Teva products that were covered by the Agreement. 5/ Impax included product-related revenue resulting from the Agreement in its unaudited quarterly reports for the first two quarters of 2004 using the revenue recognition accounting policy which had been developed in 2000 by the Company's then-chief financial officer. Although unaudited, the 2004 quarterly reports were reviewed by Impax's independent auditor, Deloitte & Touche LLP ("Deloitte"). 6/ An error in sales calculations provided by Teva was discovered during the third quarter of 2004. As a result, Impax restated its revenue and net income results for the first two quarters of 2004 using its then-current revenue recognition accounting policy.

After the restatements, Deloitte increased its scrutiny of the Company's application of its revenue recognition accounting policy to Agreement transactions. In February 2005, Impax "began discussions" with Deloitte of revenue recognition under the Agreement in connection with the audit of the 2004 financial statements due on March 31, 2005. 7/ In March 2005,

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4/ 15 U.S.C. § 78*l*(g).

5/ For the fiscal years ending December 31, 2001, 2002, and 2003, the only recognized revenue earned pursuant to the Agreement was related to loan forgiveness by Teva. Revenue related to loan forgiveness under the Agreement is not a problematic aspect of Impax's revenue recognition accounting.

6/ Deloitte took over from Impax's previous auditors in October 2003.

7/ Impax and Teva executed two amendments to the Agreement in March 2005 that purportedly resolved certain unrelated accounting issues that had resulted in Impax's

(continued...)

Deloitte informed Impax that it was unable to "reach a consensus on the appropriate method of revenue recognition for the transactions [arising under the Agreement] in 2004," and therefore was unable to complete its audit of the Company's financial statements for the year ending December 31, 2004. Deloitte advised Impax to obtain guidance from the Commission's Office of the Chief Accountant ("OCA") with respect to an appropriate revenue recognition accounting policy for transactions under the Agreement. 8/ A representative of Deloitte testified that Deloitte believed that OCA's views were necessary "because of the complexity of the [Agreement] . . . and the challenge with respect to finding the appropriate accounting literature, either by direct application or analogy [in relation] to various aspects of the [Agreement]."

On March 16, 2005, Impax filed a Form 12b-25 notification indicating that it anticipated filing its annual report for the year ending December 31, 2004 approximately two weeks late because the Company required more time to

> complete the year-end financial closing, including reviewing necessary information from its strategic partner Teva for certain commercial products sold under its agreement with them . . . , to complete the extensive Sarbanes-Oxley Section 404 internal controls requirements . . . and to investigate and evaluate potential material weaknesses or potential significant deficiencies in connection with the Sarbanes-Oxley Section 404 internal control evaluation. 9/

At about this time, Impax hired a new chief financial officer, Arthur A. Koch, Jr., to replace its retiring chief financial officer. Koch had no prior practical experience with the application of the revenue recognition policy. Koch concluded that the accounting issues arising under the Agreement were "inordinately complex" and required a "highly technical and extremely involved analysis." Accordingly, he began to augment his accounting staff and retained FTI Consulting, Inc. ("FTI") to help resolve the problem of identifying an appropriate

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7/ (...continued)
restatement of financial information. After the amendments, Deloitte increased its scrutiny of accounting issues raised by the Agreement.

8/ OCA typically offers guidance when companies or auditors are uncertain about the application of specific generally accepted accounting principles related to "critical accounting policies." See Guidance for Consulting on Accounting Matters with the Office of the Chief Accountant, http://www.sec.gov/info/accountants/ocasubguidance.htm (Last visited May 23, 2008), at *1. Obtaining OCA's views is not a prerequisite for filing an annual report. Id.

9/ Impax filed seven more Form 12b-25 notifications to address each of the remaining periodic reports covered by the period in the OIP that were not filed. Of the seven filings, Impax filed two of the Form 12b-25 notifications late. Subsequent to the period covered in the OIP, Impax failed to file five Form 12b-25 notifications.

revenue recognition accounting policy under the Agreement. Impax worked mainly with FTI's senior managing director, Ernest Ten Eyck, who had been a certified public accountant since 1971 and an assistant chief accountant with OCA for six years.

Impax and Ten Eyck collaborated during the spring of 2005 and, after receiving feedback from Deloitte, submitted a letter to OCA on May 26, 2005 ("the May 2005 Letter"). OCA's guidelines for submissions requesting OCA's views recommend that submissions include, among other things, the "conclusion of the company's auditor with respect to the accounting . . . issue and whether the submission and the proposed resolution of the issue have been discussed with the auditor's national office . . . and if so, when this discussion occurred." 10/ Impax's submission, however, stated that

> Deloitte has advised us that it believed the [May 2005 Letter] did not clearly present all of the pertinent facts related to our relationship with Teva under the [Agreement] or clearly present the proposed accounting or the basis for such accounting. . . [and] that it has not yet concluded whether it agrees with the proposed accounting described in this letter. . . . Deloitte advised management of Impax that it did not believe the draft letter was in an appropriate condition for submission to the staff of the Commission and accordingly advised us not to send this letter to the staff at this time.

Koch testified that, notwithstanding these reservations expressed by Deloitte, Impax submitted the May 2005 Letter on the advice of the Company's counsel and FTI and because Koch was frustrated by delays in obtaining feedback from Deloitte's national office. Koch thought OCA's consideration of "a very narrow issue," i.e., revenue recognition regarding product sales, would "shorten the auditor's analysis."

OCA assigned Pamela Schlosser, then a member of OCA staff who had experience working on requests for OCA guidance, to respond to Impax's letter. At the hearing, she testified that she considered Impax to be a "smaller company" with limited resources and that "[e]ven for a very large company with a very large team of management, it would take some time to work through . . . the various technical literature and consider all the [complex accounting] aspects" under the Agreement. Schlosser stated that she found the May 2005 Letter to be "alarming" because she had never seen a submission where the independent auditor not only offered no conclusion about the issue under consideration but also objected to the submission itself. Schlosser testified that she also believed that the May 2005 Letter lacked sufficient factual content and accounting analysis, including a conclusion from Deloitte, that precluded OCA from providing specific guidance.

10/ See Guidance for Consulting on Accounting Matters with the Office of the Chief Accountant, supra note 8, at *4.

Despite concerns about the adequacy of the May 2005 Letter, Schlosser testified that OCA recognized that Impax was operating under significant time constraints and held a conference call with the Company and Deloitte on June 10, 2005. During the conference call, OCA identified twelve to thirteen specific factual and analytic issues regarding both revenue recognition and other accounting matters under the Agreement that needed to be addressed before OCA could provide a meaningful assessment. At the conclusion of this ninety-minute discussion, OCA suggested that Impax should make a second submission that addressed the points raised during the call.

On June 27, 2005, Impax filed a Form 8-K 11/ with the Commission that disclosed that Impax's management had identified issues related to the Company's "financial close and reporting process" as one of five material weaknesses in its internal controls over financial reporting as of December 31, 2004. 12/ Impax represented that a "lack of sufficient accounting personnel" was a contributing factor to the weakness in its "financial close and reporting process" and that it was "[i]ncreasing the number and quality of internal general ledger supervisory and accounting personnel trained in accounting and reporting under US GAAP." By the end of 2005, Koch had increased the accounting staff to twenty-five individuals, including four certified public accountants.

Meanwhile, Nasdaq had notified Impax that the Company's continued listing on Nasdaq was at risk because compliance with its reporting obligations to the Commission is a requirement of continued listing on Nasdaq. Between May and July 2005, Impax made three requests to Nasdaq for extensions of time to cure its filing delinquencies, each time promising, but ultimately failing, to file on the requested extension date.

On August 3, 2005, Impax issued a press release ("Press Release") that discussed the potential financial impact of three different possible revenue recognition accounting policies on transactions executed pursuant to the Agreement. The Press Release assured investors that "[w]hatever policy is ultimately adopted . . . will have no effect upon the Company's liquidity or cash position." Koch testified after the issuance of the Press Release that he "began to get a great

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11/ Form 8-K is the "current report" that public companies must file upon the occurrence of an event specified in the items to the Form.

12/ A material weakness, as formerly defined in Public Company Accounting Oversight Board Auditing Standard No. 2, is a control deficiency, or combination of control deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim financial statements will not be prevented or detected. Impax identified the problem associated with Teva's product sales calculations under the Agreement as a second material weakness and the amendments to the Agreement as a purported resolution. See supra note 7. Impax identified the other material weaknesses to be related to its "billing controls for non-electronic data interchange orders," "inventory valuation procedures," and "reserve for shelf stock protection."

many calls from investors who could not understand under which circumstances which alternatives might be applicable." 13/ Koch added that "[i]t was clear from those calls that investors were very confused by that disclosure."

On August 5, 2005, Impax issued another press release acknowledging that Nasdaq had determined to delist Impax's stock effective on August 8, 2005. However, at the hearing in February 2007, Impax's website still stated that it was listed on Nasdaq. Although Koch indicated at the hearing that the error was an "oversight" that would be corrected, Impax's website currently states that "Impax Laboratories, Inc. (Nasdaq:IPXL), a Delaware corporation, is headquartered in Hayward, California."

By October 2005, Deloitte still had not reached a conclusion regarding an appropriate revenue recognition accounting policy for Agreement transactions. Koch, however, testified that an OCA reviewer told him during an October 2005 conversation that OCA was prepared to offer guidance because "it was taking so long to develop the position of the auditor." 14/ Accordingly, Impax submitted its second letter to OCA on November 7, 2005, again without a conclusion from Deloitte. Ten Eyck did not think it was likely that OCA would "approve" the November 7, 2005 letter, but thought that OCA "would informally put pressure on Deloitte . . . to get them to respond."

However, during a lengthy January 3, 2006 conference call with Impax and Deloitte, OCA noted that eight issues still had not been addressed sufficiently to enable OCA to provide specific guidance. Based on the collective acknowledgment by Impax, Deloitte, and OCA that little progress was being made, OCA suggested that Impax might have more success with a third submission by taking "a clean sheet of paper and beginning from square one."

For the next thirteen months, Impax collaborated with Ten Eyck and received feedback from Deloitte to prepare a third submission to OCA. To that end, Impax developed a series of "white papers" that attempted to address comprehensively all accounting issues related to the Agreement. Impax also revised several drafts of a third letter to OCA based on comments from Deloitte.

Meanwhile, on November 21, 2005, Deloitte had informed Impax that it would not stand for reappointment as the Company's independent auditors for the year ending December 31, 2005 and that it would resign "upon completion of its audit of the 2004 financial statements or

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13/ Koch testified that Impax issued the Press Release on advice from a former Nasdaq general counsel that a determination of whether to delist Impax would hinge on whether the Company had issued any kind of interim financial information during its reporting delinquencies.

14/ The OCA reviewer was not called to testify, and no other witness was asked to confirm this discussion.

upon its determination that it [would] be unable to complete the audit or issue a report on such financial statements." Impax did not engage a new independent auditor until November 9, 2006 when it appointed Grant Thornton LLP ("Grant Thornton") to audit the Company's internal controls and financial statements for the years ending December 31, 2005 and 2006.

On March 29, 2006, twelve months after Impax first became delinquent in filing its required reports, our Division of Corporation Finance notified Impax that it could be subject to the institution of an administrative proceeding to revoke the registration of its common stock if the Company failed to file all required reports under Exchange Act Section 13(a) within fifteen days. On December 29, 2006, the day that we issued the OIP in this proceeding, we issued an order pursuant to Exchange Act Section 12(k) temporarily suspending trading in Impax through January 16, 2007 on the basis that Impax had not filed any periodic reports since the report covering the period ending September 2004. 15/

On February 2, 2007, Impax submitted its third letter to OCA. 16/ In the letter, Impax stated that "[w]hile Deloitte has advised us that they believe our proposed model is acceptable, Deloitte has noted that the financial statement presentation resulting from the application of the model may not result in financial statements that provide transparent financial information to our investors."

Evidence Developed During and Subsequent to the Hearing. The hearing in this matter was held while Impax's third request to OCA was pending. Impax called an expert, Simon Wu. Wu opined that, notwithstanding the absence since November 2004 of the Company's financial statements, Impax's stock had been trading in an efficient market, i.e., one in which the market price reflects all publicly available information, including financial statements, and represents an unbiased estimate of the true value of the stock. Wu further concluded that institutional investors, who are typically "more sophisticated and better informed" than average retail investors, held a "significant" portion of Impax's stock and therefore "provided comfort to small retail investors, even in the absence of current financial statements."

Ten Eyck testified that determining an appropriate revenue recognition accounting policy with respect to the Agreement was "as complex as anything [he had] ever worked on in [his] career" because the accounting principles were broad, "extremely complex, and sometimes inconsistent and overlapping."

In its pleadings in this proceeding, as well as Koch's testimony at the hearing, Impax represented that it would file all of its outstanding quarterly and annual reports within eight to twelve weeks of receiving a favorable determination from OCA, contingent upon Impax's own internal preparation, as well as that of its independent auditors with respect to the annual reports,

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15/ Cosmetic Ctr., Exchange Act Rel. No. 55020 (Dec. 29, 2006), 89 SEC Docket 2268.

16/ Grant Thornton did not participate in the preparation of the third letter to OCA.

which require audited financial statements. A representative of Deloitte, however, testified that it was unable to estimate the amount of time needed to complete its audit of the financial statements for the year ending December 31, 2004. Deloitte asserted that, before it could complete its 2004 audit, it would require an understanding of "what has occurred in subsequent years and would rely on the efforts of [Grant Thornton] in connection with that." Deloitte also would need to assess whether any additional auditing procedures beyond the routine procedures would be required to process the audit in light of the application of the new revenue recognition accounting policy.

A representative of Grant Thornton testified that completion of its audit of the financial statements for the years ending December 31, 2005 and 2006 is dependent upon Deloitte first completing its audit of the 2004 financial statements. Additionally, Grant Thornton testified that processing the audit would involve numerous steps, including coordinating with Deloitte to perform a work-paper review of Deloitte's audit of the 2004 financial statements, completing its audit procedures for the audit of the 2005 and 2006 financial statements, obtaining customary documents related to the audit process, such as a management representation letter and letters from outside legal counsel, and receiving clearance to complete the audit following a multi-level internal review within Grant Thornton.

OCA informed the Company on July 24, 2007, during the pendency of this appeal, that "all open questions had been satisfactorily resolved and . . . that [it] would have no objection to the method of accounting proposed in Impax's February 2[, 2007] submission." 17/ According to OCA, a request for guidance is usually processed within two to three weeks, and the amount of time required for Impax's approval was "highly unusual." To date, Impax has not filed any of its outstanding periodic reports.

III.

Exchange Act Section 13(a) requires issuers of securities registered under Exchange Act Section 12 to file periodic and other reports with the Commission containing such information as the Commission's rules prescribe. Exchange Act Rules 13a-1 and 13a-13 require such issuers to

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17/ On July 26, 2007, Impax sought to adduce this additional evidence in the form of a declaration signed by Koch. The Division of Enforcement opposed the motion. Commission Rule of Practice 452 permits a party to adduce new evidence on appeal only if the moving party shows "with particularity" both (a) that the evidence is "material" and (b) that there were "reasonable grounds for failure to adduce such evidence previously." 17 C.F.R. § 201.452. OCA's approval of Impax's proposed accounting is relevant to the issue of when or whether Impax might file its 2004 annual report, and evidence of OCA's approval could not have been provided prior to OCA granting it. Under the circumstances, we have determined to grant Impax's motion.

file quarterly and annual reports. 18/ It is undisputed that Impax failed to file the six quarterly and two annual reports for the reporting periods charged in the OIP after September 30, 2004. 19/ Accordingly, we find that Impax failed to comply with Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13 thereunder.

IV.

Under Exchange Act Section 12(j), the Commission is authorized, "as it deems necessary or appropriate for the protection of investors," to revoke the registration of a security or suspend for a period not exceeding twelve months if it finds, after notice and an opportunity for hearing, that the issuer of the security has failed to comply with any provision of the Exchange Act or rules thereunder. 20/ Our determination of what sanctions will ensure that investors will be adequately protected "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions, on the other hand." 21/ Factors we consider in making this determination include 1) the seriousness of the issuer's violations, 2) the isolated or recurrent nature of the violations, 3) the degree of culpability involved, 4) the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and 5) the credibility of its assurances, if any, against further violations. 22/ No one of these factors is dispositive. 23/ Based on our consideration of these

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18/ 17 C.F.R. §§ 240.13a-1 and 240.13a-13; see also America's Sports Voice, Inc., Exchange Act Rel. No. 55511 (Mar. 22, 2007), 90 SEC Docket 879, 883.

19/ It is unnecessary for us to find that Impax was aware of, or intentionally ignored, its reporting obligations as scienter is not necessary to establish an issuer's liability under Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13. See America's Sports Voice, 90 SEC Docket at 883 n.12 (citing Ponce v. SEC, 345 F.3d 722, 737 n.10 (9th Cir. 2003); SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir. 1998)); Gateway Int'l Holdings, Inc., Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430, 439 n.28 (citations omitted). Nonetheless, there is no evidence, and Impax does not argue, that its failure to file was inadvertent or otherwise without intent.

20/ 15 U.S.C. § 78*l*(j).

21/ America's Sports Voice, 90 SEC Docket at 883-84; Gateway, 88 SEC Docket at 439.

22/ America's Sports Voice, 90 SEC Docket at 884; Gateway, 88 SEC Docket at 438-39.

23/ Cf. Conrad P. Seghers, Investment Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2298 & n.17 ("[T]he Commission's inquiry into the appropriate sanction to protect the public interest is a flexible one, and no one factor is dispositive.") (citing Robert W. Armstrong, III, Exchange Act Rel. No. 51920 (June 24, 2005), 85 SEC Docket

(continued...)

factors, we believe that the protection of investors requires revoking the Section 12(g) registration of the Company's common stock.

Impax attempted, but failed, to comply with its reporting obligations under Exchange Act Section 13. Even if the failure were unintentional, it has deprived the investing public of current and accurate information with respect to Impax's operations and financial condition for a period of more than three years. These are serious violations. As we stated in Eagletech Communications, Inc., 24/

> [f]ailure to file periodic reports violates a central provision of the Exchange Act. The purpose of the periodic filing requirements is to supply investors with current and accurate financial information about an issuer so that they may make sound decisions. Those requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities." SEC v. Beisinger Indus. Corp., 552 F.2d 15, 18 (1st Cir. 1977). Proceedings initiated under Exchange Act Section 12(j) are an important remedy to address the problem of publicly traded companies that are delinquent in the filing of their Exchange Act reports, and thereby deprive investors of accurate, complete, and timely information upon which to make informed investment decisions (citation omitted).

Impax has missed eight required filings, making the violations recurring. Impax concedes that "each failure to file a required report is technically a separate violation" but argues that its violations are isolated to the extent that they resulted solely from "the Company's inability to complete an unfortunately long and cumbersome process of developing a new accounting method for recognition of revenues under a 2001 multi-faceted strategic alliance agreement with another pharmaceutical company." Whether due to one or multiple causes, the fact is that Impax failed to file six quarterly and two annual reports over the course of the eighteen months covered in the OIP. In addition, subsequent to the filings that were due in the period covered by the OIP, Impax failed to file two annual and four quarterly reports. These filing failures are numerous and extend over a lengthy period, and we view them as recurrent, not isolated, in nature. 25/

23/ (...continued)
3011, 3019 (citation omitted)); see also Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1111-13 (D.C. Cir. 1988) (referencing the fact that the Commission weighs the factors relevant to a sanction in the public interest).

24/ Exchange Act Rel. No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1230.

25/ See America's Sports Voice, 90 SEC Docket at 880-84 (finding the failure to file twenty-two reports over the course of more than five years, among other things, serious and recurrent where respondent claimed failure emanated from organizational upheaval);
(continued...)

Impax argues that its violations do not warrant revocation because they are "certainly not as serious as, for example, filing reports that are false and misleading." As noted above, the failure to provide accurate, complete, and timely financial information is serious. 26/ Certainly, the filing of false and misleading reports is a serious matter. Such conduct, however, is addressed by the additional serious sanctions that are available for violation of the antifraud provisions of the federal securities laws. Among the possible violations on which an Exchange Act Section 12(j) proceeding could be based, we view the facts and circumstances of Impax's recurrent failure to file periodic reports as so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation. Impax has not made such a showing here.

With respect to the degree of culpability involved, we note that, although Impax's response to its accounting dilemma was less than desirable, Impax's attempts to contact OCA demonstrate that Impax's failure to comply with its reporting obligations was not the result of a complete disregard to solve the accounting problem. We recognize that Impax made efforts to comply with its reporting obligations. It appears that initially Impax's ability to focus on the complex accounting issues created by the Agreement was impeded by the need to correct errors in Impax's first two quarterly reports for 2004 (caused by Teva's provision of erroneous information) and the replacement of Impax's chief financial officer (who had developed the revenue recognition accounting policy) by Koch, who had no practical experience with the application of the policy. Deloitte did not inform Impax that it was unable to "reach a consensus" regarding application of the revenue recognition accounting policy under the Agreement and could not complete its audit until March 2005, shortly before the Form 10-K was due on March 31, 2005.

25/ (...continued)
Eagletech, 88 SEC Docket at 1226-30 (finding the failure to file multiple reports over the course of more than three years serious and recurrent where respondent claimed failure emanated from financial loss suffered as victim of criminal activity); Gateway, 88 SEC Docket at 439 (finding the failure to file a total of seven annual and quarterly reports over the course of eighteen months, among other things, serious and recurrent where respondent claimed failure emanated from lack of access to the books and records of its subsidiaries). The financial statements included in annual reports on Form 10-K must be prepared in conformity with generally accepted accounting principles and audited by an independent accountant in accordance with the statements of the Public Company Accounting Oversight Board (United States). See Item 8 of Form 10-K (17 C.F.R. § 249.310), Regulation S-X (17 C.F.R. § 210), and Item 302 of Regulation S-K (17 C.F.R. § 229.302); see also America's Sports Voice, 90 SEC Docket at 883 n.11 (citing United States v. Arthur Young & Co., 465 U.S. 805, 810 (1984) (observing that "[c]orporate financial statements are one of the primary sources of information available to guide the decisions of the investing public")).

26/ See supra note 24 and accompanying text.

Impax increased its accounting staff in 2005 and retained FTI to help address the problem of identifying an appropriate revenue recognition accounting policy under the Agreement. Impax and Ten Eyck collaborated for approximately two years to produce numerous drafts of letters to OCA and a series of "white papers" to address the accounting issues related to the Agreement. Impax made formal submissions to OCA in May 2005, November 2005, and February 2007. The February 2007 submission garnered OCA's approval of Impax's proposed method of accounting on July 24, 2007.

Impax's efforts to remedy its past violations and ensure future compliance nonetheless have yet to bring the Company into compliance with its reporting obligations. Moreover, Impax's efforts to provide information to the public have not been effective. For example, the August 2005 Press Release regarding three possible revenue recognition accounting policies was, as Koch conceded, more confusing than helpful to the investing public. Impax does not explain why, after learning in November 2005 that Deloitte would not stand for reappointment for the 2005 fiscal year, an entire year elapsed before Impax retained Grant Thornton in November 2006. Although Impax announced its delisting from Nasdaq in a press release, its website states that "Impax Laboratories, Inc. (Nasdaq:IPXL), a Delaware corporation, is headquartered in Hayward, California," which suggests that, or at the very least is confusing about whether, the Company is Nasdaq-listed. These lapses, in addition to the lack of accurate, complete, and timely financial statements, further detract from an investor's ability to make an informed investment decision.

Moreover, Impax has repeatedly underestimated the amount of time that it will need to become compliant. In its March 2005 Form 12b-25 notification, Impax stated that it would file its 2004 annual report two weeks late. It did not do so. Between May and July 2005, Impax made three requests to Nasdaq for extensions of time to cure its filing delinquencies, each time promising, but ultimately failing, to file on a specific date. At the hearing, Impax represented that it would file all of its outstanding quarterly and annual reports within eight to twelve weeks of receiving a favorable determination from OCA. Pending our consideration of this appeal, Impax moved to revise this estimate three times. On October 19, 2007, the Company stated that it would need a total of sixteen to twenty weeks following OCA's approval to cure its reporting delinquencies. On December 28, 2007, Impax then stated that it would need a total of approximately thirty-one weeks following OCA's approval. On February 8, 2008, Impax stated that it would need a total of approximately forty weeks following OCA's approval. 27/ It is

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27/ Impax moved to adduce this additional evidence pursuant to Commission Rule of Practice 452. See supra note 17 regarding the standards for adducing additional evidence under Commission Rule of Practice 452. Impax's revised estimates are material to the issue of when or whether it might cure its filing delinquencies and were necessary when Impax failed to meet it original and subsequent revised estimates. Pursuant to Commission Rule of Practice 323, 17 C.F.R. § 201.323, we take official notice that Impax revised its February 8, 2008 statement in a Form 8-K that it filed on May 2, 2008, estimating that it would become current in its periodic reports by June 30, 2008. On (continued...)

unclear why these estimates deviated from that provided during the hearing. It has now been forty-three weeks since OCA provided its determination, yet Impax has not filed any of its outstanding reports, including those that are subsequent to the period covered in the OIP. 28/

In addition to the factors discussed above, we are persuaded that revocation is a more appropriate sanction here than a suspension because Impax's assurances against further violations are not credible. Our primary concern is with the public interest in ensuring that investors are protected by having access to accurate, complete, and timely information, including financial statements, upon which to base their investment decisions. Impax has made repeated unfulfilled promises to file its periodic reports. Although an acceptable revenue recognition accounting policy has been identified, it must now be incorporated into the financial statements for all of the outstanding periodic reports, including one annual report and three quarterly reports for each of 2004, 2005, 2006, and 2007. The record indicates that the process involved with preparing these reports will require significant coordination among Impax, Deloitte, and Grant Thornton, each of whom will have numerous responsibilities. 29/ Impax already has needed substantially more time than anticipated to address its 2004 delinquencies, making us unconvinced that it is realistic to expect that the Company can become current entirely in its reporting obligations in the foreseeable future. 30/

27/ (...continued)
January 25, 2008, Impax also moved to adduce additional evidence regarding the quantitative nature of the hours that Deloitte, Grant Thornton, FTI, and the Company have expended on addressing the revenue recognition accounting policy. We do not find this information to be material to the disposition of this matter and therefore deny Impax's motion.

28/ Neither has Impax filed any of its five Form 12b-25 notifications due since May 2007. Although we are not finding violations based on failures to file subsequent reports, we may consider them, and other matters that fall outside the OIP, in assessing appropriate sanctions. See, e.g., Gateway, 88 SEC Docket at 440 n.30; Robert Bruce Lohmann, 56 S.E.C. 573, 583 n.20 (2003).

29/ We can impose a suspension for no more than one year under Exchange Act Section 12(j), and we cannot conclude on this record that Impax can reliably assure us that it can complete all outstanding filings within that time.

30/ Deloitte stated in the February 2, 2007 letter to OCA that the financial statement presentation resulting from application of the new revenue recognition accounting policy may not result in financial statements that provide transparent financial information to investors. Given both Deloitte's and OCA's concurrence in the appropriateness of the new revenue recognition policy, it is unclear what additional issues or cause for delay may underlie this assertion.

Impax raises several arguments against revocation, none of which is persuasive. Impax argues that its auditors failed to question the propriety of the revenue recognition accounting policy in the audited 2002 and 2003, and the unaudited 2004, financial statements. Whether or not Impax's auditors fulfilled their obligations associated with their audits, it is Impax's obligation under Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13 to ensure that its periodic reports are filed in an accurate, complete, and timely manner. 31/

Impax argues that it "bears little resemblance to the typical respondent" in proceedings initiated under Exchange Act Section 12(j) and that, "[w]hile the public and the Company's shareholders have not had access to financial reports and the important information that they impart since November 2004, the failure to file periodic reports has not had a harmful effect on the Company's operations, and the Company's business has grown significantly during this period." Impax asserts that it has "an active and growing generic pharmaceutical business with $46 million in cash and a current market capitalization of approximately $700 million," and that, as of June 2007, it "marketed 68 generic products," has "applications for approximately 20 more products pending before the FDA," and had "55 products under development." In support of these claims, Impax relies on the conclusions of its expert witness, Simon Wu. Wu concluded that, notwithstanding the absence since November 2004 of the Company's financial statements, Impax's stock had been trading in an efficient market, i.e., one in which the market price reflects all publicly available information, including financial statements, and represents an unbiased estimate of the true value of the stock. Wu further concluded that institutional investors, who are typically "more sophisticated and better informed" than average retail investors, held a "significant" portion of Impax's stock and therefore "provided comfort to small retail investors, even in the absence of current financial statements."

As discussed above, Congress mandated a different test than that proposed by Wu, i.e., the prompt provision to investors of current, periodic, audited financial statements. The publicly available information to which Wu refers is, without dispute, incomplete. Impax's financial statements, including audited financial statements containing an opinion of its independent auditors that such financial statements present fairly, in all material respects, the financial position of Impax and are in conformity with generally accepted accounting principles, have been unavailable to all investors, including sophisticated ones, since the period ending September 30, 2004. Impax concedes that certain of the publicly available information, such as the August 2005 Press Release, is confusing. The absence of financial statements, particularly in the case of an apparently expanding company with demonstrated growth objectives, deprives all investors of

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31/ 15 U.S.C. § 78m(a); 17 C.F.R. §§ 240.13a-1, 13a-13. See also Item 15 of Form 10-K (17 C.F.R. § 249.310) and Item 601 of Regulation S-K (17 C.F.R. § 229.601) (requiring a company's principal executive officer and principal financial officer to certify to the accuracy of financial statements).

the required timely information, thereby hampering their ability to make informed investment decisions. 32/

Impax argues that suspension or revocation is draconian and "is in reality a sanction imposed upon Impax's shareholders . . . who bear no responsibility for the violations, as it would eliminate all liquidity and diminish the value of their shares." We disagree. In Gateway, we stated: "Exchange Act Section 12(j) authorizes revocation as a means of protecting investors. In evaluating what is necessary or appropriate to protect investors, 'regard must be had not only for existing stockholders of the issuer, but also for potential investors.'" 33/ Both existing and prospective Impax investors are harmed by the continuing lack of current, reliable, and audited financial information because they cannot make an informed investment decision. For example, current investors do not have an adequate basis to evaluate the Company's profitability for themselves or determine accurately whether to sell stock. Impax has failed to meet each of its previously identified deadlines and has offered no credible assurances that it will provide the delinquent information on any specific date. 34/ Impax may re-register its securities under the Exchange Act once it is able to comply with the registration requirements.

Impax claims that imposition of a sanction would demonstrate that Exchange Act Section 12(j) is a strict liability statute because the Company "has done everything it possibly could to resolve its accounting issues," yet "the Commission will accept no explanation or excuse." We have considered Impax's efforts to comply in detail. As we have stated, our determination of whether to impose a sanction rests on a careful consideration of each of the factors enumerated above, taking into account all of a respondent's arguments, and results only when these factors are weighed against each other under the specific facts and circumstances of each case.

After Impax committed its first reporting violation in March 2005, the Division of Corporation Finance monitored Impax's reporting status for twelve months prior to taking any action. In March 2006, when it was evident that Impax had not addressed its reporting delinquencies, the Division notified the Company that it could be subject to the institution of an administrative proceeding to revoke the registration of its stock if the Company failed to file all required reports under Exchange Act Section 13(a) within fifteen days. In December 2006, long after the fifteen days had elapsed without Impax having addressed its outstanding reports, we issued a ten-day suspension of trading and the OIP. We initiated this proceeding under Exchange

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32/ Cf. Gateway, 88 SEC Docket at 443-44 & n.45.

33/ Id. at 443 (citing Great Grass Oils Ltd., 37 S.E.C. 683, 698 (1957), aff'd, 256 F.2d 893 (D.C. Cir. 1958)).

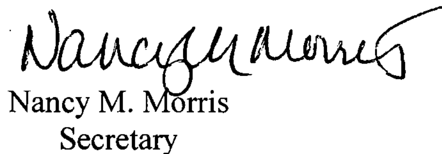
34/ Thus, suspension of registration for a period not exceeding twelve months in the hope that Impax would return to compliance within that period would very likely result in the necessity for another proceeding under Exchange Act Section 12(j) at the end of that period.

Act Section 12(j) only after Impax had failed to rectify its reporting delinquencies for twenty-one months after committing its first reporting violation.

The record demonstrates that Impax cannot credibly identify when it will become current on its reporting obligations despite its concerted efforts to avoid and correct its reporting failures. In the meantime, investors cannot make an informed investment decision about Impax because they do not have access to accurate, complete, and timely reports that comply with the requirements of the Exchange Act and rules and regulations promulgated thereunder.

An appropriate order will issue. 35/

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



Nancy M. Morris
Secretary

35/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57864 / May 23, 2008

Admin. Proc. File No. 3-12519

In the Matter of

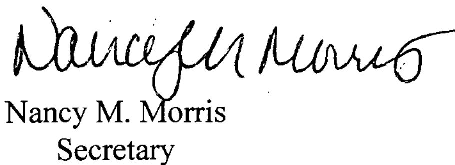
IMPAX LABORATORIES, INC.
c/o Blank Rome LLP
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the registration of all classes of the registered securities of Impax Laboratories, Inc. under Section 12(g) of the Securities Exchange Act of 1934, be, and it hereby is, revoked pursuant to Exchange Act Section 12(j).

By the Commission.



Nancy M. Morris
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 27, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13044

In the Matter of **GSI Securitization Ltd.** **(n/k/a GSI Securitization, Inc.),** **Interliant, Inc.** **(n/k/a I Successor Corp.),** **Namibian Minerals Corp.,** **Nix Co., Ltd.,** **Number Nine Visual Technology Corp., and** **Oncor, Inc.,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents GSI Securitization Ltd. (n/k/a GSI Securitization, Inc.), Interliant, Inc. (n/k/a I Successor Corp.), Namibian Minerals Corp., Nix Co., Ltd., Number Nine Visual Technology Corp., and Oncor, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. GSI Securitization Ltd. (n/k/a GSI Securitization, Inc.) ("GSII") (CIK No. 1046148) is a Nevada corporation located in Princeton, New Jersey with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). GSII 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, 2003. The audit report accompanying GSII's Form 20-F for the period ended December 31, 2002 included a "going concern" paragraph based on the company's significant losses and lack of revenue or income, among other factors. On August 12, 2004, GSII announced that its auditor had sent it a letter alleging that there may have been material misstatements in financial statements given to the auditor for an annual audit, and that there may also have

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been material misstatements in its quarterly filings for the periods ended June 30, 2003 and September 30, 2003. On September 7, 2007, GSII changed its corporate domicile from the Cayman Islands to Nevada and its name to GSI Securitization, Inc. without reporting either of those events to the Commission or recording them in the EDGAR database as required by Commission rule. As of May 14, 2008, the common stock of GSII was quoted on the Pink Sheets, had twelve market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of GSII had an average daily trading volume of 222,848 shares for the six months ended March 7, 2008.

2. Interliant, Inc. (n/k/a I Successor Corp.) ("ILNTQ") (CIK No. 1065910) is a Delaware corporation located in Purchase, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). ILNTQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2002, which reported a net loss of $48,913,266 for the prior year. On August 5, 2002, ILNTQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York, which was closed on July 25, 2006. In May 2003, the company instructed its transfer agent to halt trading in the company's stock following the sale of all the company's assets and the termination of its operations. On May 21, 2003, the company changed its name to I Successor Corp. with the State of Delaware without disclosing that change in periodic reports or recording it in the Commission's EDGAR database, as required by Commission rule. As of May 14, 2008, the common stock of ILNTQ was quoted on the Pink Sheets, had seven market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of ILNTQ had an average daily trading volume of 11,688 shares for the six months ended March 7, 2008.

3. Namibian Minerals Corp. ("NMCOF") (CIK No. 1032082) is a Yukon corporation located in New York, New York with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). NMCOF 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, 2001, which reported a net loss of $56,028,000 for the prior year. As of May 14, 2008, the common stock of NMCOF was quoted on the Pink Sheets, had nine market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of NMCOF had an average daily trading volume of 18,600 shares for the six months ended March 7, 2008.

4. Nix Co., Ltd. ("Nix") (CIK No. 856999) is a void Delaware corporation located in Huntington Valley, Pennsylvania with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Nix is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 1999, which reported a net loss of $1,173,325 for the prior year.

5. Number Nine Visual Technology Corp. ("Number Nine") (CIK No. 936448) is a Delaware corporation located in Lexington, Massachusetts with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Number Nine is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended October 2, 1999,

which reported a net loss of $6,962,000 for the prior nine months. On December 20, 1999, Number Nine filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Massachusetts. This proceeding was terminated on April 22, 2003.

6. Oncor, Inc. ("ONCR") (CIK No. 806637) is a forfeited Maryland corporation located in Rockville, Maryland with common stock and warrants registered with the Commission pursuant to Exchange Act Section 12(g). ONCR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1999, which reported a net loss of $982,000 for the prior six months. On February 26, 1999, ONCR filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware. The proceeding was terminated on April 19, 2004. As of May 14, 2008, the common stock of ONCR was quoted on the Pink Sheets, had eight market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of ONCR had an average daily trading volume of 125,021 shares for the six months ended January 4, 2008.

B. DELINQUENT PERIODIC FILINGS

7. 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 them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

Florence Harmon
Acting Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Attachment

Appendix 1

Chart of Delinquent Filings

In the Matter of GSI Securitization Ltd. (n/k/a GSI Securitization, Inc.), et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
GSI Securitization Ltd. (n/k/a GSI Securitization, Inc.)					
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2
	10-QSB	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	**18**				
Interliant, Inc. (n/k/a I Successor Corp.)					
	10-Q	03/31/03	05/15/03	Not filed	60
	10-Q	06/30/03	08/14/03	Not filed	57
	10-Q	09/30/03	11/14/03	Not filed	54
	10-K	12/31/03	03/30/04	Not filed	50
	10-Q	03/31/04	05/17/04	Not filed	48
	10-Q	06/30/04	08/16/04	Not filed	45
	10-Q	09/30/04	11/15/04	Not filed	42
	10-K	12/31/04	03/31/05	Not filed	38
	10-Q	03/31/05	05/16/05	Not filed	36
	10-Q	06/30/05	08/15/05	Not filed	33
	10-Q	09/30/05	11/14/05	Not filed	30
	10-K	12/31/05	03/31/06	Not filed	26
	10-Q	03/31/06	05/15/06	Not filed	24
	10-Q	06/30/06	08/14/06	Not filed	21
	10-Q	09/30/06	11/14/06	Not filed	18
	10-K	12/31/06	04/02/07	Not filed	13
	10-Q	03/31/07	05/15/07	Not filed	12
	10-Q	06/30/07	08/14/07	Not filed	9
	10-Q	09/30/07	11/14/07	Not filed	6
	10-K	12/31/07	03/31/08	Not filed	2
	10-Q	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	**21**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Namibian Minerals Corp.					
	20-F	12/31/02	06/30/03	Not filed	59
	20-F	12/31/03	06/30/04	Not filed	47
	20-F	12/31/04	06/30/05	Not filed	35
	20-F	12/31/05	06/30/06	Not filed	23
	20-F	12/31/06	07/02/07	Not filed	10
Total Filings Delinquent	**5**				
Nix Co., Ltd.					
	10-QSB	03/31/00	05/15/00	Not filed	96
	10-QSB	06/30/00	08/14/00	Not filed	93
	10-QSB	09/30/00	11/14/00	Not filed	90
	10-KSB	12/31/00	04/02/01	Not filed	85
	10-QSB	03/31/01	05/15/01	Not filed	84
	10-QSB	06/30/01	08/14/01	Not filed	81
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-KSB	12/31/01	04/01/02	Not filed	73
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2
	10-QSB	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	**33**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Number Nine Visual Technology Corp.					
	10-K	12/30/00	03/30/01	Not filed	86
	10-Q	04/01/00	05/16/00	Not filed	96
	10-Q	07/01/00	08/15/00	Not filed	93
	10-Q	09/30/00	11/14/00	Not filed	90
	10-K	12/30/00	03/30/01	Not filed	86
	10-Q	03/31/01	05/15/01	Not filed	84
	10-Q	06/30/01	08/14/01	Not filed	81
	10-Q	09/29/01	11/13/01	Not filed	78
	10-K	12/29/01	03/29/02	Not filed	74
	10-Q	03/30/02	05/14/02	Not filed	72
	10-Q	07/27/02	09/10/02	Not filed	68
	10-Q	09/28/02	11/12/02	Not filed	66
	10-K	12/28/02	03/28/03	Not filed	62
	10-Q	03/29/03	05/13/03	Not filed	60
	10-Q	06/28/03	08/12/03	Not filed	57
	10-Q	09/27/03	11/11/03	Not filed	54
	10-K	12/27/03	03/26/04	Not filed	50
	10-Q	04/03/04	05/18/04	Not filed	48
	10-Q	07/03/04	08/17/04	Not filed	45
	10-Q	10/02/04	11/16/04	Not filed	42
	10-K	12/25/04	03/25/05	Not filed	38
	10-Q	04/02/05	05/17/05	Not filed	36
	10-Q	07/02/05	08/16/05	Not filed	33
	10-Q	10/01/05	11/15/05	Not filed	30
	10-K	12/31/05	03/31/06	Not filed	26
	10-Q	04/01/06	05/16/06	Not filed	24
	10-Q	07/01/06	08/15/06	Not filed	21
	10-Q	09/30/06	11/14/06	Not filed	18
	10-K	12/29/07	03/28/08	Not filed	2
	10-Q	03/31/07	05/15/07	Not filed	12
	10-Q	06/30/07	08/14/07	Not filed	9
	10-Q	09/29/07	11/13/07	Not filed	6
	10-Q	03/29/08	05/13/08	Not filed	0
Total Filings Delinquent	**33**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Oncor, Inc.					
	10-Q	09/30/99	11/15/99	Not filed	102
	10-K	12/31/99	03/30/00	Not filed	98
	10-Q	03/31/00	05/15/00	Not filed	96
	10-Q	06/30/00	08/14/00	Not filed	93
	10-Q	09/30/00	11/14/00	Not filed	90
	10-K	12/31/00	04/02/01	Not filed	85
	10-Q	03/31/01	05/15/01	Not filed	84
	10-Q	06/30/01	08/14/01	Not filed	81
	10-Q	09/30/01	11/14/01	Not filed	78
	10-K	12/31/01	04/01/02	Not filed	73
	10-Q	03/31/02	05/15/02	Not filed	72
	10-Q	06/30/02	08/14/02	Not filed	69
	10-Q	09/30/02	11/14/02	Not filed	66
	10-K	12/31/02	03/31/03	Not filed	62
	10-Q	03/31/03	05/15/03	Not filed	60
	10-Q	06/30/03	08/14/03	Not filed	57
	10-Q	09/30/03	11/14/03	Not filed	54
	10-K	12/31/03	03/30/04	Not filed	50
	10-Q	03/31/04	05/17/04	Not filed	48
	10-Q	06/30/04	08/16/04	Not filed	45
	10-Q	09/30/04	11/15/04	Not filed	42
	10-K	12/31/04	03/31/05	Not filed	38
	10-Q	03/31/05	05/16/05	Not filed	36
	10-Q	06/30/05	08/15/05	Not filed	33
	10-Q	09/30/05	11/14/05	Not filed	30
	10-K	12/31/05	03/31/06	Not filed	26
	10-Q	03/31/06	05/15/06	Not filed	24
	10-Q	06/30/06	08/14/06	Not filed	21
	10-Q	09/30/06	11/14/06	Not filed	18
	10-K	12/31/06	04/02/07	Not filed	13
	10-Q	03/31/07	05/15/07	Not filed	12
	10-Q	06/30/07	08/14/07	Not filed	9
	10-Q	09/30/07	11/14/07	Not filed	6
	10-K	12/31/07	03/31/08	Not filed	2
	10-Q	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	**35**				

<u>Service List</u>

Rule 141 of the Commission's Rules of Practice provides that the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the Order Instituting Proceedings and Notice of Hearing Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), on the Respondents and their legal agents.

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

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

Neil J. Welch, Jr., Esq.
Division of Enforcement
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-7553

By Express Mail:
GSI Securitization Ltd. (n/k/a GSI Securitization, Inc.)
502 Carnegie Center, Suite 103
Princeton, NJ 08540

GSI Securitization Ltd. (n/k/a GSI Securitization, Inc.)
c/o Resident Agents of Nevada, Inc.
Registered Agent
711 S. Carson Street, Suite 4
Carson City, NV 89701

By Express Mail:
Interliant, Inc. (n/k/a I Successor Corp.)
Two Manhattanville Road
Purchase, NY 10577

Interliant, Inc. (n/k/a I Successor Corp.)
c/o Corporation Service Company
Registered Agent
2711 Centerville Road, Suite 400
Wilmington, DE 19808

By Express Mail:
Namibian Minerals Corp.
26 Dover Street
London W1S 4LY
United Kingdom

Namibian Minerals Corp.
c/o CT Corporation System, Inc.
Agent for Service in the United States
111 Eighth Avenue, 13th Floor
New York, NY 10011

Namibian Minerals Corp.
Anton Campion, Macdonald Olver
Registered Office
204 Lambert Street, Suite 200
Whitehourse
Yukon Territory Y1A 3T2
Canada

By Express Mail:
Nix Co., Ltd.
2617 Huntington Pike, Suite 202
Huntington Valley, PA 19006

Nix Co., Ltd.
c/o The Company Corporation
Registered Agent
2711 Centerville Road, Suite 400
Wilmington, DE 19808

By Express Mail:
Number Nine Visual Technology Corp.
18 Hartwell Avenue
Lexington, MA 02421-3141

Number Nine Visual Technology Corp.
c/o National Registered Agents, Inc.
Registered Agent
160 Greentree Drive, Suite 101
Dover, DE 19904

By Express Mail:
Oncor, Inc.
15200 Shady Grove Road
Rockville, MD 20850

Oncor, Inc.
c/o Mr. John L. Coker
Registered Agent
209 Perry Parkway
Gaithersburg, MD 20877

[The Division of Enforcement will also have a process server attempt personal service on all respondents.]

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57874; File No. PCAOB-2008-02)

May 27, 2008

Public Company Accounting Oversight Board; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Delaying Implementation Schedule of Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on April 22, 2008, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "SEC" or "Commission") the proposed rule change described in Items I and II below, which items have been prepared by the Board. The PCAOB has designated the proposed rule change as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule" under Section 19(b)(3)(A)(i) of the Securities Exchange Act of 1934 (as incorporated, by reference, into Section 107(b)(4) of the Act) and Rule 19b-4(f)(1) thereunder, which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule Change

The PCAOB is filing with the SEC an adjustment of the implementation schedule for Rule 3523, Tax Services for Persons in Financial Reporting Oversight Roles. Specifically the Board will not apply Rule 3523 to tax services provided on or before December 31, 2008, when those services are provided during the audit period and are completed before the professional engagement period begins. The PCAOB is not proposing any textual changes to the Rules of the PCAOB by this filing.

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II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule and discussed any comments it received on the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

On July 26, 2005, the PCAOB adopted certain rules related to registered public accounting firms' provision of tax services to public company audit clients. As part of this rulemaking, the Board adopted Rule 3523, which provides that a registered firm, subject to certain exceptions, is not independent of an audit client if the firm, or an affiliate of the firm, provides tax services during the audit and professional engagement period to a person in, or an immediate family member of a person in, a financial reporting oversight role at an audit client. This rule was intended to address concerns related to auditor independence when auditors provide personal tax services to individuals who play a direct role in preparing the financial statements of public company audit clients. Rule 3523 was approved by the SEC on April 19, 2006.

Consistent with the SEC's independence rules,[1/] the phrase "audit and professional engagement period" is defined to include two discrete periods of time. The "audit period" is the

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[1/] 17 CFR 210.2-01(f)(5).

period covered by any financial statements being audited or reviewed.[2] The "professional engagement period" is the period beginning when the firm either signs the initial engagement letter or begins audit procedures, whichever is earlier, and ends when either the company or the firm notifies the SEC that the company is no longer that firm's audit client.[3]

On April 3, 2007, the Board issued a concept release to solicit comment about the possible effect on a firm's independence of providing tax services to a person covered by Rule 3523 during the portion of the audit period that precedes the beginning of the professional engagement period and other practical consequences of applying the restrictions imposed by Rule 3523 to that portion of the audit period.[4] The Board also adjusted the implementation schedule for Rule 3523, as it applies to tax services provided during the period subject to audit but before the professional engagement period.[5]

On July 24, 2007, the Board proposed an amendment to Rule 3523 to exclude the portion of the audit period that precedes the beginning of the professional engagement period, as well as a new ethics and independence rule regarding communication with audit committees, and further adjusted the implementation schedule for Rule 3523 to allow sufficient time for consideration of

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2/ Rule 3501(a)(iii)(1).

3/ Rule 3501(a)(iii)(2).

4/ See PCAOB Release No. 2007-002 (Apr. 3, 2007).

5/ See id., at 7. Specifically, the Board stated that it would not apply Rule 3523 to tax services provided on or before July 31, 2007, when those services are provided during the audit period and are completed before the professional engagement period begins.

commenters' views.[6] After considering commenters' views, the Board adopted the amendment on April 22, 2008.[7]

The Board has determined to further adjust the implementation schedule for Rule 3523 to allow sufficient time for the SEC to consider whether to approve the amendment to Rule 3523. Specifically, the Board will not apply Rule 3523 to tax services provided on or before December 31, 2008, when those services are provided during the audit period and are completed before the professional engagement period begins.[8]

(b) Statutory Basis

The statutory basis for the proposed rule change is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Board's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Board did not solicit or receive written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Securities Exchange Act of 1934 (as incorporated, by reference, into Section 107(b)(4) of the

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[6] See PCAOB Release No. 2007-008 (July 24, 2007). Specifically, the Board stated that it would not apply Rule 3523 to tax services provided on or before April 30, 2008, when those services are provided during the audit period and are completed before the professional engagement period begins.

[7] See PCAOB Release No. 2008-003 (Apr. 22, 2008).

[8] This will apply regardless of whether there is an engagement in process on April 30, 2008.

Act) and paragraph (f) of Rule 19b-4 thereunder because of its designation by the PCAOB as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule." At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/pcaob.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number PCAOB 2008-02 on the subject line.

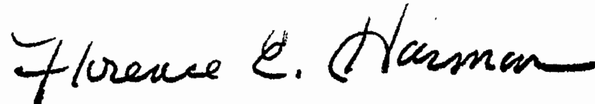
Paper comments:

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

All submissions should refer to File Number PCAOB 2008-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/pcaob/shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the

proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number PCAOB-2008-02 and should be submitted on or before **[insert date 21 days from publication in the Federal Register]**.

By the Commission.



Florence E. Harmon
Acting Secretary

F-11

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 27, 2008

In the Matter of

e.Spire Communications, Inc.,
Empire of Carolina, Inc.,
Genfinity Corp.
GSI Securitization Ltd.
(n/k/a GSI Securitization, Inc.),
Interliant, Inc.
(n/k/a I Successor Corp.),
Namibian Minerals Corp.,
Nix Co., Ltd.
(n/k/a Global Energy Resources, Inc.)
Number Nine Visual Technology Corp.
(n/k/a International Precious Minerals Group, Inc.)
NVID International, Inc.,
Oncor, Inc., and
USCI, 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 e.Spire Communications, Inc., including but not limited to its debt securities, because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Empire of Carolina, Inc. because it has not filed any periodic reports since the period ended September 30, 2000.

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Ts-17

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
May 27, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13045

In the Matter of **e.Spire Communications, Inc.,** **Empire of Carolina, Inc.,** **Genfinity Corp.** **NVID International, Inc., and** **USCI, Inc.,** **Respondents.**	**ORDER INSTITUTING PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents e.Spire Communications, Inc., Empire of Carolina, Inc., Genfinity Corp., NVID International, Inc., and USCI, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. e.Spire Communications, Inc. ("ESPIQ") [1] (CIK No. 932140) is a void Delaware corporation located in Herndon, Virginia with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). ESPIQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2001, which reported a net loss of $198,345,000 for the prior nine months. On March 22, 2001, ESPIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware. The proceeding was converted to a Chapter 7 proceeding on May 16, 2006, and was still pending as of May 14, 2008. As of May 14, 2008, the common stock of ESPIQ was quoted on the Pink Sheets, had eight market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of ESPIQ

[1] The short form of each issuer's name is also its stock symbol.

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had an average daily trading volume of 12,140 shares for the six months ended March 7, 2008. The debt securities of ESPIQ are traded on the over-the-counter markets.

2. Empire of Carolina, Inc. ("EMPIQ") (CIK No. 312840) is a void Delaware corporation located in Delray Beach, Florida with common stock, series A preferred stock, and warrants registered with the Commission pursuant to Exchange Act Section 12(g). EMPIQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2000, which reported a net loss of $6,340,000 for the prior nine months. On November 17, 2000, EMPIQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida. The proceeding was terminated on December 29, 2004. On June 29, 2001, the company and two of its subsidiaries consummated the sale of substantially all of the company's toy operations. As of May 14, 2008, the common stock of EMPIQ was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of EMPIQ had an average daily trading volume of 18,436 shares for the six months ended March 7, 2008.

3. Genfinity Corp. ("GFIN") (CIK No. 934330) is a void Delaware corporation located in Chapel Hill, North Carolina with common stock and class A warrants registered with the Commission pursuant to Exchange Act Section 12(g). GFIN 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 December 31, 2000, which reported a net loss of $5,481,074 for the prior nine months. On April 2, 2007, GFIN was the subject of an involuntary Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of New York, which was dismissed on September 18, 2007. As of May 14, 2008, the common stock of GFIN was quoted on the Pink Sheets, had six market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of GFIN had an average daily trading volume of 724 shares for the six months ended January 4, 2008.

4. NVID International, Inc. ("NVID") (CIK No. 1104192) is a forfeited Delaware corporation located in Clearwater, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). NVID 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 June 30, 2001, which reported a net loss of $486,738 for the prior six months. The auditor's report accompanying the Form 10-KSB for the period ended December 31, 2000 included a "going concern" paragraph based on the company's significant operating losses. As of May 14, 2008, the common stock of NVID was quoted on the Pink Sheets, had seven market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of NVID had an average daily trading volume of 24,065 shares for the six months ended March 7, 2008.

5. USCI, Inc. ("USCM") (CIK No. 907069) is a Delaware corporation located in Norcross, Georgia with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). USCM 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 June 30, 2001. The auditor's report accompanying USCM's Form 10-K for the period ended December 31, 2000 contained a "going

concern" paragraph based on the company's recurring operating losses, accumulated deficit, and negative working capital, among other factors. As of May 14, 2008, the common stock of USCM was quoted on the Pink Sheets, had ten market makers, and was eligible for the piggyback exemption of Exchange Act Rule 15c2-11(f)(3). The common stock of USCM had an average daily trading volume of 24,396 shares for the six months ended March 7, 2008.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

Florence Harmon
Acting Secretary

Attachment

Appendix 1

Chart of Delinquent Filings

In the Matter of e.Spire Communications, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
e.Spire Communications, Inc.					
	10-K	12/31/01	04/01/02	Not filed	73
	10-Q	03/31/02	05/15/02	Not filed	72
	10-Q	06/30/02	08/14/02	Not filed	69
	10-Q	09/30/02	11/14/02	Not filed	66
	10-K	12/31/02	03/31/03	Not filed	62
	10-Q	03/31/03	05/15/03	Not filed	60
	10-Q	06/30/03	08/14/03	Not filed	57
	10-Q	09/30/03	11/14/03	Not filed	54
	10-K	12/31/03	03/30/04	Not filed	50
	10-Q	03/31/04	05/17/04	Not filed	48
	10-Q	06/30/04	08/16/04	Not filed	45
	10-Q	09/30/04	11/15/04	Not filed	42
	10-K	12/31/04	03/31/05	Not filed	38
	10-Q	03/31/05	05/16/05	Not filed	36
	10-Q	06/30/05	08/15/05	Not filed	33
	10-Q	09/30/05	11/14/05	Not filed	30
	10-K	12/31/05	03/31/06	Not filed	26
	10-Q	03/31/06	05/15/06	Not filed	24
	10-Q	06/30/06	08/14/06	Not filed	21
	10-Q	09/30/06	11/14/06	Not filed	18
	10-K	12/31/06	04/02/07	Not filed	13
	10-Q	03/31/07	05/15/07	Not filed	12
	10-Q	06/30/07	08/14/07	Not filed	9
	10-Q	09/30/07	11/14/07	Not filed	6
	10-K	12/31/07	03/31/08	Not filed	2
	10-Q	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	**26**				
Empire of Carolina, Inc.					
	10-K	12/31/00	04/02/01	Not filed	85
	10-Q	03/31/01	05/15/01	Not filed	84
	10-Q	06/30/01	08/14/01	Not filed	81
	10-Q	09/30/01	11/14/01	Not filed	78
	10-K	12/31/01	04/01/02	Not filed	73
	10-Q	03/31/02	05/15/02	Not filed	72
	10-Q	06/30/02	08/14/02	Not filed	69
	10-Q	09/30/02	11/14/02	Not filed	66
	10-K	12/31/02	03/31/03	Not filed	62
	10-Q	03/31/03	05/15/03	Not filed	60
	10-Q	06/30/03	08/14/03	Not filed	57
	10-Q	09/30/03	11/14/03	Not filed	54
	10-K	12/31/03	03/30/04	Not filed	50
	10-Q	03/31/04	05/17/04	Not filed	48
	10-Q	06/30/04	08/16/04	Not filed	45
	10-Q	09/30/04	11/15/04	Not filed	42

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Empire of Carolina, Inc. ***(continued)***	*10-K*	12/31/04	03/31/05	Not filed	38
	10-Q	03/31/05	05/16/05	Not filed	36
	10-Q	06/30/05	08/15/05	Not filed	33
	10-Q	09/30/05	11/14/05	Not filed	30
	10-K	12/31/05	03/31/06	Not filed	26
	10-Q	03/31/06	05/15/06	Not filed	24
	10-Q	06/30/06	08/14/06	Not filed	21
	10-Q	09/30/06	11/14/06	Not filed	18
	10-K	12/31/06	04/02/07	Not filed	13
	10-Q	03/31/07	05/15/07	Not filed	12
	10-Q	06/30/07	08/14/07	Not filed	9
	10-Q	09/30/07	11/14/07	Not filed	6
	10-K	12/31/07	03/31/08	Not filed	2
	10-Q	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	**30**				
Genfinity Corp.					
	10-KSB	03/31/01	06/29/01	Not filed	83
	10-QSB	06/30/01	08/14/01	Not filed	81
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-QSB	12/31/01	02/14/02	Not filed	75
	10-KSB	03/31/02	07/01/02	Not filed	70
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-QSB	12/31/02	02/14/03	Not filed	63
	10-KSB	03/31/03	06/30/03	Not filed	59
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-QSB	12/31/03	02/17/04	Not filed	51
	10-KSB	03/31/04	06/29/04	Not filed	47
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-QSB	12/31/04	02/14/05	Not filed	39
	10-KSB	03/31/05	06/29/05	Not filed	35
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-QSB	12/31/05	02/14/06	Not filed	27
	10-KSB	03/31/06	06/29/06	Not filed	23
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-QSB	12/31/06	02/14/07	Not filed	15
	10-KSB	03/31/07	06/29/07	Not filed	11
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-QSB	12/31/07	02/14/08	Not filed	3
Total Filings Delinquent	**28**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
NVID International, Inc.					
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-KSB	12/31/01	04/01/02	Not filed	73
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2
	10-QSB	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	**27**				
USCI, Inc.					
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-KSB	12/31/01	04/01/02	Not filed	73
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
USCI, Inc.	*10-QSB*	09/30/06	11/14/06	Not filed	18
(continued)	*10-KSB*	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2
	10-QSB	03/31/08	05/15/08	Not filed	0

Total Filings Delinquent **26**

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
USCI, Inc.					
	10-QSB	09/30/01	11/14/01	Not filed	78
	10-KSB	12/31/01	04/01/02	Not filed	73
	10-QSB	03/31/02	05/15/02	Not filed	72
	10-QSB	06/30/02	08/14/02	Not filed	69
	10-QSB	09/30/02	11/14/02	Not filed	66
	10-KSB	12/31/02	03/31/03	Not filed	62
	10-QSB	03/31/03	05/15/03	Not filed	60
	10-QSB	06/30/03	08/14/03	Not filed	57
	10-QSB	09/30/03	11/14/03	Not filed	54
	10-KSB	12/31/03	03/30/04	Not filed	50
	10-QSB	03/31/04	05/17/04	Not filed	48
	10-QSB	06/30/04	08/16/04	Not filed	45
	10-QSB	09/30/04	11/15/04	Not filed	42
	10-KSB	12/31/04	03/31/05	Not filed	38
	10-QSB	03/31/05	05/16/05	Not filed	36
	10-QSB	06/30/05	08/15/05	Not filed	33
	10-QSB	09/30/05	11/14/05	Not filed	30
	10-KSB	12/31/05	03/31/06	Not filed	26
	10-QSB	03/31/06	05/15/06	Not filed	24
	10-QSB	06/30/06	08/14/06	Not filed	21
	10-QSB	09/30/06	11/14/06	Not filed	18
	10-KSB	12/31/06	04/02/07	Not filed	13
	10-QSB	03/31/07	05/15/07	Not filed	12
	10-QSB	06/30/07	08/14/07	Not filed	9
	10-QSB	09/30/07	11/14/07	Not filed	6
	10-KSB	12/31/07	03/31/08	Not filed	2
	10-QSB	03/31/08	05/15/08	Not filed	0
Total Filings Delinquent	27				

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8920 / May 27, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13046

In the Matter of First Southwest Company, Respondent.	ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933, GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION

I.

Respondent First Southwest Company ("First Southwest") has submitted a letter, dated January 11, 2008, requesting a waiver of the Rule 602 (c)(3) disqualification from the exemption from registration under Regulation E arising from First Southwest's settlement of an administrative proceeding commenced by the Commission.

II.

On May 27, 2008, pursuant to First Southwest's Offer of Settlement, the Commission issued an 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 15(b) of the Securities Exchange Act of 1934 against First Southwest. Under the Order, the Commission found that First Southwest willfully violated Sections 17(a)(2) of the Securities Act of 1933 (the "Securities Act") by engaging in violative practices in connection with certain auctions for auction rate securities. Without adequate disclosure, First Southwest intervened in auctions by bidding for its proprietary account to prevent failed auctions and to prevent all-hold auctions.

In the Order, the Commission censured First Southwest and required First Southwest (1) to cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act; (2) within 10 days of the entry of this Order, to pay a civil money penalty in the amount of $150,000 to the United States Treasury; (3) to make certain disclosures regarding its material auction practices and procedures; and (4) not later than 6 months after the date of this Order, unless otherwise extended by the staff of the Commission for good cause shown, have its chief executive officer or general counsel certify in writing to the staff of the Commission that has implemented procedures that are reasonably designed to prevent and detect failures by First Southwest to conduct the auction process in accordance with the

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auction procedures disclosed in the disclosure documents and any supplemental disclosures and that First Southwest is in compliance with Section IV.D. of the Order.

III.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if an underwriter of the securities to be offered is subject to an order of the Commission pursuant to Section 15(b) of the Exchange Act of 1934. 17 C.F.R. § 230.602(c)(3). Rule 602(e) under the Securities Act provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. 17 C.F.R. § 230.602(e).

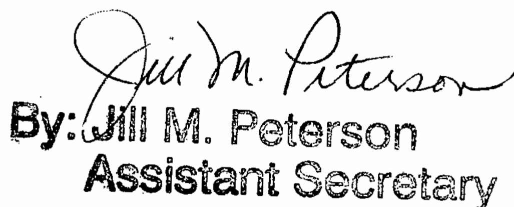
IV.

Based upon the representations set forth in First Southwest's request, the Commission has determined that, pursuant to Rule 602(e) under the Securities Act, a showing of good cause has been made that it is not necessary under the circumstances that the exemption be denied as a result of the Order.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provision of Rule 602(c)(3) under the Securities Act resulting from the entry of the Order is hereby granted.

By the Commission.

Florence E. Harmon
Acting Secretary



By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8919 / May 27, 2008

SECURITIES EXCHANGE ACT OF 1934
Release No. 57869 / May 27, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13046

In the Matter of

First Southwest Company,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

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

II.

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

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III.

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

A. RESPONDENT

Respondent **First Southwest Company**, headquartered in Dallas, Texas, is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act.

B. SUMMARY

As part of its broker-dealer business, Respondent underwrote and managed a limited number of auctions for auction rate securities. From at least January 1, 2003 through June 30, 2004, in connection with certain auctions, Respondent engaged in the practices described in Section III.C.2 below, and thereby violated Section 17(a)(2) of the Securities Act.

C. FACTS

1. The Auction Rate Securities Market

Auction rate securities are municipal bonds, corporate bonds, and preferred stocks with interest rates or dividend yields that are periodically re-set through auctions, typically every 7, 14, 28, or 35 days. Auction rate bonds are usually issued with maturities of 30 years, but the maturities can range from 5 years to perpetuity. Auction rate securities are often marketed to issuers as an alternative variable rate financing vehicle, and to investors as an alternative to money market funds. Auction rate securities were first developed in 1984, and the auction rate securities market has grown to well over $200 billion. Mostly institutional investors participate in the auction rate securities markets, although recently smaller investors also have begun participating in the market. Typically, the minimum investment is $25,000.

a. Auction Mechanics. Auction rate securities are auctioned at par so the return on the investment to the investor and the cost of financing to the issuer between auction dates is determined by the interest rate or dividend yield set through the auctions.[2] According to the disclosure documents (the prospectus or official statement) for each security, the interest rate or dividend yield is set through an auction (commonly referred to as a "Dutch" auction) in which bids with successively higher rates are accepted until all of the securities in the auction are sold. Investors can only submit the following types of orders: 1) a "hold" order, which is the default order for current investors (i.e., the order that is entered for a current holder if the holder takes no

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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] Between auctions, investors might be able to buy or sell auction rate securities in the secondary market at prices greater than, equal to, or less than par.

action), where a current investor will keep the securities at the rate at which the auction clears; 2) a "hold-at-rate" bid, where a current investor will only keep the securities if the clearing rate is at or above the specified rate; 3) a "sell" order, where a current investor will sell the securities regardless of the clearing rate; or 4) a "buy" bid, where a prospective investor, or a current investor who wants more securities, will buy securities if the clearing rate is at or above the specified rate. Disclosure documents often state that an investor's order is an irrevocable offer.

The final rate at which all of the securities are sold is the "clearing rate" that applies to all of the securities in the auction until the next auction. Bids with the lowest rate and then successively higher rates are accepted until all of the sell orders are filled. The clearing rate is the lowest rate bid sufficient to cover all of the securities for sale in the auction.[3] If there are not enough bids to cover the securities for sale, then the auction fails, the issuer pays an above-market rate set by a pre-determined formula described in the disclosure documents, and all of the current holders continue to hold the securities, with minor exceptions. If all of the current holders of the security elect to hold their positions without bidding a particular rate, then the clearing rate is the all-hold rate, a below-market rate set by a formula described in the disclosure documents.

b. Broker-Dealers' Role in Auctions. The issuer of each security selects one or more broker-dealers to underwrite the offering and/or manage the auction process. Investors can only submit orders through the selected broker-dealers. The issuer pays an annualized fee to each broker-dealer engaged to manage an auction (typically 25 basis points for the par value of the securities that it manages). The issuer also selects an auction agent to collect the orders and determine the clearing rate for the auction.

Investors must submit orders for an auction to the broker-dealer by a specified time. Many broker-dealers have an internal deadline by which investors must submit their orders to the broker-dealer. This internal deadline allows the broker-dealer sufficient time to process and submit the orders to the auction agent. Other broker-dealers allow investors to submit orders up until the submission deadline, i.e., the deadline for broker-dealers to submit orders to the auction agent. The broker-dealers must submit the orders to the auction agent before the submission deadline, and usually must identify each separate order.

c. Auction Agents' Role in Auctions. After receiving the orders from the broker-dealers, the auction agent calculates the clearing rate that will apply until the next auction. In practice, however, if there is only one broker-dealer, the broker-dealer can discern the clearing rate before submitting the orders to the auction agent.

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[3] For example, suppose $100,000 of securities were for sale and the auction received four buy bids. Bid A was for $50,000 at 1.10%, Bid B was for $50,000 at 1.15%, Bid C was for $50,000 at 1.15%, and Bid D was for $25,000 at 1.20%. Under these circumstances, the "clearing rate" would be 1.15%, meaning all of the securities in the auction would pay interest at a rate of 1.15% until the next auction. Bid A would be allocated $50,000, Bids B and C would receive pro-rata allocations ($25,000 each), and Bid D would receive no allocation.

The auction agent allocates the securities to the broker-dealers based on the orders they submitted. The auction procedures generally state that orders are filled in the following order: hold orders, hold-at-rate and buy bids with a rate below the clearing rate, hold-at-rate orders with a rate at the clearing rate, and buy bids with a rate at the clearing rate. When there are more bids for securities at the clearing rate than securities remaining for sale, the securities are allocated on a pro rata basis first to the hold-at-rate bidders and then to the buy bidders. Generally, the auction procedures require broker-dealers to follow the same hierarchy in allocating the securities to their customers.

d. Disclosures Regarding Broker-Dealer Bidding. During the relevant period, the disclosure documents for different securities varied as to what, if anything, they disclosed about broker-dealers bidding in auctions that they were managing. Some disclosure documents did not disclose anything about bidding by broker-dealers. Other disclosure documents disclosed that broker-dealers may bid in auctions with language similar to the following: "[a] broker-dealer may submit orders in Auctions for its own accounts." Still other disclosure documents disclosed that broker-dealers may bid in auctions and may have an information advantage with language similar to the following: "[a] Broker-Dealer may submit orders in Auctions for its own accounts. Any Broker-Dealer submitting an order for its own account in any Auction might have an advantage over other bidders in that it would have knowledge of other orders placed through it for that Auction (but it would not have knowledge of orders submitted by other Broker-Dealers, if any)."

2. Respondent's Conduct

Without adequate disclosure, Respondent intervened in auctions by bidding for its proprietary account to prevent failed auctions and to prevent all-hold auctions. In certain instances, the interventions affected the clearing rate.[4]

a. Bids To Prevent Failed Auctions. Without adequate disclosure, Respondent bid to prevent auctions from failing. Failed auctions occur when there are more securities for sale than there are bids for securities and result in an above-market rate described in the disclosure documents. Respondent submitted bids to ensure that all of the securities would be purchased to avoid failed auctions and thereby, in certain instances, affected the clearing rate.

b. Bids To Prevent All-Hold Auctions. Without adequate disclosure, Respondent submitted bids to prevent the all-hold rate, which is the below-market rate set when

[4] The clearing rate determines the interest rate or yield the issuer must pay to investors until the next auction. In those instances when these practices lowered the clearing rate, investors received a lower rate of return on their investments. Conversely, in those instances when the practices raised the clearing rate, issuers had to pay a higher interest rate or yield. To the extent that these practice affected the clearing rate, investors may not have been aware of the liquidity and credit risks associated with certain securities.

all current holders want to hold their positions so that there are no securities for sale in the auction. In certain instances, this practice affected the clearing rate.

D. LEGAL SECTION

Section 17(a)(2) of the Securities Act prohibits material misstatements and omissions in any offer or sale of securities. Negligent conduct can violate Section 17(a)(2). See, e.g., SEC v. Hughes Capital Corp., 124 F.3d 449, 453 (3d Cir. 1997). As a result of Respondent's conduct, Respondent willfully[5] violated Section 17(a)(2) of the Securities Act.

E. THE PENALTY AMOUNT

The Commission aims to promote voluntary disclosures in industry-wide investigations and to encourage firms to provide comprehensive information to the staff in such investigations. See In the Matter of Bear, Stearns & Co. Inc. et al., Securities Act Release No. 8684 (May, 31, 2006); In the Matter of Citigroup Global Markets, Inc., successor by merger to Legg Mason Wood Walker Inc., Securities Exchange Act Release No. 55712 (May 7, 2007) (collectively "Previous Settlements"). In determining the size of the penalty in this matter, the Commission considered Respondent's cooperation afforded the Commission staff and Respondent's relatively small share of the auction rate securities markets compared to each of the broker-dealers in the Previous Settlements. The Commission, however, also considered that Respondent did not report to the Commission the practices described in Section III.C.2.

IV.

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

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

A. Respondent be, and hereby is, censured.

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

C. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $150,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such

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

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 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 Kenneth R. Lench, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, D.C. 20549-6041.

D. Not later than 6 months after the entry of this Order, Respondent shall provide all of its customers who hold auction rate securities ("Holders") and the issuers of such securities ("Issuers") with a written description of the Respondent's material auction practices and procedures. In addition, commencing not later than 6 months after the entry of this Order, Respondent shall, at or before the completion of the applicable transaction, provide all customers who are first-time purchasers, and all broker-dealers who are purchasers, of auction rate securities from Respondent ("Purchasers") with a written description of its material auction practices and procedures. Respondent may fulfill the foregoing requirements to provide such written description to Holders and Purchasers by sending a written notification (e.g., via e-mail, subject to applicable legal requirements) or, with respect to Purchasers, by including a written notification with the trade confirmation, that a written description of Respondent's material auction practices and procedures is available on a specified web page of its website accessible to such Holders and Purchasers. Such written notification must be set forth prominently in such a manner as to call it to the attention of the reader and also state that a written description of Respondent's material auction practices and procedures will be sent to the Holder or Purchaser upon request. In addition, not later than 6 months after the entry of this Order, Respondent shall send a written description of its material auction practices and procedures accompanied by a list of all auction rate securities for which it serves as broker-dealer (including related CUSIP numbers) to each Nationally Recognized Municipal Securities Information Repository ("NRMSIR") and appropriate State Information Depository ("SID"), if any. Respondent may use the facilities of DisclosureUSA for such purpose with respect to auction rate securities that are municipal securities.

Furthermore, commencing not later than 3 months after the entry of this Order, Respondent shall at all times make a description of its then-current material auction practices and procedures available to (1) all customers and broker-dealers who are participating through Respondent in an auction of auction rate securities on the portion of its website that is accessible to such customers and broker-dealers and is related to such auction and (2) the general public on another portion of its website accessible to the general public.

As used in this Section, "auction rate securities" means, with respect to Respondent, auction rate securities sold in auctions managed by it.

E. Not later than 6 months after the date of this Order, unless otherwise extended by the staff of the Commission for good cause shown, Respondent's chief executive officer or general counsel shall certify in writing to the staff of the Commission that Respondent has implemented procedures that are reasonably designed to prevent and detect failures by it to conduct the auction process in accordance with the auction procedures disclosed in the disclosure documents and any supplemental disclosures and that Respondent is in compliance with Section IV.D of this Order.

By the Commission.

Florence E. Harmon
Acting Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

May 28, 2008

IN THE MATTER OF	
Affinity Networks, Inc.	ORDER OF SUSPENSION OF TRADING
File No. 500-1	

It appears to the Securities and Exchange Commission that the public interest and the protection of investors require a suspension of trading in the securities of Affinity Networks, Inc. ("Affinity") because there is a lack of current and accurate information concerning its securities. Affinity is quoted on the Pink Sheets under the ticker symbol AFFN.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EDT May 28, 2008 through 11:59 p.m. EDT, on June 10, 2008.

By the Commission.

Florence E. Harmon
Acting Secretary

Document 34 of 46

60. Section 240.17Ad-2 is amended by:

a. in paragraph (h)(1), revising the phrase "Regional or District Office of the Commission for the region or district" to read "regional office of the Commission for the region"; and

b. removing the authority citation at the end of the section.

61. Section 240.17Ad-21T, paragraphs (c) and (e)(2), second sentences, is amended by removing the phrase "450 Fifth Street, NW, Washington, DC 20549–1002", each time that it appears, and by adding in its place the phrase "100 F Street, NE., Washington, DC 20549-6628".

PART 249- FORMS, SECURITIES EXCHANGE ACT OF 1934

62. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq., and 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

63. Section 249.322 is amended by removing the phrase "450 Fifth Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549", in the last sentence of paragraph (a).

PART 249b- FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

64. The authority citation for Part 249b continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq., unless otherwise noted;

* * * * *

65. Section 249b.100 is amended by removing the phrase "450 Fifth Street, NW, Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549" and removing the phrase "and district" in footnote 1.

66. Section 249b.102 is amended by removing the phrase "450 Fifth Street, NW, Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549" and removing the phrase "and district" in footnote 1.

67. Section 249b.200 is amended by removing the phrase "450 Fifth Street, NW, Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549" and removing the phrase "and district" in footnote 1.

PART 260- GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

68. 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.

69. Section 260.0-5, paragraph (a), is amended by removing the phrase "450 Fifth Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

PART 270- RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

70. The authority citation for Part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 et seq., 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

71. Section 270.17f-4, paragraph (c)(1), fourth sentence, is amended by removing the phrase "450 5th Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

PART 274- FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

72. The authority citation for Part 274 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

* * * * *

73. Section 274.0-1 is amended, in paragraph (b), by removing the phrase "450 Fifth Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549" in the first sentence, and removing the phrase "and district" in the second and third sentences.

PART 275- RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

74. The authority citation for Part 275 continues to read, in part, as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

75. Section 275.204-2 is amended by removing the phrase "or District" in

a. the first sentence of paragraph (j)(3)(i);

b. the first sentence of the legend following paragraph (j)(3)(i); and

c. the last sentence of paragraph (j)(3)(ii).

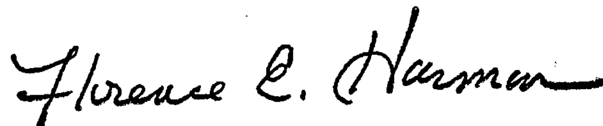
PART 279- FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

76. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b-1 et seq.

77. Section 279.0-1 is amended, in paragraph (b), by removing the phrase "450 Fifth Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549" in the first sentence, and removing the phrase "and district", in the second and third sentences.

By the Commission.



Florence E. Harmon
Acting Secretary

Date: May 28, 2008

m. in paragraph (e)(7)(ii), last sentence, removing "450 Fifth Street, NW., Room 1024, Washington, DC" to read "100 F Street, NE., Washington, DC";

n. in paragraph (e)(7)(iii), second sentence, removing the phrase "450 Fifth Street, NW., Room 1024, Washington, D.C." and adding in its place the phrase "100 F Street, NE., Washington, DC", and removing the phrase "and district".

The revisions read as follow:

§ 200.80 Commission records and information.

* * * * *

(c)(1) Public reference facility. In order to disseminate records, including those listed in appendix A to this section, the Commission has a specially staffed and equipped public reference room located at 100 F Street, NE., Washington, DC. Copying machines, which are available to requestors on a self-service or contractor-operated basis, can be used to make immediate copies up to 8 1/2 by 11 inches in size of materials that are available for inspection in the Washington, DC Headquarters. Fees and levels of service are set out in the Commission's schedule of fees in appendix E to this section and in information available from the public reference room. The Commission accepts only written requests for copies of documents.

(i) The public reference room in Washington, DC has available for public inspection all of the publicly available records of the Commission as described in paragraph (a) of this section. Upon request, and only when suitable arrangements can be made with respect to the transportation, storage, and inspection of records, records may be sent to any other Commission office for inspection at that office, if the records are not needed by the Commission or the staff in connection with the performance of official

duties. When the records are sent to another office at the request of a member of the public, the requestor shall be charged all costs incurred by the Commission in transporting the records.

(ii) All regional offices of the Commission have available for public examination the materials set forth in paragraph (a)(2) of this section and the *SEC Docket*, *SEC News Digest*, and other SEC publications. Blank forms as well as other general information about the operations of the Commission described in paragraph (a)(1) of this section may also be available at particular regional offices.

(iii) The addresses of the Commission's regional offices are:

Atlanta Regional Office -- 3475 Lenox Road, NE, Suite 1000, Atlanta, GA 30326-1232. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Boston Regional Office-- 33 Arch Street, 23rd Floor, Boston, MA 02110-1424. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Chicago Regional Office -- 175 West Jackson Boulevard, Suite 900, Chicago, IL 60604-2908. Office hours -- 8:45 a.m. to 5:15 p.m. C.T.

Denver Regional Office -- 1801 California Street, Suite 1500, Denver, CO 80202-2656. Office hours -- 8 a.m. to 4:30 p.m. M.T.

Fort Worth Regional Office -- Burnett Plaza, Suite 1900, 801 Cherry Street, Unit #18, Fort Worth, TX 76102-6882. Office hours -- 8:30 a.m. to 5 p.m. C.T.

Los Angeles Regional Office -- 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036-3648. Office hours -- 8:30 a.m. to 5 p.m. P.T.

Miami Regional Office -- 801 Brickell Avenue, Suite 1800, Miami, FL 33131-4901. Office hours -- 9 a.m. to 5:30 p.m. E.T.

New York Regional Office -- 3 World Financial Center, Suite 400, New York, NY 10281-1022. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Philadelphia Regional Office -- 701 Market Street, Suite 2000, Philadelphia, PA 19106-1532. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Salt Lake City Regional Office -- 15 W. South Temple Street, Suite 1800, Salt Lake City, UT 84101-1573. Office hours -- 8 a.m. to 4:30 p.m. M.T.

San Francisco Regional Office -- 44 Montgomery Street, Suite 2600, San Francisco, CA 94104-4716. Office hours -- 8:30 a.m. to 5 p.m. P.T.

* * * * *

(d) * * *

(6) * * *

(ii) The appeal must be mailed to the Office of Freedom of Information and Privacy Act Operations, SEC, 100 F Street, NE., Washington, DC 20549, and a copy of it must be mailed to the General Counsel, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

12. Section 200.80e is amended by revising the phrase "public reference rooms" to read "public reference room" in the last paragraph, first sentence; and in the third sentence of that paragraph removing the phrase "450 Fifth Street, NW., room 1024, Washington, DC 20549 or calling 202–272–3100" and adding in its place "100 F Street, NE., Washington, DC 20549 or calling 202-551-8090".

13. Section 200.83 is amended by removing the phrase "Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413", and adding in its place the phrase

"100 F Street, NE., Washington, DC 20549", in the first sentence of paragraph (c)(3) and the second sentence of paragraph (c)(7).

14. Section 200.83(e)(2) is amended by removing the phrase "Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703-914-1149)" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549, or by facsimile (202-772-9337)", in the second sentence, and by removing the phrase "450 Fifth Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549" in the third sentence.

Subpart G- Plan of Organization and Operation Effective During Emergency Conditions

15. The authority citation for Part 200, Subpart G, continues to read as follows:

Authority: 15 U.S.C. 77s, 78d, 78d-1, 78w, 77sss, 80a-37, 80b-11; Reorganization Plan No. 10 of 1950 (15 U.S.C. 78d nt).

16. Section 200.202(a), second sentence, is amended by removing the phrase "and District" and by removing the phrase "or District Administrator".

17. Section 200.203(c)(1)(v) is removed.

18. Section 200.204 is amended by removing the phrase "and District Administrators".

Subpart H- Regulations Pertaining to the Privacy of Individuals and Systems of Records Maintained by the Commission

19. The authority citation for Part 200, Subpart H, continues to read in part as follows:

Authority: 5 U.S.C. 552a(f), unless otherwise noted.

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20. Section 200.303 is amended by:

a. revising the phrase "Privacy Act Officer, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or by facsimile (703–914–1149)" in the introductory text of paragraph (a), first sentence, to read "Office of Freedom of Information and Privacy Act Operations, SEC, 100 F Street, NE., Washington, DC 20549, or by facsimile (202-772-9337)";

b. revising paragraph (a)(2); and

c. revising the phrase "Office of Freedom of Information and Privacy Act Operations, SEC, Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413, or at one of its Regional or District" to read "Office of Freedom of Information and Privacy Act Operations, SEC, 100 F Street, NE., Washington, DC 20549, or at one of its Regional" in the first sentence of paragraph (b)(2).

The revision reads as follows:

§ 200.303 Times, places and requirements for requests pertaining to individual records in a record system and for the identification of individuals making requests for access to the records pertaining to them.

(a) * * *

(2) Verification of identity. When the fact of the existence of a record is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, or when a record as to which access has been requested is not required to be disclosed under that Act, the individual seeking the information or requesting access to the record shall be required to verify his or her identity before access will be granted or information given. For this purpose, individuals shall appear at the Office of Freedom of Information and Privacy Act Operations, SEC, 100 F Street, NE., Washington, DC

20549, during normal business hours of 9 a.m. to 5:30 p.m. E.S.T., Monday through Friday, or at one of the Commission's Regional Offices. The addresses and business hours of those offices are listed below:

Atlanta Regional Office -- 3475 Lenox Road, NE, Suite 1000, Atlanta, GA 30326-1232. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Boston Regional Office -- 33 Arch Street, 23rd Floor, Boston, MA 02110-1424. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Chicago Regional Office -- 175 West Jackson Boulevard, Suite 900, Chicago, IL 60604-2908. Office hours -- 8:45 a.m. to 5:15 p.m. C.T.

Denver Regional Office -- 1801 California Street, Suite 1500, Denver, CO 80202-2656. Office hours -- 8 a.m. to 4:30 p.m. M.T.

Fort Worth Regional Office -- Burnett Plaza, Suite 1900, 801 Cherry Street, Unit #18, Fort Worth, TX 76102-6882. Office hours -- 8:30 a.m. to 5 p.m. C.T.

Los Angeles Regional Office -- 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036-3648. Office hours -- 8:30 a.m. to 5 p.m. P.T.

Miami Regional Office -- 801 Brickell Avenue, Suite 1800, Miami, FL 33131-4901. Office hours -- 9 a.m. to 5:30 p.m. E.T.

New York Regional Office -- 3 World Financial Center, Suite 400, New York, NY 10281-1022. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Philadelphia Regional Office -- 701 Market Street, Suite 2000, Philadelphia, PA 19106-1532. Office hours -- 9 a.m. to 5:30 p.m. E.T.

Salt Lake City Regional Office -- 15 W. South Temple Street, Suite 1800, Salt Lake City, UT 84101-1573. Office hours -- 8 a.m. to 4:30 p.m. M.T.

San Francisco Regional Office -- 44 Montgomery Street, Suite 2600, San Francisco, CA 94104-4716. Office hours -- 8:30 a.m. to 5 p.m. P.T.

None of the Commission's offices is open on Saturday, Sunday or the following legal holidays: New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Veterans' Day, Columbus Day, Thanksgiving Day and Christmas Day.

* * * * *

21. Section 200.309 is amended by removing the phrase "or District" in the third and fourth sentences of paragraph (a)(1), and removing the authority citation at the end of the section.

Subpart J- Classification and Declassification of National Security Information and Material

22. The authority citation for Part 200, Subpart J, continues to read as follows:

Authority: Sec. 19, Securities Act of 1933, as amended, 48 Stat. 84, 15 U.S.C. 77s. E.O. 12356, (47 FR 14874, Apr. 6, 1982). Information Security Oversight Office Directive No. 1 (47 FR 27836, June 25, 1982).

23. Section 200.503, introductory text of the section, second sentence, is amended by removing the phrase "450 5th Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

24. Section 200.508, paragraph (a), second sentence, is amended by removing the phrase "450 5th Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

Subpart K- Regulations Pertaining to the Protection of the Environment

25. The authority citation for Part 200, Subpart K, continues to read as follows:

Authority: 15 U.S.C. 78w(a)(2).

26. Section 200.554, paragraph (b), is amended by removing the phrase "450 Fifth Street, NW., Room 1024, Washington, DC" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

Subpart L- Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Securities and Exchange Commission

27. The authority citation for Part 200, Subpart L, continues to read as follows:

Authority: 29 U.S.C. 794.

28. Section 200.670, paragraph (c), is amended by removing the phrase "450 Fifth Street NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

Subpart M- Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission

29. The authority citation for Part 200, Subpart M, is revised to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 80a-37, 80b-11; E.O. 11222, 3 CFR, 1964-1965 Comp., p.36; 5 CFR 735.104, unless otherwise noted.

30. Section 200.735-3 is amended by:

a. in the second sentence of paragraph (a)(3), third sentence of paragraph (b)(3)(i), and third sentence of paragraph (b)(10)(i), removing the phrase "Regional Administrators" and adding in its place the phrase "Regional Directors"; and

b. in the fourth sentence of paragraph (b)(3)(i), first sentence of paragraph (b)(6)(i) and second sentence of paragraph (b)(10)(i), removing the phrase "Regional Administrator" and adding in its place the phrase "Regional Director".

31. Section 200.735-4 is amended by:

a. in the first sentence of paragraph (b)(6)(iii)(A)(1), first and second sentences of paragraph (b)(6)(iii)(B), and third sentence of paragraph (f), removing the phrase "Regional Administrators" and adding in its place the phrase "Regional Directors"; and

b. in the first sentence of introductory text of paragraph (b)(6)(iii)(A) and second sentence of paragraph (f), removing the phrase "Regional Administrator" and adding in its place the phrase "Regional Director".

32. Section 200.735-5, is amended by:

a. in the first sentence of paragraph (f)(2), removing the phrase "Regional Administrator" and adding in its place the phrase "Regional Director"; and

b. in the second sentence of paragraph (f)(2), removing the phrase "Regional Administrators" and adding in its place the phrase "Regional Directors".

33. Section 200.735-6, is amended by:

a. in the first and fourth sentences, removing the phrase "Regional Administrator" and adding in its place the phrase "Regional Director"; and

b. in the second sentence, removing the phrase "Regional Administrators" and adding in its place the phrase "Regional Directors".

34. Section 200.735-11 is amended by revising paragraph (c)(2)(v) to read as follows:

§ 200.735-11 Statement of employment and financial interests.

* * * * *

(c) * * *

(2) * * *

(v) Regional Offices

(A) Directors

(B) Associate Directors

(C) Assistant Directors

* * * * *

35. Section 200.735-15, paragraph (b), first sentence, is amended by removing the phrase "Administrator of each regional office" and adding in its place "Regional Director of each regional office".

PART 201- RULES OF PRACTICE

36. The authority citation for Part 201, is revised to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 78x, 80a-37, and 80b-11; 5 U.S.C. 504(c)(1).

Subpart C- Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934

37. The authority citation for Part 201, Subpart C, continues to read as follows:

Authority: 15 U.S.C. 78u-1 and 78w.

38. Section 201.63, last sentence, is amended by removing "450 Fifth Street NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

PART 202- INFORMAL AND OTHER PROCEDURES

39. The authority citation for Part 202 is revised to read as follows:

Authority: 15 U.S.C. 77s, 77t, 77sss, 77uuu, 78d-1, 78u, 78w, 78ll(d), 80a-37, 80a-41, 80b-9, 80b-11, 7202 and 7211 et seq., unless otherwise noted.

Section 202.5 is also issued under sec. 20, 48 Stat. 86, sec. 21, 48 Stat. 899, sec. 18, 49 Stat. 831, sec. 321, 53 Stat. 1174, sec. 1, 76 Stat. 394, 15 U.S.C. 77t, 77uuu, 78d-1, 78u, 80a-4l, and 80b-9.

Section 202.9 is also issued under sec. 223, 110 Stat. 859 (Mar. 29, 1996).

40. Section 202.2 is amended by removing the phrase "or district" from the last sentence.

41. Section 202.5, paragraph (c), third sentence, is amended by revising the phrase "Division Director, Regional Director, or District Administrator" to read "Division Director or Regional Director".

42. Section 202.7, paragraph (a), second sentence, is amended by removing the phrase "or district", in both places it appears.

PART 203- RULES RELATING TO INVESTIGATIONS

43. The authority citation for Part 203 is revised to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 80a-37, and 80b-11, unless otherwise noted.

44. Section 203.2 is amended by removing the phrase "Regional Offices at the level of Assistant Regional Director or District Administrator or higher" and adding in its place "Regional Offices at the level of Assistant Regional Director or higher".

45. Section 203.7 is revised by:

a. in paragraph (a), second sentence, removing the phrase "Regional or District Offices at the level of Assistant Regional Director or District Administrator or higher" and adding in its place "Regional Offices at the level of Assistant Regional Director or higher"; and

b. in paragraph (e), second sentence, removing the phrase "§ 201.2(e) of this chapter (Rule 2(e) of the Commission's rules of practice)," and adding in its place the phrase "§ 201.102(e) of this chapter (Rule 102(e) of the Commission's rules of practice),".

PART 209- FORMS PRESCRIBED UNDER THE COMMISSION'S RULES OF PRACTICE

46. The authority citation for Part 209 is revised to read as follows:

Authority: 15 U.S.C. 77h-1, 77u, 78u-2, 78u-3, 78v, 78w, 80a-9, 80a-37, 80a-38, 80a-39, 80a-40, 80a-41, 80a-44, 80b-3, 80b-9, 80b-11, and 80b-12, unless otherwise noted.

47. Section 209.0-1 is amended by:

a. revising the phrase "450 Fifth Street, N.W., Washington, D.C. 20549" to read "100 F Street, NE., Washington, DC 20549" in the first sentence of paragraph (b); and

b. removing the phrase "and district" in the second and third sentences of paragraph (b).

PART 230- GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

48. 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.

* * * * *

49. Section 230.497, paragraph (k)(2)(ii), second sentence, is amended by removing the phrase "450 Fifth St., NW., Mail Stop 5–6, Washington, DC 20549–6009" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549-4720".

PART 232- REGULATION S-T- GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

50. The authority citation for Part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a–8, 80a–29, 80a–30, 80a–37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

51. Section 232.12, paragraph (a), is amended by removing the phrase "450 Fifth Street, NW., Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549".

PART 240- GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

52. 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.

* * * * *

53. Section 240.15b7-3T, paragraph (c), second sentence and paragraph (e)(2) are amended by removing the phrase "450 Fifth Street, NW, Washington, DC 20549–1002", each time that it appears, and by adding in its place the phrase "100 F Street, NE., Washington, DC 20549-6628".

54. Section 240.15c3-1 is amended:

a. in paragraph (a)(6)(iv), second sentence, by removing the phrase "or district" each time it appears;

b. in paragraph (a)(6)(v), second sentence, by removing the phrase "or district" each time it appears;

c. in paragraph (c)(2)(x)(C)(1), by removing the phrase "district or" both times it appears;

d. in paragraph (c)(12), by removing the phrase "or District"; and

e. in paragraph (e)(1)(iv), by removing the phrase "or district" both times it appears

55. Section 240.15c3-1d is amended by:

a. removing the phrase "or District" in the first and fourth sentences of paragraph (c)(6)(i) and the first sentence of paragraph (c)(6)(ii), each time that it appears; and

b. removing the phrase "or district" in the first sentence of paragraphs (c)(6)(i) and (c)(6)(ii); and

c. removing the authority citation at the end of the section.

56. Section 240.17a-3 is amended by removing the phrase "or district" in the first sentence of paragraph (b)(2) and the first sentence of the legend following paragraph (b)(2).

57. Section 240.17a-5 is amended by removing the phrase "or district" each time that it appears in:

a. the first sentence of paragraph (a)(3);

b. the second sentence of paragraph (b)(1);

c. the introductory text of paragraph (c)(1);

d. paragraph (c)(2)(iii);

e. paragraph (c)(2)(iv);

f. the last sentence of paragraph (d)(1)(i);

g. the first sentence of paragraph (d)(6);

h. the last sentence of the introductory text of paragraph (e)(4);

i. the first sentence of paragraph (f)(2)(i);

j. the introductory text of paragraph (f)(4); and

k. paragraph (n)(1).

58. Section 240.17a-7 is amended by removing the phrase "or District" in:

a. paragraph (b)(1);

b. the first sentence of the legend following paragraph (b)(1); and

c. the last sentence of paragraph (b)(2).

59. Section 240.17a-11 is amended, in paragraph (g), by revising the phrase "regional or district office of the Commission for the region or district" to read "regional office of the Commission for the region".

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 201, 202, 203, 209, 230, 232, 240, 249, 249b, 260, 270, 274, 275, and 279

[Release No. 34-57877]

Regional Office Reorganization

AGENCY: Securities and Exchange Commission.

ACTION: Final rule amendments.

SUMMARY: The Securities and Exchange Commission is amending its rules to reflect the reorganization of its former five regional and six district offices into eleven regional offices reporting directly to SEC Headquarters. The Commission also is correcting addresses appearing in its rules.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Stephen Jung, (202) 551-5162, Assistant General Counsel, Office of the General Counsel; Michael Bloise, (202) 551-5116, Senior Counsel, Office of the General Counsel, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION

The Commission is amending 17 CFR Parts 200, 201, 202, 203, 209, 230, 232, 240, 249, 249b, 260, 270, 274, 275, and 279.

I. Discussion

On March 30, 2007, the Chairman of the Securities and Exchange Commission announced a new structure for the Commission's regional and district offices and changes to the designation of the offices and their chief supervisory personnel.[1] These changes,

[1] Press Rel. No. 2007-59 (March 30, 2007).

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which became effective on April 1, 2007, were intended to facilitate the regional offices' cooperation with state and federal regulators, law enforcement agencies and consumer groups at the local level to better protect investors no matter where they live or with whom they invest.

As a result of the reorganization, the former structure, in which there were six district offices reporting to five regional offices that, in turn, reported to Commission headquarters, was replaced by a new structure in which there are eleven regional offices, each reporting directly to Commission headquarters. Each regional office is now designated by the name of the city in which it is located, as follows: Atlanta Regional Office, Boston Regional Office, Chicago Regional Office, Denver Regional Office, Fort Worth Regional Office, Los Angeles Regional Office, Miami Regional Office, New York Regional Office, Philadelphia Regional Office, Salt Lake City Regional Office, and San Francisco Regional Office.

Pursuant to the reorganization, the title "District Administrator" was discontinued, and the heads of all of the regional offices are now called "Regional Directors." The term "Regional Director" also replaced the term "District Administrator" in the titles of subordinate managers in the regional offices. The regional offices report, on enforcement matters, to the Deputy Director of the Division of Enforcement who is responsible for regional office enforcement matters and, on examination matters, to the Director of the Office of Compliance Inspections and Examinations. The Director of Regional Office Operations continues to oversee regional office operational and management issues.

To reflect this reorganization, the Commission is amending certain of its rules to delete the term "district office" or replace it with the term "regional office," as

appropriate. Likewise, the Commission is amending certain of its rules to delete the term "District Administrator" or replace it with the term "Regional Director," as appropriate. The Commission also is removing rules that describe the duties of District Administrators and delegate functions to these persons. In addition, because a number of Commission offices have relocated since the adoption of the current rules, the Commission is amending its rules to update the addresses that appear in its rules for all of its offices.

The rule amendments also update the geographic allocation of examination and enforcement jurisdiction to each Regional Director. This geographic allocation also determines where brokers, dealers, transfer agents, clearing agents, registered securities associations, investment advisers, and others must file reports that are required to be filed in regional offices. These registrants should note changes in the geographic allocation resulting from the reorganization.

II. Administrative Procedure Act and Other Administrative Laws

The Commission has determined that these amendments to its rules relate solely to the agency's organization, procedure, or practice. Therefore, the provisions of the Administrative Procedure Act ("APA") regarding notice of proposed rulemaking and opportunity for public participation are not applicable.[2] For the same reason, and because these amendments do not substantially affect the rights or obligations of non-agency parties, the provisions of the Small Business Regulatory Enforcement Fairness Act are not applicable.[3] In addition, the provisions of the Regulatory Flexibility Act, which apply only when notice and comment are required by the APA or other law, are

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[2] 5 U.S.C. 553(b).

[3] 5 U.S.C. 804.

not applicable.[4] Finally, these amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[5]

III. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The rule amendments the Commission is adopting today update the Commission's rules to reflect the reorganization of the Commission's regional offices. The amendments also update addresses for the Commission's offices that appear in the Commission's rules.

The Commission believes that the reorganization of the Commission's regional offices will produce the benefit of facilitating the offices' cooperation with state and federal regulators, law enforcement agencies and consumer groups at the local level to better protect investors no matter where they live or with whom they invest. The reorganization also should help eliminate the potential for redundancy and overlap in the Commission's inspection and enforcement procedures. Updating addresses in the Commission's rules will help registrants, investors, and others avoid misdirecting their communications with the Commission. The Commission does not believe that the rule amendments will impose any costs on non-agency parties, or that if there are any such costs, they are negligible.

IV. Consideration of Burden on Competition

Section 23(a)(2) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition.

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[4] 5 U.S.C. 601-12.

[5] 44 U.S.C. 3501-20.

The Commission does not believe that the amendments that the Commission is adopting today will have any impact on competition.

V. Statutory Basis

The Commission is adopting amendments to 17 CFR Parts 200, 201, 202, 203, 209, 229, 230, 232, 239, 240, 249, 249b, 260, 269, 270, 274, 275, and 279 pursuant to 15 U.S.C. 77s, 78d-1, 78w, 80a-37, 80b-11, 7202, and the authorities set forth therein.

VI. Text of Final Amendments

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Classified information, Environmental impact statements, Equal employment opportunity, Freedom of information, Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements.

17 CFR Parts 201 and 209

Administrative practice and procedure.

17 CFR Part 202

Administrative practice and procedure, Securities.

17 CFR Part 203

Administrative practice and procedure, Investigations, Securities.

17 CFR Parts 230 and 232

Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Brokers, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 249, 249b, 260, 274, 275, and 279

Reporting and recordkeeping requirements.

17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, 17 CFR, Chapter II of the Code of Federal Regulations is amended as follows:

PART 200 – ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A- Organization and Program Management

1. The authority citation for Part 200, Subpart A, is amended by revising the following sub-authorities to read as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 78d, 78d-1, 78d-2, 78w, 78ll(d), 78mm, 80a-37, 80b-11, and 7202, unless otherwise noted.

Sections 200.27 and 200.30-6 are also issued under 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77q, 77u, 78e, 78g, 78h, 78i, 78k, 78m, 78o, 78o-4, 78q, 78q-1, 78t-1, 78u, 77hhh, 77uuu, 80a-41, 80b-5, and 80b-9.

* * * * *

Section 200.30-3 is also issued under 15 U.S.C. 78b, 78d, 78f, 78k-1, 78q, 78s, and 78eee.

* * * * *

2. Section 200.11 is revised to read as follows:

§ 200.11 Headquarters Office—Regional Office relationships.

(a)(1) Division and Office Heads in the Headquarters Office (100 F Street, NE., Washington, DC 20549) have Commission-wide responsibility to the Commission for the

overall development, policy and technical guidance, and policy direction of the operating programs under their jurisdiction.

(2) Each Regional Director is responsible for the direction and supervision of his or her work force and for the execution of all programs in his or her office's region as shown in paragraph (b) of this section, in accordance with established policy, and reports, on enforcement matters, to the Deputy Director of the Division of Enforcement who is responsible for Regional Office enforcement matters and, on examination matters, to the Director of the Office of Compliance Inspections and Examinations. The Director of Regional Office Operations interacts with the Regional Directors and their staff on operational and administrative/management issues and serves as their representative in the Commission's Washington Headquarters in those areas.

(b) Regional Directors of the Commission.

Atlanta Regional Office: Alabama, Georgia, North Carolina, South Carolina, and Tennessee -- Regional Director, 3475 Lenox Road, N.E., Suite 1000, Atlanta, GA 30326-1232.

Boston Regional Office: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont -- Regional Director, 33 Arch Street, 23rd Floor, Boston, MA 02110-1424.

Chicago Regional Office: Kentucky, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin -- Regional Director, 175 West Jackson Boulevard, Suite 900, Chicago, IL 60604-2908.

Denver Regional Office: Colorado, Kansas, Nebraska, New Mexico, North Dakota, South Dakota, and Wyoming -- Regional Director, 1801 California Street, Suite 1500, Denver, CO 80202-2656.

Fort Worth Regional Office: Arkansas, Kansas (for certain purposes), Oklahoma, and Texas -- Regional Director, Burnett Plaza, Suite 1900, 801 Cherry Street, Unit #18, Fort Worth, TX 76102-6882.

Los Angeles Regional Office: Arizona, Southern California (zip codes 93599 and below, except 93200-93299), Guam, Hawaii, and Nevada -- Regional Director, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036-3648.

Miami Regional Office: Florida, Louisiana, Mississippi, Puerto Rico, and the Virgin Islands -- Regional Director, 801 Brickell Avenue, Suite 1800, Miami, FL 33131-4901.

New York Regional Office: New York and New Jersey -- Regional Director, 3 World Financial Center, Suite 400, New York, NY 10281-1022.

Philadelphia Regional Office: Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia -- Regional Director, 701 Market Street, Suite 2000, Philadelphia, PA 19106-1532.

Salt Lake City Regional Office: Utah -- Regional Director, 15 W. South Temple Street, Suite 1800, Salt Lake City, UT 84101-1573.

San Francisco Regional Office: Alaska, Northern California (zip codes 93600 and up, plus 93200-93299), Idaho, Montana, Oregon, and Washington -- Regional Director, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104-4716.

(c) The geographic allocation set forth in paragraph (b) of this section determines where registered brokers, dealers, transfer agents, clearing agents, registered securities associations, investment advisers, and others as designated in this chapter must file reports required to be filed in regional offices.

3. Section 200.12 is amended by removing from the first sentence the phrase "and District Administrators" and the authority citation following the section.

4. Section 200.21a, paragraph (b)(2), is amended by removing the phrase "District Administrators,".

5. Section 200.27 is revised to read as follows:

§ 200.27 The Regional Directors.

Each Regional Director is responsible for executing the Commission's programs within his or her geographic region as set forth in § 200.11(b), subject to review, on enforcement matters, by the Deputy Director of the Division of Enforcement who is responsible for Regional Office enforcement matters and, on examination matters, by the Director of the Office of Compliance Inspections and Examinations, and subject to policy direction and review by the other Division Directors, the General Counsel, and the Chief Accountant. The Regional Directors' responsibilities include particularly the investigation of transactions in securities on national securities exchanges, in the over-the-counter market, and in distribution to the public; the examination of members of national securities exchanges and registered brokers and dealers, transfer agents, investment advisers and investment companies, including the examination of reports filed under § 240.17a-5 of this chapter; the prosecution of injunctive actions in U.S. District Courts and administrative proceedings before Administrative Law Judges; the rendering

of assistance to U.S. Attorneys in criminal cases; and the making of the Commission's facilities more readily available to the public in that area. In addition, the Regional Director of the New York Regional Office is responsible for the Commission's participation in cases under chapters 9 and 11 of the Bankruptcy Code in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont; the Regional Director of the Atlanta Regional Office is responsible for such participation in Alabama, Delaware, District of Columbia, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, Virgin Islands, Virginia, and West Virginia; the Regional Director of the Chicago Regional Office is responsible for such participation in Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Wisconsin, and Wyoming; and the Regional Director of the Los Angeles Regional Office is responsible for such participation in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, and Washington.

6. Section 200.27a is removed.

7. Section 200.28, paragraph (a), is amended by removing the phrase "Regional Administrators" and adding in its place "Regional Directors".

8. Section 200.30-6a is removed.

9. Section 200.30-11 is amended in paragraph (c)(2) by removing the phrase "or district" and by removing the authority citation following the section.

Subpart D- Information and Requests

10. The general authority citation for Part 200, Subpart D, is revised to read as follows:

Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a-37, 80a-44(a), 80a-44(b), 80b-10(a), and 80b-11.

* * * * *

11. Section 200.80 is amended by:

a. in paragraph (a)(2), the introductory text, revising the phrase "during normal business hours at the public reference room located at 450 Fifth Street, NW., Room 1024, Washington, DC and at the Northeast and Midwest Regional Offices of the Commission," to read "from 10 a.m. to 3 p.m., E.T., at the public reference room located at 100 F Street, NE., Washington, DC,";

b. revising paragraph (c)(1);

c. in paragraph (c)(2), first sentence, removing the phrase "or at its other public reference facilities"; second sentence, removing the phrase "and District"; and third sentence, removing the phrase "450 Fifth Street, NW., Washington, DC 20549" and adding in its place "100 F Street, NE., Washington, DC 20549";

d. in paragraph (d)(1):

i. first sentence, revising the phrase "reference facilities may be made in person during normal business hours at those facilities" to read "reference facility may be made in person from 10 a.m. to 3 p.m., E.T., at this facility";

ii. second sentence, revising the phrase "reference facilities" to read "reference facility"; and

iii. last sentence, revising the phrase "Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413. The request may also be made by facsimile (703–914–1149) or by Internet" to read "100 F Street, NE., Washington, DC 20549. The request may also be made by facsimile (202-772-9337) or by Internet";

e. in paragraphs (d)(2) and (d)(4), first sentence, revising the phrase "reference facilities" to read "reference facility";

f. in paragraph (d)(2), first sentence, removing the word "appropriate";

g. revising paragraph (d)(6)(ii);

h. in paragraph (d)(7)(i) in the third and fourth sentences, removing the phrase "or district";

i. in the introductory text of paragraph (e), second sentence, removing the phrase "or district";

j. in paragraph (e)(2), first and third sentences, revising the phrase "reference facilities" to read "reference facility" and in the second sentence revising the phrase "450 Fifth Street, NW., Room 1024, Washington, DC" to read "100 F Street, NE., Washington, DC";

k. in paragraph (e)(7)(i), first sentence, by removing the phrase "Washington, DC, Northeast, or Midwest public reference rooms", and adding in its place "Washington, DC public reference room";

l. in paragraph (e)(7)(i), first sentence, removing the phrase "450 Fifth Street, NW., room 1024, Washington, DC 20549" and adding in its place the phrase "100 F Street, NE., Washington, DC 20549"; and

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57879 / May 28, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12554

In the Matter of

Michael Sassano, Dogan Baruh, Robert Okin, and R. Scott Abry,

Respondents.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO ROBERT OKIN

I.

On January 31, 2007, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Robert Okin ("Okin" or "Respondent").

II.

In connection with 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 Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 as to Robert Okin ("Order"), as set forth below.

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III.

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

Respondent

1. Robert Okin, 52, resides in Armonk, New York. From November 1997 to January 2003, Okin was a Managing Director of CIBC World Markets, Corp. He served as the Head of Private Client Division ("PCD") from July 2002 to January 2003. As the Head of PCD, Okin had ultimate supervisory authority for the registered representatives in PCD. In January 2003, when CIBC sold its retail division to Fahnestock and Co., Inc. ("Fahnestock"), Okin became the co-Head of PCS and remained a supervisor at Fahnestock. Currently, Okin is the co-Head of Branch Distribution at Oppenheimer and Co., Inc. He holds Series 7, 8 and 63 licenses.

Other Relevant Entities

2. CIBC is a New York-based broker-dealer subsidiary of Canadian Imperial Bank of Commerce, a Canadian financial and bank holding company. CIBC, through its CIBC Oppenheimer retail division, serviced high-net-worth individuals, money managers, and other customers, including hedge funds. In January 2003, CIBC sold its Oppenheimer retail division to Fahnestock. During the relevant time period, CIBC was registered with the Commission as both a broker-dealer and an investment adviser. On July 20, 2005, the Commission instituted settled administrative and cease-and-desist proceedings against CIBC, in which CIBC settled to charges that it violated Section 17(a) of the Securities Act, Sections 7(c), 10(b), 11(d), 15(c) and 17(a) of the Exchange Act and Rules 22c-1 as adopted under Section 22(c) of the Investment Company Act and Regulation T promulgated by the Federal Reserve Board regarding the extension of margin credit.

3. Fahnestock was a New York-based broker-dealer which, in January 2003, through its parent holding company Fahnestock Viner Holdings, Inc., acquired CIBC's retail division. After the purchase, Okin and other brokers became employees of Fahnestock, with Okin remaining a supervisor. In September 2003, Fahnestock changed its name to Oppenheimer and Co, Inc. ("Oppenheimer"). Oppenheimer is registered with the Commission as both a broker-dealer and an investment adviser.

Summary

4. This matter involves Okin's failure reasonably to supervise certain registered representatives of CIBC and Fahnestock (the "Brokers").

5. Between 1998 and September 2003, the Brokers defrauded numerous mutual funds and the funds' shareholders by utilizing deceptive practices to circumvent the mutual

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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.

funds' restrictions on market timing. On numerous occasions, mutual funds rejected market timing customers' trades, and notified the Brokers and the firms that such trading violated the funds' prohibitions and harmed the funds. The Brokers nevertheless employed deceptive acts and practices to enable their customers to continuing timing.

6. Okin failed reasonably to supervise the Brokers in order to prevent and detect their violations of the federal securities laws. From July 2002 through September 2003, Okin had ultimate supervisory authority for the Brokers, and he was informed of the Brokers' efforts to deceive mutual funds in order to facilitate market timing. Despite being alerted that both mutual funds and annuity companies objected to the Brokers' deceptive market timing practices, Okin failed reasonably to respond to this information. Okin, therefore, failed reasonably to supervise the Brokers in connection with their violations of the securities laws.

The Brokers Utilized Deceptive Trading Practices

7. The Brokers had a large and highly profitable market timing business in which they executed mutual fund orders on behalf of their customers, including market timing hedge funds. The Brokers received numerous communications from mutual funds stating that the market timing violated prohibitions on trading set forth in the funds' prospectuses and harmed the funds; accordingly, many funds rejected the brokers' trades. The Brokers repeatedly ignored these letters and emails. Instead, the brokers worked with their customers to evade restrictions placed by the mutual funds.

8. To continue market timing mutual funds that had blocked their customers' trading, the brokers utilized deceptive practices on behalf of their customers, including: (1) creating new accounts for blocked customer accounts; (2) creating new registered representative identification numbers to disguise timers and their brokers from mutual funds; (3) trading in smaller dollar amounts in order to avoid detection by mutual funds; (4) using annuities to market time; and (5) using other broker-dealer firms that had other trading platforms, such as Charles Schwab & Co., Inc. ("Schwab") and FMR Corp. ("Fidelity").

9. As a result of the conduct described above, the Brokers violated, among other provisions, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Okin Failed Reasonably to Supervise the Brokers

10. Okin supervised the brokers and affirmed their exclusive right to engage in market timing. He knew that the brokers engaged in deceptive market timing but nevertheless permitted the conduct to continue.

11. Okin was aware that many mutual funds had told the Brokers that their trading harmed the funds and their shareholders. He was aware that, at various times, certain mutual funds threatened to cancel their dealer agreements because of the Brokers' market timing.

12. Okin also knew the Brokers used deceptive tactics to evade the mutual funds' restrictions. For example, Okin and others knew that the Brokers used the Schwab trading platform to continue to market time mutual funds that had blocked the Brokers' customers timing activity.

13. Okin knew that the Brokers broke up trades to evade mutual funds' internal timing monitors, used smaller dollar amounts, and used external trading platforms to conceal trading activity and avoid detection. Okin did not stop the conduct and did not discipline the Brokers.

14. The Brokers also market timed mutual funds through variable annuities. Okin approved the Brokers' market timing of annuities, as long as the Brokers did not time through annuities issued by certain favored companies.

15. As a result of the conduct described above, Okin failed reasonably to supervise the Brokers.

Failure to Supervise

16. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6)(A)(i) incorporates by reference Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker or dealer.

17. As a result of the conduct described above, Okin, the head of the PCD group who had ultimate responsibility over the Brokers, failed reasonably to supervise the Brokers with a view to preventing their violations of the federal securities laws. Consequently, Okin failed reasonably to supervise the Brokers under Section 15(b)(6) of the Exchange Act, which incorporates by reference Section 15(b)(4)(E).

Undertakings

18. Ongoing Cooperation by Okin. Okin undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, Okin has undertaken:

A. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff;

B. To be interviewed by the Commission's staff at such times as the staff reasonably may request and to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

C. In connection with any testimony of Okin to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, to:

i. Agree that any such notice or subpoena for his appearance and testimony may be served by regular mail on his counsel, Lawrence Iason, Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., 565 Fifth Avenue, New York, NY 10017; and

ii. Agree that any such notice or subpoena for his appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure or the Commission's Rules of Practice.

IV.

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

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

A. Respondent be, and hereby is, suspended from association in a supervisory capacity with any broker or dealer for a period of 12 months, effective on the second Monday following the entry of this Order.

B. Respondent shall, within 30 days of the entry of this Order, pay disgorgement of $1, and a civil money penalty in the amount of $150,000 to the Securities and Exchange Commission. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Okin as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Stoelting, Senior Trial Counsel, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, NY 10281.

C. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution") by the fair fund established in In the Matter of Canadian Imperial Holdings, Inc. and CIBC World Markets Corp., AP File No. 3-11987. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that he shall not, after offset or reduction in any Related

Investor Action based on Respondent's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Florence E. Harmon
Acting Secretary

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57880 / May 28, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12554

In the Matter of

Michael Sassano, Dogan Baruh, Robert Okin, and R. Scott Abry,

Respondents.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO R. SCOTT ABRY

I.

On January 31, 2007, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against R. Scott Abry ("Abry" or "Respondent").

II.

In connection with 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 Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 as to R. Scott Abry ("Order"), as set forth below.

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III.

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

Respondent

1. R. Scott Abry, 44, resides in Cos Cob, Connecticut. From 1997 to January 2003, Abry was a Managing Director of CIBC World Markets Corp. ("CIBC"). He served as a branch manager in the Private Client Division ("PCS") from 1995 to January 2003. As a branch manager in the PCS, Abry had supervisory authority for the registered representatives in his branch. In January 2003, when CIBC sold its retail division to Fahnestock and Co., Inc. ("Fahnestock"), Abry remained a branch manager at Fahnestock. In September 2003, Abry resigned from Fahnestock and became a branch manager at another registered broker-dealer in New York. He holds Series 7, 9 and 10 licenses.

Other Relevant Entities

2. CIBC is a New York-based broker-dealer subsidiary of Canadian Imperial Bank of Commerce, a Canadian financial and bank holding company. CIBC, through its CIBC Oppenheimer retail division, serviced high-net-worth individuals, money managers, and other customers, including hedge funds. In January 2003, CIBC sold its Oppenheimer retail division to Fahnestock. During the relevant time period, CIBC was registered with the Commission as both a broker-dealer and an investment adviser. On July 20, 2005, the Commission instituted settled administrative and cease-and-desist proceedings against CIBC, in which CIBC settled to charges that it violated Section 17(a) of the Securities Act, Sections 7(c), 10(b), 11(d), 15(c) and 17(a) of the Exchange Act and Rules 10b-3, 10b-5 and 17a-3 thereunder, as well as Rule 22c-1 as adopted under Section 22(c) of the Investment Company Act and Regulation T promulgated by the Federal Reserve Board regarding the extension of margin credit.

3. Fahnestock was a New York-based broker-dealer which, in January 2003, through its parent holding company Fahnestock Viner Holdings, Inc., acquired CIBC's retail division. After the purchase, Abry and other registered representatives became employees of Fahnestock, with Abry remaining a supervisor. In September 2003, Fahnestock changed its name to Oppenheimer and Co, Inc. ("Oppenheimer"). Oppenheimer is registered with the Commission as both a broker-dealer and an investment adviser.

Summary

4. This matter involves Abry's failure reasonably to supervise certain registered representatives of CIBC and Fahnestock (the "Brokers").

[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.

5. Between 1998 and September 2003, the Brokers defrauded numerous mutual fund companies and the fund companies' shareholders by utilizing deceptive practices to circumvent the mutual fund companies' restrictions on market timing. On numerous occasions, mutual fund companies rejected market timing customers' trades, and notified the Brokers and the firms that such trading violated the fund companies' prohibitions and harmed the fund companies. The Brokers nevertheless employed deceptive acts and practices to enable their customers to continue timing.

6. Abry failed reasonably to supervise the Brokers and to prevent their violations of the federal securities laws. From August 1999 through September 2003, Abry had supervisory authority for the Brokers, and he was informed of the Brokers' efforts to deceive mutual fund companies in order to facilitate market timing. Despite being alerted that both mutual fund companies and annuity companies objected to the Brokers' deceptive market timing practices, Abry failed reasonably to respond to stop the Brokers' deceptive market timing activity. Abry, therefore, failed reasonably to supervise the Brokers.

The Brokers Utilized Deceptive Trading Practices

7. The Brokers had a large and highly profitable market timing business in which they executed mutual fund orders on behalf of their customers, including market timing hedge funds. The Brokers received numerous communications from mutual fund companies stating that the market timing violated prohibitions on trading set forth in the fund companies' prospectuses and harmed the fund companies; accordingly, many fund companies rejected the Brokers' trades. The Brokers repeatedly ignored these letters and emails. Instead, the Brokers worked with their customers to evade restrictions placed by the mutual fund companies.

8. To continue market timing mutual fund companies that had blocked their customers' trading, the Brokers utilized deceptive practices on behalf of their customers, including: (1) creating new accounts for blocked customer accounts; (2) creating new registered representative identification numbers to disguise timers and their Brokers from mutual fund companies; (3) trading in smaller dollar amounts in order to avoid detection by mutual fund companies; (4) using annuities to market time; and (5) using additional broker-dealer firms that had other trading platforms, such as Charles Schwab & Co., Inc. ("Schwab") and FMR Corp. ("Fidelity").

9. As a result of the conduct described above, the Brokers violated, among other provisions, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Abry Failed Reasonably to Supervise the Brokers

10. Abry supervised the Brokers and became aware that the Brokers engaged in deceptive market timing but nevertheless failed to take appropriate action to stop the practices.

11. Abry had become aware that certain mutual fund companies had told the Brokers that their trading harmed the fund companies and their shareholders. He also became aware that, at various times, certain mutual fund companies had threatened to cancel their dealer agreements because of the Brokers' market timing.

12. Abry also became aware the Brokers used deceptive tactics to evade the mutual fund companies' restrictions. For example, Abry and others became aware that the Brokers used the Schwab trading platform to continue to market time mutual fund companies that had blocked the Brokers' customers timing activity.

13. Abry became aware that the Brokers broke up trades to evade mutual fund companies' internal timing monitors, used smaller dollar amounts, multiple accounts and multiple registered represenative numbers, and used external trading platforms to conceal trading activity and avoid detection. Abry did not stop the conduct and did not discipline the Brokers.

14. The Brokers also market timed mutual fund companies through variable annuities. Abry failed reasonably to supervise the Brokers' market timing through annuities.

15. As a result of the conduct described above, Abry failed reasonably to supervise the Brokers.

Failure to Supervise

16. Section 15(b)(4)(E) of the Exchange Act provides for the imposition of a sanction against a broker or dealer who "has failed reasonably to supervise, with a view to preventing violations of the securities laws, another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(6)(A)(i) incorporates by reference Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker or dealer.

17. As a result of the conduct described above, Abry, as a branch manager in the PCS group who had supervisory responsibility over the Brokers, failed reasonably to supervise the Brokers with a view to preventing their violations of the federal securities laws. Consequently, Abry failed reasonably to supervise the Brokers under Section 15(b)(6) of the Exchange Act, which incorporates by reference Section 15(b)(4)(E).

Undertakings

18. Ongoing Cooperation by Abry. Abry undertakes to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order. In connection with such cooperation, Abry has undertaken:

A. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff;

B. To be interviewed by the Commission's staff at such times as the staff reasonably may request and to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

C. In connection with any testimony of Abry to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, to:

i. Agree that any such notice or subpoena for his appearance and testimony may be served by regular mail on his counsel, Richard D. Marshall, Ropes & Gray LLP, 1211 Avenue of the Americas, New York NY 10036-8704; and

ii. Agree that any such notice or subpoena for his appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure or the Commission's Rules of Practice.

IV.

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

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

A. Respondent be, and hereby is, suspended from association in a supervisory capacity with any broker or dealer for a period of 12 months, effective on the second Monday following the entry of this Order.

B. Respondent shall pay disgorgement of $1 and a civil money penalty in the amount of $125,000 to the Securities and Exchange Commission. Abry shall satisfy this obligation by paying $62,501 within thirty (30) days of entry of this Order and the remaining $62,500 by March 2, 2009. Such payments shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Abry as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to David Stoelting, Senior Trial Counsel, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, NY 10281.

C. Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution") by the fair fund established in In the

Matter of Canadian Imperial Holdings, Inc. and CIBC World Markets Corp., AP File No. 3-11987. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that he shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that he is entitled to, nor shall he further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57891 / May 30, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2834 / May 30, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13049

In the Matter of **DENNIS L. HYNSON, CPA,** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Dennis L. Hynson, CPA ("Hynson" or "Respondent").

II.

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

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III.

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

A. RESPONDENT

1. From April 2002 until September 2003, Hynson, age 45, served as the Vice President of Finance of the U.S. Orthopedics Division of Centerpulse Ltd. ("Centerpulse" or the "Company"), a Swiss medical devices manufacturer. Prior to becoming Vice President of Finance, Hynson had served as the Director of Finance for the U.S. Orthopedics Division for two years. As the Vice President of Finance for the U.S. Orthopedics Division ("Division"), Hynson was responsible for, among other things, maintaining accurate books and records at the Division, and for devising and maintaining an adequate system of internal accounting controls at the Division. Hynson is also a Certified Public Accountant licensed in Texas and was so while he was employed at Centerpulse.

B. SUMMARY

2. This matter arises out of an accounting determination that Hynson made during Centerpulse's fiscal third quarter 2002.[2] In particular, Hynson did not properly write off costs for certain impaired assets associated with a software system called the "Global Supply Chain" project. Instead, pursuant to instructions from Urs Kamber (Centerpulse's then-Chief Financial Officer) and Stephan Husi (Centerpulse's then-Controller), Hynson allowed the costs to remain on his Division's books and records as an asset, which was then rolled up into the Company's consolidated financial statements. This accounting treatment was not in conformity with Generally Accepted Accounting Principles in the United States ("U.S. GAAP"),[3] and it resulted in an 18 percent overstatement of Centerpulse's third quarter 2002 pretax income, as it was reported in the financial statements that the Company included in the Form 6-K it furnished to the Commission on November 12, 2002.

3. By virtue of his conduct, Hynson violated Exchange Act Rule 13b2-1 by falsifying certain books and records. He also caused Centerpulse's violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B) by failing to keep accurate books and records, and by failing to devise and maintain an adequate system of internal accounting controls at the U.S. Orthopedics Division.

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

[2] Centerpulse's fiscal year ended on December 31 of each calendar year, and accordingly its fiscal third quarter 2002 ended on September 30, 2002.

[3] While Centerpulse disclosed that its financial statements were reported in accordance with International Financial Reporting Standards, Centerpulse's accounting controls, and Hynson's own practice, were to maintain the Division's accounts in accordance with U.S. GAAP.

C. BACKGROUND

4. Originally named Sulzer Medica AG, Centerpulse was a publicly traded corporation headquartered in Switzerland that manufactured a variety of medical devices, including hip and knee implants. From at least January 2001 through October 2003, Centerpulse's American Depository Shares were registered with the Commission pursuant to Exchange Act Section 12(b) and were traded on the New York Stock Exchange under the symbol "CEP." As a foreign private issuer, Centerpulse filed annual reports with the Commission on Form 20-F and furnished other periodic reports to the Commission on Form 6-K. In October 2003, the Company was acquired by and merged with Zimmer Holdings, Inc., a U.S. medical devices company.

5. In 2001, Centerpulse was named as a defendant in over 1,980 products liability and personal injury lawsuits filed in federal and state courts in the United States, as well as courts in other foreign jurisdictions, which alleged various defects in certain hip and knee implants that the Company had recalled (the "recall litigation"). By May 2002, Centerpulse had obtained court approval for a global settlement of the recall litigation. The final settlement agreement established a trust of approximately $1.1 billion to fund payments to individual plaintiffs and claimants. Centerpulse contributed $725 million in cash to the trust in 2002, $635 million of which was funded through a credit facility arranged by a consortium of banks.

6. During Centerpulse's fiscal third quarter 2002, as Centerpulse was attempting to secure the $635 million credit facility, Kamber and Husi instructed Centerpulse employees to release certain reserves, to not record certain expenses, and to engage in other accounting improprieties in order to improve the Company's reported financial results.[4] Hynson's involvement related to an incorrect accounting determination not to record certain expenses. Specifically, pursuant to instructions from Kamber and Husi, Hynson improperly accounted for certain impaired assets described in this Order.

D. DESCRIPTION OF THE IMPROPER ASSET OVERSTATEMENT

7. Hynson became the Vice President of Finance of Centerpulse's U.S. Orthopedics Division in April 2002. That month, Hynson learned that Centerpulse's European Orthopedics Division had decided to discontinue its involvement in a project to develop and implement a "Global Supply Chain" software system, which was to be used to track inventory at the Company. He also learned that there were approximately $3.5 million in costs associated with the European portion of the project that remained on the books of the U.S. Orthopedics Division As a result of the European Division's decision to abandon its involvement in the project, the costs associated with that portion of the project became impaired and were required to be written off under U.S. GAAP.

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[4] The Commission filed a lawsuit against Urs Kamber, Stephan Husi and Richard Jon May (respectively, Centerpulse's former Chief Financial Officer, former Controller, and the former Group Vice President of Finance, Tax Counsel and Treasurer of Centerpulse USA Holding Company), alleging that they engaged in various improper accounting practices at Centerpulse during the third and fourth quarters of 2002. SEC v. Urs Kamber et al., Civil Action No. 1:07-CV-01867 (JDB) (D.D.C.) (Oct. 17, 2007); see also Litigation Release No. 20336 (Oct. 17, 2007).

8. In June 2002, Kamber terminated the previous Vice President of Finance for the U.S. Orthopedics Division who had managed the costs for the Global Supply Chain project. Thereafter, Hynson became responsible for managing the costs and endeavored to obtain the information necessary to account for the Global Supply Chain asset. Hynson examined the costs for both the European and U.S. portions of the project, all of which were being maintained on the U.S. Orthopedics Division's books, and determined that the costs associated with the European portion of the project needed to be written off because the European Division had abandoned the project. Hynson shared his assessment with other Centerpulse financial managers.

9. For example, on July 12, 2002, Hynson sent Husi and another Centerpulse employee an e-mail describing the asset and explaining why an impairment was necessary:

> "SOUS[5] has an asset on our books for the Supply Chain project. Originally, this project involved SOAG as well. However, during Q1 2002, SOAG chose not to participate in the project any longer. SOUS had incurred approximately $3.5 mil related to the SOAG participation through this time. Now that SOAG will no longer participate, the asset is over stated or impaired by this amount. The centralized services fixed asset accountant has indicated that Urs [Kamber] did not want to write this off. However, per U.S. GAAP we should write the asset down if it is impaired...."

10. On August 28, 2002, one of Hynson's subordinates sent an e-mail asking whether he could "accrue [the costs] as a write off." As the subordinate explained, "I have kept 3.4 mil as CIP [construction in progress] and have not written off in SOUS book. My concern is that either SOUS or SOAG needs to show 3.4 mil as a write off."

11. Husi was copied on the same e-mail, and later that day he replied that "[w]e will finalize this before end of Q3. SOUS should not consider any write offs in August." Husi explained in his reply that "I will have to agree with Urs [Kamber] on how to handle it."

12. In accordance with Husi's instruction, Hynson kept the costs on his books as an asset. However, Hynson also sent an e-mail to Husi stating that "[s]ince this issue impacts SOUS books, of which I am responsible, I would like to be part of the decision making process."

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[5] "SOUS" was the acronym that Centerpulse employees used to refer to the U.S. Orthopedics Division. The initials stood for "Sulzer Orthopedics U.S." and originated when Centerpulse was named Sulzer Medica AG. "SOAG" was the acronym for the European Orthopedics Division, standing for "Sulzer Orthopedics A.G." After Sulzer Medica changed its name to Centerpulse, Company personnel also used the terms "COUS" and "COAG" to refer to the Orthopedics Divisions in the United States and Europe, respectively.

13. Throughout September 2002, the $3.4 million in costs remained on the U.S. Orthopedics Division's books. On September 23, 2002, Hynson sent Husi an e-mail revisiting Husi's previous instruction not to write-off the costs, and noted that the costs should not be kept on the U.S. Division's books:

> "There seems to be reluctance to proceed with the transfer of the SOAG portion of the Supply Chain asset from SOUS to SOAG. You had emailed me prior to your holiday that we should not do it in August, however, I have not heard the reason why. For the Estimate 2002 portion of the 2003 Budget process, SOUS is showing the asset as being transferred to SOAG. This is the proper thing to do, as the funds were spent in Switzerland on the SOAG portion of the project at the time, the project plan called for the transfer, and the decision to abandon the project was made at SOAG. The costs were simply managed from one location (SOUS) for control purposes. It is clear that this item belongs on SOAG's books and not SOUS! It is impacting SOUS business metrics (operating assets, RONA) which are part of our bonus calculation."

14. Later that day, Hynson and others participated in a conference call concerning the Global Supply Chain project. Afterward, he sent an e-mail to the Chief Executive Officer of the U.S. Orthopedics Division explaining that, according to Kamber, the costs were not being written off to avoid upsetting the impending $635 million credit facility:

> "My group had a conference call today with members from COAG. We (both COUS and COAG) have been requested (indirectly) by Urs [Kamber] to keep the EU Supply Chain asset on COUS books *for the 2002 Estimate only, due to the bankers*. I am not clear why it is an issue with the bankers. I didn't realize they would see the individual BU [business unit] 2002 Estimate. [Emphasis added].
>
> Therefore, we need to change the numbers and the corresponding narrative...."

15. That message was amplified the next day. On September 24, 2002, a senior Centerpulse accounting employee in Europe sent an e-mail to Hynson, Husi and others, communicating Husi's instructions that the Global Supply Chain project costs should remain on the U.S. Orthopedics Division's books as an asset:

> "With regards to our conference call from this afternoon I have had an additional discussion with Stephan Husi later. He told me to communicate to you the following:
>
> - it is not the intention of Cooperate [sic] to show this potential write off in the actual Estimate 2002
> - transactions in connection with this case should be kept at a minimum.
> - therefore the asset stays in the SOUS books for the moment (September Closing as well as Estimate 2002 – see also original message below). No write off is being booked against this asset.

- this does not mean that SOAG is not taking over the position as well as the corresponding write off by the end of the year.
- Stephan Husi and Mr Kamber will decide in October 2002 per when the assets is [sic] going to be taken over and written off by SOAG.
- SOAG is mentioning and explaining the story behind this in its estimate-narratives (SOUS can do so as well)"

16. In compliance with instructions from Kamber, Husi and others, Hynson did not write off any of the $3.4 million in costs related to the Global Supply Chain project throughout 2002. Hynson's failure to write off these costs was improper because the asset was impaired.

17. As a result of the improper accounting treatment described above, Centerpulse falsely reported in an interim report for the third quarter of 2002 that it had earned approximately $21.9 million in pretax income for the third quarter of 2002 instead of at most approximately $18.5 million, an overstatement of at least 18 percent. That interim report was subsequently furnished to the Commission on November 12, 2002 in a Form 6-K.

E. LEGAL DISCUSSION

18. Exchange Act Section 13(b)(2)(A) requires issuers with securities registered under Exchange Act Section 12 to make and keep books, records and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Exchange Act Section 13(b)(2)(B) requires such registrants to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements, and to maintain the accountability of assets. Exchange Act Rule 13b2-1 prohibits any person from directly or indirectly falsifying or causing the falsification of any book, record, or account subject to Exchange Act Section 13(b)(2)(A). No showing of scienter is necessary to establish violations of these provisions. See, e.g., SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir.), cert. denied sub nom., Shanklin v. SEC, 525 U.S. 931 (1998).

19. Hynson violated Exchange Act Rule 13b2-1 and caused Centerpulse to violate Exchange Act Section 13(b)(2)(A) when he determined not to have the U.S. Orthopedics Division write off $3.4 million in costs for the discontinued – and therefore impaired – European portion of the Global Supply Chain project. As a result, Centerpulse's third quarter 2002 books and records were false because they continued to reflect the costs as an asset. Hynson's determination not to have the U.S. Division write off these costs also constituted a failure to devise and maintain an adequate system of internal accounting controls at the U.S. Orthopedics Division which in turn caused Centerpulse to violate Exchange Act Section 13(b)(2)(B).

IV.

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

Accordingly, it is hereby ORDERED that:

Pursuant to Section 21C of the Exchange Act, Respondent Hynson cease and desist from committing or causing any violations and any future violations of Exchange Act Rule 13b2-1 and from causing any violations and any future violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B).

By the Commission.

Florence E. Harmon
Acting Secretary

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

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57890 / May 30, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2833 / May 30, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13048

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Christopher W. Kelford ("Kelford" or "Respondent").

II.

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

III.

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

A. RESPONDENT

1. From June 2002 to April 2004, Kelford, age 57, served as the Vice President of Finance for the Dental Division of Centerpulse Ltd. ("Centerpulse" or the "Company"), a Swiss medical devices manufacturer. In this position, Kelford was responsible for, among other things, maintaining accurate books and records at the Division, and for devising and maintaining an adequate system of internal accounting controls at the Division.

B. SUMMARY

2. This matter arises out of a reserve release that Kelford directed during Centerpulse's fiscal third quarter 2002.[2] In particular, pursuant to instructions he received from Urs Kamber (Centerpulse's then-Chief Financial Officer) and Stephan Husi (Centerpulse's then-Controller), Kelford improperly directed his staff to make an unsupported $1 million release from an inventory revaluation reserve kept on the Dental Division's books and records, which then rolled up into the Company's consolidated financial statements, and which had the effect of improving Centerpulse's reported earnings for the third quarter. This release was not in conformity with Generally Accepted Accounting Principles in the United States ("U.S. GAAP"),[3] and it caused Centerpulse's consolidated pretax income that quarter to be overstated by approximately 4.6 percent, as it was reported in the financial statements the Company included in the Form 6-K it furnished to the Commission on November 12, 2002.

3. By virtue of his conduct, Kelford violated Exchange Act Section 13(b)(5) and Rule 13b2-1 thereunder by knowingly falsifying certain books and records and knowingly circumventing certain internal accounting controls. Kelford also caused Centerpulse to violate Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B) by failing to keep accurate books and records, and by failing to devise and maintain an adequate system of internal accounting controls at the Dental Division.

C. BACKGROUND

4. Originally named Sulzer Medica AG, Centerpulse was a publicly traded corporation headquartered in Switzerland that manufactured a variety of medical devices, including hip and knee implants. From at least January 2001 through October 2003, Centerpulse's American Depository Shares were registered with the Commission pursuant to Exchange Act Section 12(b) and were traded on the New York Stock Exchange under the symbol "CEP." As a foreign private issuer, Centerpulse filed annual reports with the

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

[2] Centerpulse's fiscal year ended on December 31 of each calendar year, and accordingly its fiscal third quarter 2002 ended on September 30, 2002.

[3] While Centerpulse disclosed that its financial statements were reported in accordance with International Financial Reporting Standards, Centerpulse's accounting controls, and Kelford's practice, were to maintain the Division's accounts in accordance with U.S. GAAP.

Commission on Form 20-F and furnished other periodic reports to the Commission on Form 6-K. In October 2003, the Company was acquired by and merged with Zimmer Holdings, Inc., a U.S. medical devices company.

5. In 2001, Centerpulse was named as a defendant in over 1,980 products liability and personal injury lawsuits filed in federal and state courts in the United States, as well as courts in other foreign jurisdictions, which alleged various defects in certain hip and knee implants that the Company had recalled (the "recall litigation"). By May 2002, Centerpulse had obtained court approval for a global settlement of the recall litigation. The final settlement agreement established a trust of approximately $1.1 billion to fund payments to individual plaintiffs and claimants. Centerpulse contributed $725 million in cash to the trust in 2002, $635 million of which was funded through a credit facility arranged by a consortium of banks.

6. During Centerpulse's fiscal third quarter 2002, as Centerpulse was attempting to secure the $635 million credit facility, Centerpulse employees improperly released certain reserves, did not record certain expenses, and made other accounting entries that did not comply with U.S. GAAP, and that had the effect of improving the Company's reported financial results. Pursuant to instructions he received from Kamber and Husi, Kelford directed the improper release described in this Order.

D. DESCRIPTION OF THE IMPROPER RESERVE RELEASE

7. In 2001, Centerpulse's outside auditors observed that the Company was not recording variances on a monthly basis for the difference between standard and actual costs associated with purchase prices, labor and overhead at the Dental Division. Centerpulse management agreed that going forward they would record such variances each month in accordance with the correct accounting treatment. However, during the first half of 2002, certain members of the Dental Division's finance department did not consistently record manufacturing and inventory variances in this manner. Kelford was not employed by Centerpulse during this time period.

8. After becoming Vice President of Finance for the Dental Division in June 2002, Kelford recognized that inventory variances had not been recorded regularly during the first six months of the year. He directed that inventory variances be recorded monthly going forward. Pursuant to Kelford's instructions, the Dental Division's accounting staff made journal entries for variances in June, July and August 2002, with accompanying support and analyses. These adjustments increased the Dental Division's inventory revaluation reserve by approximately $1.2 million, which had the effect of reducing the Division's third quarter income (and, thus, Centerpulse's earnings) by approximately $1.2 million.

9. On October 17, 2002, one day after the Dental Division's third quarter books had been closed, Kelford received an e-mail from Kamber, who complained that the inventory revaluation adjustments had eroded the Dental Division's profitability. Specifically, Kamber stated:

> "I have been going through the numbers for the third quarter this year with Stephan Husi. When analyzing the Dental numbers very strange things appear.

> Sales rose as we expected at almost 20% where as the profitability has decreased y.o.y. [year over year]. Stephan [Husi] informed me that this is due to 'special' adjustments in inventory....
>
> Chris this is not acceptable at this time. I cannot show a decreasing profitability while the revenue increased at 20%. In theory, your Gross Profit and bottom line should go through the roof. We will all be in deep problems if I present this to the banks which give [sic] me $635 million to pay the [recall] settlement.
>
> I ask you to immediately contact Stephan Husi and go through item by item of what was booked. I cannot accept any reserves building, revaluation of inventory, etc. at this point. This has to be postponed to December."

10. In a telephone conversation later that day, Kelford and Husi agreed to release $1 million from the inventory revaluation reserve. Kelford then directed his staff to make a $1 million adjustment to the Dental Division's inventory revaluation reserve. Kelford directed the adjustment over the objection of one of his subordinates who refused to book the entry, and Kelford provided no documentation or support for the entry. The individual who recorded the entry wrote "Per Chris Kelford" on the journal entry form.

11. The reserve release was not in conformance with U.S. GAAP or the Dental Division's policy for accounting for inventory variances. The release also effectively reversed the prior variance entries for June, July and August that had been made at Kelford's instruction and that contained accompanying support and analyses. Moreover, the release was made based on corporate direction and had the effect of improving Centerpulse's reported income in the third quarter of 2002.

12. As a result of the improper accounting practices set forth above, Centerpulse falsely reported in an interim report for the third quarter of 2002 that it had earned approximately $21.9 million in pretax income for the third quarter of 2002 instead of at most approximately $20.9 million, an overstatement of approximately 4.6 percent. That interim report was subsequently furnished to the Commission on November 12, 2002 in a Form 6-K.

E. LEGAL DISCUSSION

13. Exchange Act Section 13(b)(2)(A) requires issuers with securities registered under Exchange Act Section 12 to make and keep books, records and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Exchange Act Section 13(b)(2)(B) requires such registrants to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements, and to maintain the accountability of assets. Exchange Act Rule 13b2-1 prohibits any person from directly or indirectly falsifying or causing the falsification of any book, record, or account subject to Exchange Act Section 13(b)(2)(A). No showing of scienter is necessary to establish violations of these provisions. See, e.g., SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir.), cert. denied sub nom., Shanklin v. SEC, 525 U.S. 931

(1998). Exchange Act Section 13(b)(5) prohibits a person from knowingly falsifying any book, record, or account or knowingly circumventing internal controls.

14. Kelford violated Exchange Act Section 13(b)(5) and Exchange Act Rule 13b2-1, and caused Centerpulse to violate Exchange Act Section 13(b)(2)(A), when he directed his staff to make an unsupported and improper $1 million release from the Dental Division's inventory revaluation reserve. As a result, Centerpulse's third quarter 2002 books and records were false because they reflected an overstatement of the Company's consolidated income. The improper release also constituted a failure to devise and maintain an adequate system of internal accounting controls at the Dental Division which in turn caused Centerpulse to violate Exchange Act Section 13(b)(2)(B).

IV.

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

Accordingly, it is hereby ORDERED that:

Pursuant to Section 21C of the Exchange Act, Respondent Kelford cease and desist from committing or causing any violations and any future violations of Exchange Act Section 13(b)(5) or Rule 13b2-1 thereunder and from causing any violations and any future violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B).

By the Commission.

Florence E. Harmon
Acting Secretary

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57894; File Nos. SR-Amex-2008-15; SR-CBOE-2005-11; SR-ISE-2008-12; SR-NYSEArca-2008-52; and SR-Phlx-2008-17)

May 30, 2008

Self-Regulatory Organizations; American Stock Exchange LLC, Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, Philadelphia Stock Exchange, Inc., and NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified, and Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified, Relating to Listing and Trading Options on the SPDR Gold Trust

On January 25, 2005, the Chicago Board Options Exchange, Incorporated ("CBOE") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4[2] thereunder to list and trade options on shares of the SPDR Gold Trust (formerly, the streetTRACKS Gold Trust) ("Gold Trust Options"). On April 12, 2005, CBOE submitted Amendment No. 1 to the proposed rule change. On March 7, 2008, CBOE submitted Amendment No. 2 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on March 17, 2008 for a 21-day comment period.[3] On May 21, 2008, CBOE submitted Amendment No. 3 to the proposed rule change.[4] This order approves the proposed rule change, as modified by Amendment Nos. 1, 2, and 3.

In addition, four other exchanges submitted proposals to list and trade Gold Trust Options. Specifically, the International Securities Exchange, LLC ("ISE") submitted its proposal on February 7, 2008, the American Stock Exchange LLC ("Amex") filed on February 20, 2008,

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 57465 (March 11, 2008), 73 FR 14284.

4 In Amendment No. 3, CBOE updated its proposed rule text to reflect the change in name, effective May 21, 2008, of the underlying trust from streetTRACKS Gold Trust to SPDR Gold Trust. This is a technical amendment and is not subject to notice and comment.

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the Philadelphia Stock Exchange, Inc. ("Phlx") filed on February 28, 2008, and NYSE Arca, Inc. ("NYSE Arca") filed on May 21, 2008 with the Commission the proposed rule changes as described in Items I and II below, which items have been prepared substantially by the Amex, ISE, NYSE Arca, and Phlx. On May 20, 2008, ISE and Phlx submitted Amendment No. 1 to their respective proposals. On May 21, 2008, ISE and Phlx submitted Amendment No. 2 to their respective proposals and Amex submitted Amendment No. 1 to its proposal. The proposals submitted by the Amex, ISE, NYSE Arca, and Phlx are substantively identical to CBOE's proposal. Pursuant to Section 19(b)(1) of the Act[5] and Rule 19b-4[6] thereunder, the Commission is publishing this notice to solicit comments on these four proposed rule changes, as modified, from interested persons and is approving the proposals, as modified, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex, ISE, NYSE Arca, and Phlx each propose to amend certain of their respective rules to enable the listing and trading of Gold Trust Options on their markets. The text of the proposals is available at each of the respective exchanges, the Commission's Public Reference Room, and www.amex.com, www.iseoptions.com, www.nysearca.com, and www.phlx.com.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In their filings with the Commission, the Amex, ISE, NYSE Arca, and Phlx included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below. These exchanges have prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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5 15 U.S.C. 78s(b)(1).

6 17 CFR 240.19b-4.

A. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Amex, ISE, NYSE Arca, and Phlx each state that the purpose of its proposed rule changes is to permit the listing and trading of Gold Trust Options.

Currently, the rules of these exchanges permit only certain "Units" (also referred to herein as exchange traded funds ("ETFs")) to underlie options traded on their markets.[7] Specifically, to be eligible as an underlying security for options traded on the Amex, ISE, NYSE Arca, or Phlx, an ETF must represent: (i) interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities, and/or financial instruments including, but not limited to, stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse purchase agreements ("Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements ("Money Market Instruments") comprising or otherwise based on or representing investments in indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); or (ii) interests in a trust or similar entity that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency and pays the

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7 See Amex Rule 915 Commentary .06; ISE Rule 5.2(h); NYSE Arca Rule 5.3; and Phlx Rule 1009 Commentary .06.

beneficial owner interest and other distributions on deposited non-U.S. currency, if any, declared and paid by the trust; or (iii) commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency. The proposed rule change would expand the types of ETFs that may be approved for options trading on the Exchanges to include the SPDR Gold Trust.

Apart from allowing the SPDR Gold Trust to be an underlying for options traded on Amex, ISE, NYSE Arca, and Phlx as described above, the listing standards for ETFs would remain unchanged from those that apply under the current rules of these exchanges. ETFs on which options may be listed and traded would still have to be listed and traded on a national securities exchange and satisfy the other listing standards set forth in the respective rules of each of these exchanges.[8]

Specifically, in addition to satisfying the aforementioned listing requirements, Units would have to continue to: (1) meet the criteria and guidelines under the exchanges' rules for underlying ETFs; or (2) be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue Units in a specified aggregate number even if some or all of the investment assets required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral

[8] See Amex Rule 916 Commentary .07; ISE Rule 502(h); NYSE Arca Rule 5.3(g); and Phlx Rule 1009 Commentary .06.

consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus.[9]

Amex, ISE, NYSE Arca, and Phlx each propose that the current continued listing standards for options on ETFs would apply to Gold Trust Options. Specifically, options on Units may be subject to the suspension of opening transactions as follows: (1) following the initial twelve-month period beginning upon the commencement of trading of the Units, there are fewer than 50 record and/or beneficial holders of the Units for 30 or more consecutive trading days; (2) the value of the index or portfolio of securities, non-U.S. currency, or portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or Financial Instruments and Money Market Instruments on which Units are based is no longer calculated or available; or (3) such other event occurs or condition exists that in the opinion of the exchanges makes further dealing on the exchange inadvisable.[10]

In addition, shares of the SPDR Gold Trust would not be deemed to meet the requirements for continued approval, and the Amex, ISE, NYSE Arca, and Phlx would not open for trading any additional series of option contracts of the class covering shares of the SPDR Gold Trust, if the shares of the SPDR Gold Trust cease to be an "NMS stock" as provided for in rules of these exchanges[11] or shares of the SPDR Gold Trust are halted from trading on their primary market.

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[9] See Amex Rule 915 Commentary .06; ISE Rule 502(h)(A)-(B); NYSE Arca Rule 5.3(g)(1)(A)-(B); and Phlx Rule 1009 Commentary .06.

[10] See Amex Rule 916 Commentary .07; ISE Rule 503(h); NYSE Arca Rule 5.4(k); and Phlx Rule 1010 Commentary .08.

[11] See Amex Rule 916 Commentary .07; ISE Rule 503(h); NYSE Arca Rule 5.4(b); and Phlx Rule 1010.

Amex, ISE, NYSE Arca, and Phlx each represented that the addition of the SPDR Gold Trust to types of Units that may underlie listed options traded on the exchange would not have any effect on the rules pertaining to position and exercise limits[12] or margin.[13]

Amex, ISE, NYSE Arca, and Phlx also represent that the respective surveillance procedures applicable to Gold Trust Options would be similar to those applicable to all other options on ETFs currently traded on these exchanges. In addition, the Amex, ISE, NYSE Arca, and Phlx note that they may obtain information from the New York Mercantile Exchange, Inc. ("NYMEX") through the Intermarket Surveillance Group ("ISG") related to any financial instrument traded there that is based, in whole or in part, upon an interest in, or performance of, gold.[14]

2. Statutory Basis

Amex, ISE, NYSE Arca, and Phlx each state that amending its rules to accommodate the listing and trading of Gold Trust Options will benefit investors by providing them with valuable risk management tools. Accordingly, these exchanges believe that the proposed rule changes are consistent with the requirements of Section 6(b) of the Act[15] in general, and further the objectives of Section 6(b)(5)[16] of the Act in particular, in that they are designed to remove

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12 See Amex Rules 904 and 905; ISE Rules 412 and 414; NYSE Arca Rules 6.8 and 6.9; and Phlx Rules 1001 and 1002.

13 See Amex Rule 462; ISE Rule 1202; NYSE Arca Rules 4.15 and 4.16; and Phlx Rule 722.

14 The Commission noted a surveillance arrangement between the New York Stock Exchange, Inc. and NYMEX in its order approving proposed rule changes to permit the listing and trading of shares of the SPDR Gold Trust. See Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR-NYSE-2004-22).

15 15 U.S.C. 78f(b).

16 15 U.S.C. 78f(b)(5).

impediments to, and perfect the mechanism of, a free and open market in a manner consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

Amex, ISE, NYSE Arca, and Phlx each believe that the proposed rule changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Amex, ISE, NYSE Arca, and Phlx each state that no written comments were solicited or received with respect to the proposed rule changes.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Nos. SR-Amex-2008-15; SR-ISE-2008-12; SR-NYSEArca-2008-52; and SR-Phlx-2008-17 on the subject line.

Paper comments:

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

All submissions should refer to File Numbers SR-Amex-2008-15; SR-ISE-2008-12; SR-NYSEArca-2008-52; and SR-Phlx-2008-17. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more

efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Numbers SR-Amex-2008-15; SR-ISE-2008-12, SR-NYSEArca-2008-52; and SR-Phlx-2008-17 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission Findings

After careful consideration, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange[17] and, in particular, the requirements of Section 6 of the Act.[18] Specifically, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,[19] which requires, among other things, that the rules of a national securities

17 In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

18 15 U.S.C. 78f.

19 15 U.S.C. 78f(b)(5).

exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. In accordance with the Memorandum of Understanding entered into between the Commodity Futures Trading Commission ("CFTC") and the Commission on March 11, 2008, and in particular the addendum thereto concerning Principles Governing the Review of Novel Derivative Products, the Commission believes that novel derivative products that implicate areas of overlapping regulatory concern should be permitted to trade in either or both a CFTC- or Commission-regulated environment, in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority).

As national securities exchanges, each of Amex, CBOE, ISE, NYSE Arca, and Phlx is required under Section 6(b)(1) of the Act[20] to enforce compliance by its members, and persons associated with its members, with the provisions of the Act, Commission rules and regulations thereunder, and its own rules. In addition, brokers that trade Gold Trust Options will also be subject to best execution obligations and FINRA rules.[21] Applicable exchange rules also require that customers receive appropriate disclosure before trading Gold Trust Options.[22] Further, brokers opening accounts and recommending options transactions must comply with relevant customer suitability standards.[23]

Gold Trust Options will trade as options under the trading rules of each of the exchanges. These rules, among other things, are designed to avoid trading through better displayed prices for

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20 15 U.S.C. 78f(b)(1).

21 See FINRA Rule 2320.

22 See Amex Rule 926; CBOE Rule 9.15; ISE Rule 616; NYSE Arca Rule 9.18(g); and Phlx Rule 1029.

23 See FINRA Rules 2860, 2860-2 and 2310; Amex Rule 923; CBOE Rules 9.7 and 9.9; ISE Rules 608 and 610; NYSE Arca Rule 918(b)-(c); and Phlx Rules 1024 and 1026.

Gold Trust Options available on other exchanges and, thereby, satisfy each exchange's obligation under the Options Intermarket Linkage Plan.[24] Series of the Gold Trust Options will be subject to exchange rules regarding continued listing requirements, including standards applicable to the underlying SPDR Gold Trust. Shares of the SPDR Gold Trust must continue to be traded through a national securities exchange or through the facilities of a national securities association, and must be "NMS stock" as defined under Rule 600 of Regulation NMS.[25] In addition, the underlying shares must continue to be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value.[26] If the SPDR Gold Trust shares fail to meet these requirements, the exchanges will not open for trading any new series of Gold Trust Options.

The Amex, CBOE, ISE, NYSE Arca, and Phlx have all represented that they have surveillance programs in place for the listing and trading of options based on the SPDR Gold Trust. For example, these exchanges may obtain trading information via the ISG from the NYMEX related to any financial instrument traded there that is based, in whole or in part, upon an interest in, or performance of, gold. Additionally, the listing and trading of Gold Trust Options will be subject to the exchanges' rules pertaining to position and exercise limits[27] and margin.[28]

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24 See Amex Rule 942; CBOE Rule 6.83; ISE Rule 1902; NYSE Arca Rule 6.94; and Phlx Rule 1085. Specifically, each of the exchanges is a participant in the Options Intermarket Linkage Plan.

25 17 CFR 242.600.

26 See Amex Rule 915 Commentary .06, Interpretation and Policy .06 to CBOE Rule 5.3; ISE Rule 502(a)-(b); NYSE Arca Rule 5.3(a)-(b); and Phlx Rule 1009 Commentary .06.

27 See Amex Rules 904 and 905; CBOE Rules 4.11 and 4.12; ISE Rules 412 and 414; NYSE Arca Rules 6.8 and 6.9; and Phlx Rules 1001 and 1002.

28 See Amex Rule 462; CBOE Rule 12.3; ISE Rule 1202; NYSE Arca Rules 4.15 and 4.16; and Phlx Rule 722. See also FINRA Rules 2860 and 2860-1.

In addition, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[29] for approving the proposed rule changes of the Amex, ISE, Phlx, and NYSE Arca prior to the thirtieth day after the date of publication of notice in the Federal Register. The Commission notes that proposals of the Amex, ISE, Phlx, and NYSE Arca are substantively identical to the CBOE proposal, which was published for a 21-day comment period and generated no comments. Therefore, the Commission does not believe that the proposals of the Amex, ISE, Phlx, and NYSE Arca raise any new regulatory issues different from that of the CBOE proposal. Accordingly, the Commission finds that there is good cause, consistent with Section 6(b)(5) of the Act,[30] to approve the proposals by Amex, ISE, NYSE Arca, and Phlx on an accelerated basis.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[31] that the proposed rule change (SR-CBOE-2005-11), as modified, be and is hereby approved and that the proposed rule changes (SR- SR-Amex-2008-15; SR-ISE-2008-12, SR-NYSEArca-2008-52; and SR-Phlx-2008-17), as modified, be, and are hereby approved on an accelerated basis.

By the Commission.

Florence E. Harmon
Acting Secretary

29 15 U.S.C. 78s(b)(2).

30 15 U.S.C. 78s(b)(5).

31 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57895; File No. SR-OCC-2008-07)

May 30, 2008

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Relating to SPDR Gold Shares

I. Introduction

On March 7, 2008, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-OCC-2008-07 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal was published in the Federal Register on March 17, 2008, and was republished on April 25, 2008.[2] On May 22, 2008, OCC filed Amendment No. 1 to the proposed rule change.[3] No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change, as amended.

II. Description

The rule change helps to clarify the manner in which options and security futures on SPDR Gold Shares will be treated and cleared by adding an interpretation to the definition of "fund share" in Article I, Section 1 of OCC's By-Laws.[4] Under the interpretation, OCC will

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

2 Securities Exchange Act Release Nos. 57466 (March 11, 2008), 73 FR 14297 and 57695 (April 21, 2008), 73 FR 22452. The Commission republished notice of the proposed rule change in order to add footnote 6 to Section IV, Solicitation of Comments.

3 Although the proposed rule change was amended after it was noticed for comment in the Federal Register, republication of the notice is not necessary because the post-notice amendment made only a technical change to reflect that streetTRACKS Gold Trust has been re-named SPDR Gold Trust.

4 The new interpretation replaces the interpretation that was added to OCC's By-Laws by File No. SR-OCC-2008-04, which was effective upon filing. At the request of the Commission, OCC withdrew SR-OCC-2008-04 from consideration by the Commission in conjunction with the submission of this filing, SR-OCC-2008-07.

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clear and treat as securities options any option contracts on SPDR Gold Shares, which are traded on securities exchanges. Similarly, OCC will clear and treat as security futures any futures contracts on SPDR Gold Shares.[5]

In its capacity as a "derivatives clearing organization" registered with the Commodity Futures Trading Commission ("CFTC"), OCC also filed the proposed rule change with the CFTC for prior approval by the CFTC pursuant to provisions of the Commodity Exchange Act ("CEA").[6]

III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions.[7] By amending its By-Laws to help clarify that options and security futures on SPDR Gold Shares will be treated and cleared as securities options or security futures, OCC's proposed rule change should help clarify the jurisdictional status of such contracts and accordingly should help to promote the prompt and accurate clearance and settlement of securities transactions. In accordance with the Memorandum of Understanding entered into between the CFTC and the Commission on March 11, 2008, and in particular the addendum thereto concerning Principles Governing the Review of Novel Derivative Products, the Commission believes that novel derivative products that implicate areas of overlapping

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[5] The exact language of the interpretation can be found at http://www.optionsclearing.com/publications/rules/proposed_changes/sr_occ_08_07.pdf.

[6] OCC's filing with the CFTC can be found at http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rul030708occ001.pdf.

[7] 15 U.S.C. 78q-1(b)(3)(F).

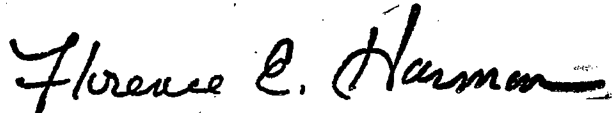
regulatory concern should be permitted to trade in either or both a CFTC- or Commission-regulated environment, in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority).

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.[8]

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-OCC-2008-07), as Modified by Amendment No. 1, be and hereby is approved.

By the Commission.



Florence E. Harmon
Acting Secretary

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8 In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-8922; 34-57888; 39-2454; IC-28292]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions are being made primarily to reflect the United States Department of Treasury's Financial Management Service's (FMS) designation of U.S. Bank of St. Louis, Missouri as the new Financial Agent for General Lockbox Services for the Commission. U.S. Bank assumed this responsibility from Mellon Bank effective February 4, 2008. In addition, the revisions include a modification to the EDGARLite Form TA-1 (Application for registration as a transfer agent filed pursuant to the Securities Exchange Act of 1934) to correct the form version number and Form TA-2 (Annual Report of Transfer Agent activities filed pursuant to the Securities Exchange Act of 1934) to allow filers to input up to two decimal places for percentage values in their response to Question 5(d).

The filer manual is also being revised to incorporate changes to reflect several amended rules and forms previously proposed or adopted by the Commission and implemented in EDGAR. Those rules address (1) the electronic submission on EDGAR of applications for orders under any section of the Investment Company Act of 1940 and Regulation E filings of Small Business Investment Companies (SBIC's) and Business Development Companies (BDC's) if and when the

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Commission might adopt rule changes making these mandatory electronic submissions and (2) Smaller Reporting Company regulatory relief and simplification.

The revisions to the Filer Manual reflect changes within Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 7 (May 2008). The updated manual will be incorporated by reference into the Code of Federal Regulations.

EFFECTIVE DATE: [Insert date of publication in the Federal Register]. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: In the Office of Information Technology, Rick Heroux, at (202) 551-8800; in the Office of Financial Management, for questions concerning the change in financial agents, contact Connie Cornett, at (202) 551-7812; in the Division of Investment Management, for questions concerning applications for orders under any section of the Investment Company Act of 1940, contact Ruth Armfield Sanders, Senior Special Counsel, Office of Legal and Disclosure, at (202) 551-6989, Nadya Roytblat, Assistant Director, Office of Investment Company Regulation, at (202) 551-6821, or Keith Carpenter, Senior Special Counsel, Office of Insurance Products, at (202) 551-6766; for questions concerning Regulation E filings of Small Business Investment Companies (SBIC's) and Business Development Companies (BDC's), contact Ruth Armfield Sanders, Senior Special Counsel, Office of Legal and Disclosure, at (202) 551-6989; in the Division of Corporation Finance, for questions concerning Smaller Reporting Companies, Gerald J. Laporte, Chief; Kevin M. O'Neill, Special Counsel; or Johanna Vega Losert, Attorney-Advisor, Office of Small Business Policy (202) 551-3430.

SUPPLEMENTARY INFORMATION: Today we are adopting an updated EDGAR Filer Manual, Volume II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink[2] and the Online Forms/XML Web site.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers should consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

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[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on August 20, 2007. See Release No. 33-8834 (August 15, 2007) [72 FR 46559].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] See Rule 301 of Regulation S-T (17 CFR 232.301).

[4] See Release Nos. 33-6977 (February 23, 1993) [58 FR 14628], IC-19284 (February 23, 1993) [58 FR 14848], 35-25746 (February 23, 1993) [58 FR 14999], and 33-6980 (February 23, 1993) [58 FR 15009] in which we comprehensively discuss the rules we adopted to govern mandated electronic filing. See also Release No. 33-7122 (December 19, 1994) [59 FR 67752], in which we made the EDGAR rules final and applicable to all domestic registrants; Release No. 33-7427 (July 1, 1997) [62 FR 36450], in which we adopted minor amendments to the EDGAR rules; Release No. 33-7472 (October 24, 1997) [62 FR 58647], in which we announced that, as of January 1, 1998, we would not accept in paper filings that we require filers to submit electronically; Release No. 34-40934 (January 12, 1999) [64 FR 2843], in which we made mandatory the electronic filing of Form 13F; Release No. 33-7684 (May 17, 1999) [64 FR 27888], in which we adopted amendments to implement the first stage of EDGAR modernization; Release No. 33-7855 (April 24, 2000) [65 FR 24788], in which we implemented EDGAR Release 7.0; Release No. 33-7999 (August 7, 2001) [66 FR 42941], in which we implemented EDGAR Release 7.5; Release No. 33-8007 (September 24, 2001) [66 FR 49829], in which we implemented EDGAR Release 8.0; Release No. 33-8224 (April 30, 2003) [68 FR 24345], in which we implemented EDGAR Release 8.5; Release Nos. 33-8255 (July 22, 2003) [68 FR 44876] and 33-8255A (September 4, 2003) [68 FR 53289] in which we implemented EDGAR Release 8.6; Release No. 33-8409 (April 19, 2004) [69 FR 21954] in which we implemented EDGAR Release 8.7; Release No. 33-8454 (August 6, 2004) [69 FR 49803] in which we implemented EDGAR Release 8.8; Release No. 33-8528 (February 3, 2005) [70 FR 6573] in which we implemented EDGAR Release 8.10; Release No. 33-8573 (May 19, 2005) [70 FR 30899] in which we implemented EDGAR Release 9.0; Release No. 33-8612 (September 21, 2005) [70 FR 57130] in which the Commission granted the authorization to publish the release adopting the reorganized EDGAR Filer Manual; Release No. 33-8633 (November 1, 2005) [70 FR

The FMS has designated U.S. Bank of St. Louis, Missouri as the new Financial Agent for General Lockbox Services for the SEC[5]. U.S. Bank has taken over this responsibility from Mellon Bank effective February 4, 2008. EDGAR Release 9.9 was implemented on February 4, 2008 to make the system changes necessary to support this transition. All fee payments (wires and checks) must be submitted to U.S. Bank on and after this date. As of February 1, 2008, payments should no longer be submitted to Mellon Bank. It is not necessary for filers to have an account at U.S. Bank to submit fee payments.

For wire payments, the hours of operation at U.S. Bank are 8:30am until 6:00pm eastern time for wires. U.S. Bank's ABA number is 081000210. To ensure proper credit and prompt filing acceptance, it is critical to include the SEC's account number at U.S. Bank (152307768324) and the payor's SEC-assigned CIK (Central Index Key) number (also know as the SEC-assigned registrant or payor account number) in your wire payment.

To remit your SEC filing fee payment by certified check, cashier's check or money order, you must make them payable to the Securities and Exchange Commission, omitting the name or title of any official of the Commission. On the front of the check or money order, you must include the SEC's account number (152307768324) and CIK number of the account to which the fee is to be applied. You must mail checks or money orders to the following U.S. Bank addresses. U.S. Bank does not support walk-in deliveries by individuals.

For USPS remittances, they MUST be sent to the following PO Box address.

67350] in which we implemented EDGAR Release 9.2; Release No 33-8656 (January 27, 2006) [71 FR 5596] in which we implemented EDGAR Release 9.3; and Release No. 33-8834 (August 15, 2007)[72 FR 46559] in which we implemented EDGAR Release 9.7.

[5] See Release No. 33-8885 (January 29, 2008) (Amendment of Procedures for Payment of Fees).

Securities & Exchange Commission
P.O. Box 979081
St. Louis, MO 63197-9000

The following address can be used for common carriers such as FedEx, Airborne, DHL, and UPS.

U.S. Bank
Government Lockbox 979081
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

For complete details regarding how to remit wire and check payment, please refer to the SEC's "Instructions for Wire Transfer (FEDWIRE) and Check Payment of SEC Filing Fees" (http://www.sec.gov/info/edgar/fedwire.htm) on our "Information for EDGAR Filers" webpage. Filers should periodically check both the SEC's and FMS' websites for additional information and updates.

Also included in EDGAR Release 9.9 were modifications to the EDGARLite Form TA-1 (Application for registration as a transfer agent filed pursuant to the Securities Exchange Act of 1934) to correct the form version number and TA-2 (Annual Report of Transfer Agent activities filed pursuant to the Securities Exchange Act of 1934) to allow filers to input up to two decimal places for percentage values in their response to Question 5(d) (5(d)(i) Corporate Equity Securities, 5(d)(ii) Corporate Debt Securities, 5(d)(iii) Open-Ended Investment Company Securities, 5(d)(iv) Limited Partnership Securities, 5(d)(v) Municipal Debt Securities, 5(d)(vi) Other Securities). Filers have communicated to the Division of Trading and Markets that their percentages are not necessarily whole numbers, so this modification will help filers provide more accurate answers to these questions. Filers must download the updated EDGARLite TA-1 and

TA-2 Submission Templates from the EDGAR OnlineForms Website to ensure that submissions will be processed successfully. Previous versions of the templates will not work properly.

We have recently proposed to amend Regulation S-T[6] to make mandatory the electronic submission on EDGAR of applications for orders under any section of the Investment Company Act of 1940 ("Investment Company Act") and Regulation E filings of small business investment companies and business development companies.[7] We have updated the EDGAR Filer Manual to describe the EDGAR electronic filing submission types that filers would use for electronic submission on EDGAR if and when we might adopt these proposals. The submission types are as follows:

- In connection with applications for orders under the Investment Company Act,
    - 40-OIP (Application under the Investment Company Act submitted pursuant to Investment Company Act Rule 0-2 reviewed by the Office of Insurance Products)
    - 40-OIP/A (Amendment to an application under the Investment Company Act submitted pursuant to Investment Company Act Rule 0-2 reviewed by the Office of Insurance Products)
    - 40-6B (Application under the Investment Company Act by an employees' securities company submitted pursuant to Investment Company Act Rule 0-2)
    - 40-6B/A (Amendment to an application under the Investment Company Act by an employees' securities company submitted pursuant to Investment Company Act Rule 0-2)
    - 40-APP (Application under the Investment Company Act submitted pursuant to Investment Company Act Rule 0-2 other than those reviewed by the Office of Insurance Products or submitted by an employees' securities company)

[6] 17 CFR 232.

[7] See Release No. 33-8859 (November 1, 2007) [72 FR 63513] (Rulemaking for EDGAR System; Mandatory Electronic Submission of Applications for Orders under the Investment Company Act and Filings Made Pursuant to Regulation E – proposing release).

  - 40-APP/A (Amendment to an application under the Investment Company Act submitted pursuant to Investment Company Act Rule 0-2 other than those reviewed by the Office of Insurance Products or submitted by an employees' securities company)

- In connection with Regulation E filings,

  - 1-E: Notification under Regulation E by small business investment companies and business development companies

  - 1-E/A: Amendment to a notification under Regulation E by small business investment companies and business development companies

  - 2-E: Report of sales of securities pursuant to Rule 609 under Regulation E

  - 2-E/A: Amendment to a report of sales of securities pursuant to Rule 609 under Regulation E

  - 1-E AD: Sales material filed pursuant to Rule 607 under Regulation E

  - 1-E AD/A: Amendment to sales material filed pursuant to Rule 607 under Regulation E

The following paper submission types became obsolete as of December 17, 2007: 40-6C, 40-6C/A, and 40-RPT. They have been replaced by paper submission types 40-APP, 40-OIP, or 40-6B, as appropriate.

Similarly, the following new paper submission types, 1-E AD and 1-E AD/A, were added.

Revisions were made to support Smaller Reporting Company regulatory relief and simplification[8]. Specifically, we added a "Smaller Reporting Company" indicator to the header of submission types: 10-K, 10-K/A, 10-KT, 10-KT/A, 10-Q, 10-Q/A, 10-QT, 10-QT/A, S-1, S-1/A, S-1MEF, S-3, S-3/A, S-3D, S-3DPOS, S-3MEF, S-4, S-4POS, S-4/A, S-4EF, S-4EF/A, S-4MEF, S-8, S-8POS, S-11, S-11/A, S-11MEF, 10-12B, 10-12B/A, 10-12G, and 10-12G/A; suspending the filing of the following submission types: 10SB12B, 10SB12B/A, 10SB12G, 10SB12G/A, SB-1, SB-1/A, SB-1MEF, SB-2, SB-2/A, and SB-2MEF as of February 4, 2008; suspending the filing of the following submission types: 10QSB and 10QSB/A as of November 3, 2008; and suspending

the filing of the following submission types: 10KSB and 10KSB/A as of March 16, 2009. Those filers needing to file amendments to filings previously submitted on submission types 10SB12B, 10SB12G, SB-1, SB-1MEF, SB-2, SB-2MEF, 10QSB, or 10KSB may do so using submission type 10-12B, 10-12G, S-1, S-1MEF, S-2, S-2MEF, 10-Q, and 10-K respectively.

Additional changes to the Filer Manual are being made to update obsolete material such as references to Effective Dates that have already passed (e.g., S-3ASR Effective 12/1/2005) and instructions for submitting fees.

The submission templates 1 and 3 were updated to support the aforementioned EDGARLink submission type changes in EDGAR Release 9.8. The new submission types added for applications for orders under any section of the Investment Company Act and Regulation E filings of small business investment companies and business development companies should only be used on EDGAR if and when we might adopt these proposals. However, with regard to the EDGARLink submission type changes made to support Smaller Reporting Company regulatory relief and simplification, filers must download, install, and use the updated EDGARLink software and submission templates to ensure that submissions will be processed successfully. Previous versions of the templates will not work properly. Notice of the update has previously been provided on the EDGAR Filing Web site and on the Commission's public Web site. The discrete updates are reflected on the EDGAR Filing Web site and in the updated Filer Manual, Volume II. No EDGARLink software or submission template changes were made for EDGAR Release 9.9 implemented on February 4, 2008.

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S-T to provide for the incorporation by reference into the Code of Federal Regulations of today's

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[8] See Release No. 33-8876 (December 19, 2007).

revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, US Securities and Exchange Commission, 100 F Street, NE, Room 1580, Washington DC 20549, on official business days between the hours of 10:00am and 3:00pm. We will post electronic format copies on the Commission's Web site; the address for the Filer Manual is http://www.sec.gov/info/edgar.shtml. You may also obtain copies from Thomson Financial, the paper document contractor for the Commission, at (800) 638-8241.

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA)[9]. It follows that the requirements of the Regulatory Flexibility Act[10] do not apply.

The effective date for the updated Filer Manual and the rule amendments is [Insert date of publication in the Federal Register]. In accordance with the APA[11], we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 9.9 was made available on February 4, 2008. The Commission believes that it is necessary to align the updated Filer Manual with the system upgrade.

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[9] 5 U.S.C. 553(b).

[10] 5 U.S.C. 601- 612.

[11] 5 U.S.C. 553(d)(3).

Statutory Basis

We are adopting the amendments to Regulation S-T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[12] Sections 3, 12, 13, 14, 15, 23, and 35A of the Exchange Act ,[13] Section 319 of the Trust Indenture Act of 1939,[14] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[15]

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENT

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232 - REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

1. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll(d), 79t(a), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

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2. Section 232.301 is revised to read as follows:

§232.301 EDGAR Filer Manual.

[12] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

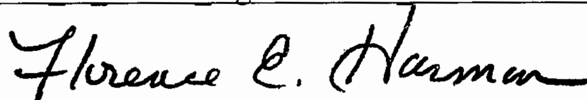
[13] 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78w, and 78ll.

[14] 15 U.S.C. 77sss.

[15] 15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: "General Information," Version 4 (August 2007). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 7 (May 2008). Additional provisions applicable to Form N-SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N-SAR Supplement," Version 1 (September 2005). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, US Securities and Exchange Commission, 100 F Street, NE, Room 1580, Washington, DC 20549, on official business days between the hours of 10:00am and 3:00pm, or by calling Thomson Financial at (800) 638-8241. Electronic copies are available on the Commission's Web site. The address for the Filer Manual is http://www.sec.gov/info/edgar.shtml. You can also photocopy the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

By the Commission.



Florence E. Harmon
Acting Secretary

May 30, 2008

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57889 / May 30, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2832 / May 30, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13047

In the Matter of PAULA J. NORBOM, CPA, Respondent.	ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Paula J. Norbom, CPA ("Norbom" or "Respondent").

II.

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

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III.

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

A. RESPONDENT

1. From at least April 2002 until October 2003, Norbom, age 42, served as the Vice President of Finance for the SpineTech Division of Centerpulse Ltd. ("Centerpulse" or the "Company"), a Swiss medical devices manufacturer. The SpineTech Division ("Division") was one of four Centerpulse Divisions. In this position, Norbom was responsible for, among other things, maintaining accurate books and records at the Division, and for devising and maintaining an adequate system of internal accounting controls at the Division. In addition, Norbom is a Certified Public Accountant licensed in Wisconsin and was so while she was employed at Centerpulse.

B. SUMMARY

2. This matter arises out of a reserve release that Norbom directed during Centerpulse's fiscal third quarter 2002.[2] On September 17, 2002, Norbom improperly directed her staff to release $2.4 million from a sales, use and property tax reserve which was being maintained on the SpineTech Division's books and records. The release, which was rolled up into the Company's consolidated financial statements, did not conform with Generally Accepted Accounting Principles in the United States ("U.S. GAAP"),[3] and it caused a 12 percent overstatement of Centerpulse's consolidated fiscal third quarter 2002 pretax income. The overstatement was reported in the financial statements the Company included in the Form 6-K it furnished to the Commission on November 12, 2002.

3. By virtue of her conduct, Norbom violated Exchange Act Rule 13b2-1 by falsifying certain books and records. She also caused Centerpulse to violate Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B) by failing to keep accurate books and records, and by failing to devise and maintain an adequate system of internal accounting controls at the SpineTech Division.[4]

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

[2] Centerpulse's fiscal year ended on December 31 of each calendar year, and accordingly its fiscal third quarter 2002 ended on September 30, 2002.

[3] While Centerpulse disclosed that its financial statements, which were consolidated in Switzerland, were reported in accordance with International Financial Reporting Standards, Centerpulse's accounting controls, and Norbom's practice, were to maintain the Division's accounts in accordance with U.S. GAAP.

[4] The Commission filed a lawsuit against Urs Kamber, Stephan Husi and Richard Jon May (respectively, Centerpulse's former Chief Financial Officer, former Controller, and the former Group Vice President of Finance, Tax Counsel and Treasurer of Centerpulse USA Holding Company), alleging that they engaged in various improper accounting practices at Centerpulse during the third and fourth quarters of 2002. SEC v. Urs Kamber et al., Civil Action No. 1:07-CV-01867 (JDB) (D.D.C.) (Oct. 17, 2007); see also Litigation Release No. 20336 (Oct. 17, 2007).

C. BACKGROUND

4. Originally named Sulzer Medica AG, Centerpulse was a publicly traded corporation headquartered in Switzerland that manufactured a variety of medical devices, including hip, knee, spine and dental implants. From at least January 2001 through October 2003, Centerpulse's American Depository Shares were registered with the Commission pursuant to Exchange Act Section 12(b) and were traded on the New York Stock Exchange under the symbol "CEP." As a foreign private issuer, Centerpulse filed annual reports with the Commission on Form 20-F and furnished other periodic reports to the Commission on Form 6-K. In October 2003, the Company was acquired by and merged with Zimmer Holdings, Inc., a U.S. medical devices company.

D. DESCRIPTION OF THE IMPROPER RESERVE RELEASE

5. Between at least 1997 and 2001, prior to Norbom's tenure at the SpineTech Division, the SpineTech Division did not comply with state laws regarding the collection and remittance of sales, use and property taxes to various jurisdictions. As a result, during the year-end 2001 closing process, certain SpineTech employees increased the reserve covering this tax exposure from $200,000 to approximately $6 million, which was the low end of their estimated range of liability. The reserve was increased periodically in the following months.

6. Norbom joined the SpineTech Division in April 2002. Around July 2002, Norbom and others at Centerpulse began to review the SpineTech Division's sales, use and property tax exposure. As part of this process, they engaged the services of an outside consulting firm. In late July 2002, tax consultants with the outside firm informed Norbom and others that SpineTech lacked exemption certificates, the filing of which was necessary to reduce the Company's sales tax exposure, in 49 of the 50 states. As a result, the Company still faced full tax exposure in these jurisdictions, plus penalties and interest.

7. A July 19, 2002 status report, which Norbom and others received from the outside tax consultants, stated that "there are very few exemption certificates on file for SPT [SpineTech] customers" and that "the only certificates found on file at SPT were for the state of Illinois and were in conjunction with a sales tax audit that occurred. Depending on the results of the taxability research, this could increase SPT's sales and use tax exposure in the states."

8. A July 26, 2002 status report, which Norbom and others received, likewise stated that the tax consulting firm "has received verification that the only exemption certificates available and on file for SPT are for the state of Illinois." This lack of exemption certificates was listed as one of the "Important issues/concerns" in the status report and was assigned a "High" priority.

9. On August 2, 2002, Norbom attended a meeting with the outside tax consultants and others. According to Norbom's hand-written notes from this meeting, the consultants informed her that the "#1 problem" with SpineTech's sales and use tax exposure was that "there are no exempt certs on file," and there was a "$6.25M liability because there are not certs. on file." At this time, the tax consultants provided Norbom and others at Centerpulse with a report that estimated the SpineTech Division's sales and use tax exposure at $6.25 million, not

including penalties and interest. At this time, the SpineTech Division's sales, use and property tax reserve was just over $6.4 million.

10. On August 30, 2002, Norbom was informed by email that the SpineTech Division's sales for August were going to miss the budgeted amount by approximately $2.8 million, and that Centerpulse's Chief Financial Officer, Urs Kamber, had informed Norbom's superior that the result was "not very satisfactory." Among other things, the $2.8 million sales miss was going to negatively affect the Company's anticipated revenue, operating income and pretax income for the third quarter of 2002. Norbom was also aware at that time that Centerpulse's financial results were being reviewed by a group of banks because the Company was seeking financing for the settlement of a massive products liability litigation.

11. On September 16, 2002, Richard May (the Group Vice President of Finance, Tax Counsel and Treasurer of Centerpulse USA Holding Company) wrote an email to Norbom after he learned of her intention to reduce the reserve to $3 million. May wrote, "I am not sure I understand the $3M number--I think it is more like $4M. But in any regard, I do not think we can or want to reverse any of it yet--we should revisit this at yearend--but for now, without the exemption certificates in place, we still have the full exposure (or most of it anyway)."

12. On or about September 17, 2002, Norbom instructed a SpineTech employee to release over $2.4 million from the reserve, which took the reserve below the SpineTech Division's estimated liability of over $6.4 million. There was no supporting documentation or analysis attached to the journal entry under which the release was made.

13. The release was improper because it was contrary to the quantification of the liability that the tax consultants had given Norbom.

14. Although it was released on September 17, 2002, Norbom directed that the release be given a "list date" of August 23, 2002, which was the last fiscal day of August 2002 and, thus, the last day the release could be included in SpineTech's August financial results.

15. An internal Centerpulse e-mail sent by Norbom's superior to Kamber on September 22, 2002 indicated that the $2.4 million reserve release was one of the "changes to our earlier reported August results" which had been discussed with Norbom. The email also noted that the release increased SpineTech's August 2002 operating income by $415,000 and its net income by nearly $2 million. The release offset much of the negative effects on SpineTech's operating income and pretax income that had been caused by the $2.8 million shortfall in August sales.

16. As a result of the reserve release, Centerpulse falsely reported in an interim report for the third quarter of 2002 that it had earned approximately $21.9 million in pretax income for the third quarter of 2002 instead of at most approximately $19.5 million, an overstatement of approximately 12 percent. That interim report was subsequently furnished to the Commission on November 12, 2002 in a Form 6-K.

E. **LEGAL DISCUSSION**

17. Exchange Act Section 13(b)(2)(A) requires issuers with securities registered under Exchange Act Section 12 to make and keep books, records and accounts that accurately and fairly reflect the transactions and dispositions of their assets. Exchange Act Section 13(b)(2)(B) requires such registrants to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements, and to maintain the accountability of assets. Exchange Act Rule 13b2-1 prohibits any person from directly or indirectly falsifying or causing the falsification of any book, record, or account subject to Exchange Act Section 13(b)(2)(A). No showing of scienter is necessary to establish violations of these provisions. See, e.g., SEC v. McNulty, 137 F.3d 732, 740-41 (2d Cir.), cert. denied sub nom., Shanklin v. SEC, 525 U.S. 931 (1998).

18. Norbom violated Exchange Act Rule 13b2-1 and caused Centerpulse to violate Exchange Act Section 13(b)(2)(A) when she directed her staff to improperly release $2.4 million from the SpineTech Division's sales, use and property tax reserve. As a result, Centerpulse's third quarter 2002 books and records were false because they reflected an overstatement of the Company's consolidated income. The improper release also constituted a failure to devise and maintain an adequate system of internal accounting controls at the SpineTech Division which in turn caused Centerpulse to violate Exchange Act Section 13(b)(2)(B).

IV.

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

Accordingly, it is hereby ORDERED that:

Pursuant to Section 21C of the Exchange Act, Respondent Norbom cease and desist from committing or causing any violations and any future violations of Exchange Act Rule 13b2-1 and from causing any violations and any future violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B).

By the Commission.

Florence E. Harmon
Acting Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8923 / May 30, 2008

SECURITIES EXCHANGE ACT OF 1934
Release No. 57892 / May 30, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13050

In the Matter of ANALOG DEVICES, INC. and JERALD G. FISHMAN, 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 against Analog Devices, Inc. and Jerald G. Fishman (collectively "Respondents") pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act").

II.

In anticipation of the institution of these proceedings, each of the Respondents has submitted an Offer of Settlement ("Offer") that the Commission has determined to accept. Solely for the purposes of these proceedings and any other proceeding 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.[1]

[1] In a separate civil action filed simultaneously with this proceeding, Analog Devices, Inc. and Jerald G. Fishman each separately consented to the entry of a final judgment by the U.S. District Court for the District of Columbia pursuant to Section 20(d) of the Securities Act and Section 21(d) of the Exchange Act that orders Analog and Fishman to pay civil penalties of $3 million and $1 million, respectively; and orders Fishman to pay disgorgement of $450,000 plus prejudgment interest thereon of $42,110. *SEC v. Analog Devices, Inc. and Jerald Fishman*, Civ.

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III.

On the basis of this Order and Respondents' Offers, the Commission finds[2] that:

A. RESPONDENTS

1. **Analog Devices, Inc.** is a Massachusetts corporation with its principal offices in Norwood, Massachusetts. Founded in 1965, the company designs, manufactures and markets high-performance integrated circuits that are used in signal processing for industrial, communication, computer, and consumer applications. During the relevant period, the company's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange under the symbol ADI.

2. **Jerald G. Fishman**, age 60, resides in Weston, Massachusetts. Fishman has been the President of Analog since 1991 and its Chief Executive Officer since November 1996. He is also a member of the company's Board of Directors. Fishman began his career with Analog in 1971, holding a series of positions in marketing, operations and strategic planning. He holds undergraduate and graduate degrees in engineering, as well as an MBA from Boston University and a law degree from Suffolk Law School.

B. SUMMARY

3. During at least 1998 through 2002, Analog Devices, Inc. ("Analog" or "the company") and its CEO Jerald G. Fishman ("Fishman") engaged in an improper course of conduct involving backdating stock option grants that operated as a fraud on Analog's shareholders and resulted in Fishman and other executives, directors and employees of Analog receiving undisclosed compensation. In 1998, 1999 and 2001, Fishman caused the company to backdate stock option grants to price them below the market price of the stock on the date they were actually approved, resulting in in-the-money option grants that the company failed to properly expense as compensation costs in its financial statements. The company and Fishman failed to disclose this practice in Analog's 1999-2002 proxy statements and related annual reports, and instead made false and misleading statements and omissions concerning the option grants and the benefits they provided to Analog's top officers, directors and employees. In addition, in 1999 and again in 2000, Fishman caused the company to grant favorably-priced options to himself and others by accelerating those grants to occur before the announcement of material nonpublic information about the company. This practice, which was undisclosed, but which does not form the basis of the charges in this Order, enhanced the company's and

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Action No. __ (_____ D.D.C.) (___).

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

Fishman's ability to provide stock option grant benefits to Analog's top officers, directors and employees.[3]

C. FACTS

4. In the competitive high tech industry of the late 1990s and early 2000s, Analog, like other high tech companies, used stock options as an important means to attract and retain employees, including executives.[4] Analog's option grants gave the recipients the right to purchase from the company (by "exercising" the options) a fixed number of shares of its common stock at a fixed price (the "exercise" price) prior to expiration of the options, which was generally 10 years from the grant date. Options granted to employees, including executives, typically vested in equal amounts on the third, fourth and fifth anniversaries of the grant date; options granted to non-employee directors typically vested on the first, second and third anniversaries of the grants. The company's ability to grant options at favorable (lower) exercise prices, which would be perceived by employees as having significant value, was a substantial part of its strategy to retain its highly skilled, professional employees.

5. Analog awarded options to executives and other employees during this period under a shareholder-approved stock option plan that allowed the Board of Directors to establish the exercise price at the time the options were granted, and required the Board to determine when to grant the options.[5] The plan required the exercise price to be "not less than 100% of the fair market value" of the company's common stock at the time of the option grant.

6. Analog's Compensation Committee, pursuant to authority delegated by the Board, granted the options under the plan. The Compensation Committee relied on Fishman to recommend when to make the option grants. The Committee ordinarily approved one grant date a year based on a recommendation by Fishman.[6] For each of the

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[3] The conduct that forms the basis of the violations found in this Order are solely the instances of backdating described at paragraphs 9 through 13, 16, 18 and 23 through 25. On July 26, 2006, the Commission adopted changes to the rules requiring disclosure of executive and director compensation which, among other requirements, address disclosure concerning an issuer's practice of timing option grants in coordination with the public release of material nonpublic information.

[4] The options discussed in this Order are non-statutory stock options.

[5] This plan is referred to in Analog's proxy statements and annual reports as the 1998 Stock Option Plan. Analog shareholders approved this plan on March 10, 1998.

[6] After the Compensation Committee approved the grant, Fishman orally informed the company's Chief Financial Officer ("CFO") of the grant date and exercise price for the options. The CFO then initiated the process of generating confirmatory documents to be given to the stock option recipients.

four grants discussed in this Order, Fishman recommended grants on dates corresponding to low points in Analog's stock price.

7. During 1998 to 2001, Analog made three option grants to officers and employees (and one grant to directors in 2001) at lower exercise prices than were allowed by the company's option plan. On three occasions (1998, 1999 and 2001), Fishman caused Analog to backdate grants, resulting in options with exercise prices that were below the market price of Analog's stock on the date the Compensation Committee actually approved the grants. In addition, although not a basis for the charges in this Order, on two occasions (1999 and 2000), Fishman accelerated or "timed" the grants to occur in advance of Analog's public announcement of record financial results that Fishman believed was likely to result in a material increase in Analog's stock price and make the options immediately in-the-money and, thus, more valuable to the recipients.[7] Although the options awarded from these practices were not immediately exercisable and vested over a period of up to five years, the options provided Fishman and other recipients with the benefit of lower exercise prices than they would have received had the options been granted at-the-money or after the public announcement of favorable financial results.[8]

8. Analog filed proxy statements and annual reports with the Commission that contained disclosures related to these option grants. Each of the company's proxy statements described the stock option compensation of Fishman and Analog's four other most highly paid executives (collectively, the "top five" officers or executives), including the grant date and exercise price of the options. The proxy statements also contained reports of Analog's Compensation Committee, which described the purpose and pricing policy of the company's stock option grants. Analog's annual reports, which incorporated the proxy statements by reference, also described the pricing policy of the company's stock option plan and the impact of that policy on the company's accounting. These proxy statements and annual reports did not disclose the benefits to option

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7 The company had engaged in the practice of timing grants prior to the release of favorable nonpublic financial information for years prior to the 1999 and 2000 grants that are the subject of this Order. At some point during these earlier years, certain management and non-management Directors had obtained advice from Analog's outside counsel that it was not inappropriate in the context of the company's insider trading policies for the company to grant options on the basis of and prior to the release of favorable nonpublic financial information. Analog's outside counsel was present at the Board meetings in 1999 and 2000 when the Board reviewed the timed grants made by the Compensation Committee. Analog never sought advice from its counsel about whether this practice and the benefit it provided to the option recipients should be disclosed to the company's shareholders. Outside counsel participated in the drafting of the relevant proxy statements but did not make recommendations concerning any such disclosure. As noted above, this non-disclosure predated the rule changes that expressly required disclosure concerning an issuer's practice of timing option grants in coordination with the public release of material nonpublic information. *See supra* note 3.

8 Other than options granted to Fishman in 1998, which have been fully exercised, neither Fishman nor any other Director has exercised any of the options that are the subject of this Order.

recipients and the costs to Analog from the option grant practices identified above. In each year between at least 1999 and 2002, Fishman received drafts of the company's proxy statements and annual reports, and signed the annual reports as CEO.[9]

1. The 1998 Option Grant

9. In September 1998, following a substantial downturn in the price of Analog's stock during 1998, Fishman recommended that the Compensation Committee grant stock options to employees, including senior executives.

10. In its 1999 proxy statement, Analog disclosed to its shareholders the date on which it granted options to its senior officers and employees: "[t]he Company granted options to employees on . . . September 4, 1998." The options purported to have been granted on September 4, 1998 – the Friday before the Labor Day weekend – were given an exercise price of $13.25 per share, the closing price of the company's stock on that day – and the lowest closing price of Analog stock during the entire year of 1998.

11. However, Analog's Compensation Committee actually approved the stock option grant at a meeting on September 8, 1998, after the 4 p.m. close of trading of the company's stock on the New York Stock Exchange. The company's stock option plan thus required the exercise price of the options to be set at the closing price of the company's stock on September 8, 1998, which was $14.75 per share. This price was $1.50 per share higher than the closing price on the date reported in the company's 1999 proxy statement. Indeed, the minutes of a meeting of the full Board the next day (September 9th), where the grants made by the Compensation Committee were reviewed, provided that the "exercise price of such stock option grants shall be the share closing price of the common stock of the Corporation on the New York Stock Exchange on September 8, 1998."

12. Although the Compensation Committee approved the options on September 8 at that day's closing price, Fishman caused the company to record the options as having been granted at the lower price on September 4.

13. As a result of the misrepresentation of the grant date, the top five officers for whom Analog disclosed stock option compensation in its proxy filings (including Fishman who received 300,000 shares) received options priced $1.50 per share *lower* than the closing price of Analog's stock on the date that the options were actually granted. In total, the 6.4 million options granted to employees and senior executives were in-the-money on the grant date by a total of $9.7 million. Fishman's options alone

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[9] The disclosures made in the annual reports of the company for the reporting periods between 1998 and 2002 are incorporated by reference in registration statements that Analog filed with the Commission on Forms S-8, which registered the securities underlying the stock option grants under the company's stock option plan. These registration statements were filed on March 11, 1998, June 27, 2000, and December 14, 2001, and incorporated by reference each of the above-described annual reports and proxy statements. Analog's outside Directors and Fishman signed each of these registration statements.

were in-the-money by $450,000. Fishman realized the full amount of this benefit when he exercised his options and sold the underlying stock between June 2003 and January 2004. The options granted to the four other top officers were in-the-money by a combined total of $307,500. These amounts were not disclosed by Analog in its executive compensation disclosures. Instead, the proxy filing stated that the options granted to the top five officers were granted at the fair market value of the company's stock on the grant date. In addition, the company failed to report in its financial statements the compensation expense associated with the in-the-money portion of these grants, as required by generally accepted accounting principles ("GAAP"), because the Company treated the options as having been granted at fair market value on September 4. Instead, the company's annual report stated that the company granted options at not less than the fair market value at the time of grant and that it therefore did not recognize stock option expense under GAAP.[10]

2. The 1999 Option Grant

14. Analog and Fishman's goal of finding low points for the price of the stock in fixing stock option exercise prices led Fishman, in 1999 and 2000 – one of the most profitable periods in the company's history – to recommend that Analog grant stock options to employees and officers, including Fishman himself, prior to the company's release of favorable nonpublic financial information that was known to him and the Board.

15. At Fishman's request, the Compensation Committee met on November 29, 1999, a week earlier than the normal December Board meeting, in order to award options prior to an expected positive earnings release. The Committee awarded a total of 7,361,550 million options to executives and employees, including 550,000 options to the company's top five officers. Fishman alone received 300,000 options. The full Board met the next day to review the grants made by the Compensation Committee.

16. In addition, despite the fact that the options were approved on November 29, 1999, after the close of the market, when the closing price of the company's stock was $57.94 per share, Fishman caused Analog to misrepresent that the options were granted on November 30, 1999, with an exercise price corresponding to the closing price of the stock on that day, $57.50 per share.

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[10] Under Accounting Principle Board Opinion No. 25, issuers are required to expense the intrinsic value of an option grant, generally ratably, over the vesting period of the option. An option's intrinsic value is generally defined as the amount by which the stock's market price exceeds the exercise price of the option on its grant date or "measurement date" (i.e., the date on which both the number of shares an individual employee is entitled to receive and the price of the options are known). Analog's annual reports stated that it accounted for stock option grants in accordance with APB No. 25: "The Company grants stock options for a fixed number of shares to employees with an exercise price equal to the fair value of the shares at the date of grant. The Company accounts for stock option grants in accordance with APB Opinion No. 25 . . . and, accordingly, recognizes no compensation expense for the stock option grants."

17. On December 1, 1999, the company released record year-end earnings results, which exceeded Wall Street earnings per share estimates by 5 cents per share. The next day, analysts revised upward their price targets for the company as a result of the earnings news. The stock price increased, climbing to above $65.00 per share in the afternoon of December 2, 1999, a 13% increase over the grant price. In the aggregate, the over 7 million options granted to employees and executives were in-the-money by $55 million soon after the news was released.

18. The company disclosed in its 1999 annual report on Form 10-K that "[t]he Company grants stock options for a fixed number of shares to employees with an exercise price equal to the fair value of the shares at the date of grant," while incorporating by reference the disclosure from the 2000 proxy statement that executives were granted options on November 30, 1999 at the "fair market value" on the grant date.[11] These statements misrepresent the date of the actual grant.

3. The 2000 Option Grant

19. The next year, on November 10, 2000, Fishman again convened meetings of the Compensation Committee and Board in advance of the regularly scheduled December meetings to approve a grant of approximately 12.54 million stock options to 3,500 employees (including executives), and this time also a grant of 25,000 options to each of the five non-employee Directors.[12] The grant included 1.39 million options granted to the top five executives (including 600,000 options to Fishman). The meetings again were called to grant options ahead of the release of material, favorable nonpublic year-end earnings news (ahead of consensus estimates by 4 cents per share) that was known to the Board at the time of the grant. The options were granted with an exercise price of $44.50 per share, equal to the closing price of the stock on November 10, 2000.

20. As had occurred a year earlier, the company's stock price increased following the company's public release of record earnings, resulting in all of the options being substantially in-the-money. The company announced its year-end earnings on November 14, 2000. By November 15, 2000, the closing price of the stock was $63.25, an increase of $18.75 (42%) over the November 10, 2000 closing price. In the aggregate,

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[11] Because this grant occurred during the company's 2000 fiscal year (October 31, 1999 – October 28, 2000), the company also made similar disclosures concerning this grant in its 2000 annual report and its 2001 proxy statement.

[12] In years prior to this grant, options to non-employee directors were awarded under a plan that required non-employee directors to receive options granted on a fixed date each year (the anniversary of the date the director joined the Board). In early December 1999, shortly after certain directors had received option grants with a significantly higher exercise price than executives and employees had received prior to the company's December 1, 1999 earnings release, the Board decided to cancel its own option plan and grant options to directors under the employee plan (the 1998 Stock Option Plan). The Board cancelled the directors' plan in part to enable the Directors to benefit in the future from the undisclosed practice the company followed under the employee stock option plan of selecting grant dates to occur shortly before the announcement of favorable financial results.

the 12.54 million shares granted to employees, officers and directors were in-the-money by $235 million after the news was released.

4. The 2001 "Salary Reduction" Option Grant

21. During an industry-wide business slump through parts of 2001, the company undertook an across-the-board salary reduction for its employees in lieu of implementing layoffs or other cost-cutting measures. The company used a formula to determine the percentage of salary that would be surrendered by each employee, and then set out to replace that salary with a special, mid-year stock option grant. This special stock option program was authorized by a written consent of the Compensation Committee, dated as of May 17, 2001, which gave Mr. Fishman the authority to set the date of the option grant.

22. On July 20, 2001, Analog's outside counsel spoke with members of the Compensation Committee and, by a written memorandum of that date, sent them a revised version of the May 17 written consent, requesting that they sign the new version and advising them that it replaced the earlier signed consent. As counsel's memorandum advised the Committee, "the previous consent authorized Jerry Fishman to designate the grant date of the stock options. The new (attached) Consent provides that the Compensation Committee will determine the grant date."

23. On July 26, 2001, Analog's counsel sent the Committee members the written consent to authorize the grant, which they signed in the following days. This consent stated that the grant date was "fixed at July 18, 2001." Although the grant date included in the consent was July 18, 2001, the Committee members had not agreed on that date to grant the options. The July 18, 2001 grant date reflected on the consent was selected by Fishman. The closing price of Analog's stock on that date was one of the lowest closing prices of the company's stock during the month in which the options were granted.

24. Because the Compensation Committee did not grant the options until July 26, 2001, at the earliest, the options were substantially in-the-money on the date they were actually granted. The closing price of Analog's stock on July 26, 2001, was $48.27 per share, $9.21 per share higher than the $39.06 exercise price of the 1,932,766 stock options granted to Analog executives, directors and employees. By that measure, the options were in-the-money by a total of $17.8 million. Fishman's options were in-the-money by $128,608. The options granted to the four other top officers were in-the-money by a total of $210,089.

25. The company disclosed in its 2002 annual report that "[t]he Company grants stock options for a fixed number of shares to employees with an exercise price equal to the fair value of the shares at the date of grant," while incorporating by reference the disclosures from the 2002 proxy statement that executives and directors were granted options on July 18, 2001 at the "fair market value" on the grant date. In fact, these options were not granted until July 26, 2001, at the earliest, at a price that was then *below*

the fair value of the stock. In addition, the company failed to report in its financial statements the compensation expense associated with the in-the-money portion of these grants, as required by GAAP, because the company treated the options as having been granted at fair market value on July 18, 2001.

D. VIOLATIONS

26. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, among other things, make it unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security: to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person. Sections 17(a)(2) and 17(a)(3) of the Securities Act prohibit similar conduct in the offer or sale of securities.

27. Establishing a violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder requires a showing of scienter. Aaron v. SEC, 446 U.S. 680 (1980). However, actions under Sections 17(a)(2) and 17(a)(3) of the Securities Act require no such showing. Id. Scienter is the "mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). Scienter is established by showing that a person acted intentionally or with severe recklessness. See SEC v. Fife, 311 F.3d 1, 9 (1st Cir.2002).

28. Analog violated Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, by filing false and misleading annual reports and proxy statements from 1999 to 2002 that failed to disclose the compensation and benefits provided to senior executives, directors and employees through the grant of stock options with favorable exercise prices resulting from the backdating of option grants. Fishman, who received the proxy statements before they were filed and who signed the annual reports, violated Sections 17(a)(2) and 17(a)(3) of the Securities Act by causing the company to engage in this stock option practice and to make these false and misleading stock option disclosures.

29. In disclosing the option grants made to the company's top five officers in 1998, 1999 and 2001, Analog's 1999, 2000, and 2002 proxy statements falsely disclosed the grant dates and exercise prices of the options by representing that the grants occurred on different dates with lower exercise prices than the date and price of the stock when the options were actually granted. The company also disclosed that the options were granted at prices "*equal to* the fair market value" of the company's stock on the grant date, when in fact the options were granted at prices *below* the stock's market price on the date of grant (i.e., that were in-the-money when granted). The company made similarly misleading disclosures in its annual reports, which stated that it was Analog's practice, and the pricing policy of its shareholder-approved stock option plan, to grant options at a price "equal to" (or "not less than 100% of") the "fair value" or "fair market value" of its stock on the date of grant.

30. By misrepresenting the date and price of the options, the company also failed to disclose information required by Commission rules for in-the-money option grants. Specifically, Analog's proxy statements failed to identify the market price of stock on the date the options were granted to the top five officers, as required by Item 402(c)(2)(iv) of Regulation S-K. Analog also failed to disclose the value of the grant-date market price in its disclosure of the potential realizable value of the options, as required by Item 402(c)(2)(vi)(A)(3) of Regulation S-K. These disclosures, had they been made, would have revealed both the extent to which the options were in-the-money on the date that they were granted, as well as the value of the potential gain associated with this undisclosed benefit. As a result, the company failed to disclose $1.3 million of additional potential gain to the top five officers, of which Fishman received approximately $710,000. Fishman caused the company to backdate these option grants and, thus, to misrepresent the grant dates and exercise prices of the options in the company's annual reports and proxy statements.

31. In addition, the company failed to record the in-the-money portion of all of the backdated options granted in 1998, 1999 and 2001, including the grants to all employees (and directors in 2001), which in the aggregate totaled $30.7 million ($21.8 million net of tax). Analog failed to record this amount as compensation expense in its financial statements filed with the Commission for the fiscal periods from 1998 to 2005, as required by GAAP.

32. Based on the foregoing, Analog violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Fishman violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

E. UNDERTAKINGS

33. As detailed in the following paragraph, Analog undertakes to re-price the unexercised options that were granted to Fishman in order to eliminate the benefit of the lower exercise prices that resulted from backdating the options. The re-pricing shall occur within 30 days of entry of this Order and, promptly thereafter, Analog agrees to provide to the Commission staff documents or information acceptable to the staff to reflect that the re-pricing has been completed.

34. Analog undertakes to re-price two of the three option grants discussed in this Order that were awarded to Fishman but that he has not yet exercised. Specifically, the options granted on November 29, 1999, shall be re-priced from $28.75 to $28.97 per share, the split-adjusted trading price of the company's common stock on November 30, 1999. The options represented to have been granted on July 18, 2001, shall be re-priced from $39.06 to $48.27 per share, the closing price of the company's common stock on July 26, 2001, the date the Compensation Committee granted the options.

IV.

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

Accordingly, it is hereby ORDERED that:

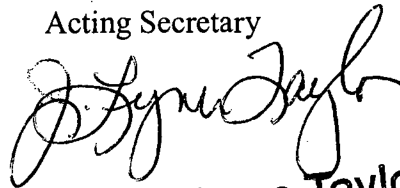
A. Respondent Analog cease and desist from committing or causing any violations and any future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent Analog shall comply with its undertakings as enumerated in Section III.E., above.

C. Respondent Jerald G. Fishman 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.

By the Commission.

Florence E. Harmon
Acting Secretary



By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56145A; File No. SR-NASD-2007-023)

May 30, 2008

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change To Amend the By-Laws of NASD To Implement Governance and Related Changes To Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc.

Amended

In Part V of Securities Exchange Act Release No. 56145 ("Release No. 34-56145"), issued July 26, 2007,[1] the Securities and Exchange Commission ("Commission") is adding, immediately after the following sentence:

> "Accordingly, after reviewing the record in this matter, the Commission believes that NASD has provided sufficient basis on which the Commission can find that, under the Exchange Act, NASD complied with its Certificate of Incorporation and By-Laws with respect to the proxy approval process and that the proposed amendments to its By-Laws were properly approved by NASD members."

the following paragraph:

> "This finding as to NASD compliance and members' approval is not a definitive adjudication under state law, such as a trial court would make after an evidentiary hearing, regarding the claim that the proxy statement was misleading. Except to the extent that state law informs the Commission's finding that, as a federal matter under the Exchange Act, NASD complied with its Certificate of Incorporation and By-Laws with respect to the proxy approval process and that the proposed amendments to its By-Laws

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1 See Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007) (FR Doc. E7-14855).

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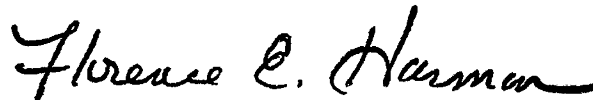
were properly approved by NASD members, the Commission is not purporting to decide a question of state law. The Commission does not intend that its determination regarding the NASD's uncontradicted prima facie showing before the Commission that the proxy statement was not misleading be binding on a court in a claim based on state law."

In adding this clarifying language, the Commission is not vacating, nullifying or rendering void Release No. 34-56145, which approved NASD's proposed rule change to amend the By-Laws of NASD to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. Release No. 34-56145, as amended herein, remains in effect as of July 26, 2007, the date it was issued by the Commission.

By the Commission.



Florence E. Harmon
Acting Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 230, 232, 239, 240 and 249

[Release Nos. 33-8924; 34-57896; 39-2455; IC-28293; File No. S7-11-08]

RIN 3235-AJ71

Interactive Data to Improve Financial Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing rules requiring companies to provide financial statement information in a form that would improve its usefulness to investors. Under the proposed rules, financial statement information could be downloaded directly into spreadsheets, analyzed in a variety of ways using commercial off-the-shelf software, and used within investment models in other software formats. The rules would apply to domestic and foreign public companies that prepare their financial statements in accordance with generally accepted accounting principles as used in the United States (U.S. GAAP), and foreign private issuers that prepare their financial statements using International Financial Reporting Standards (IFRS) as promulgated by the International Accounting Standards Board (IASB). Companies would provide their financial statements to the Commission and on their corporate Web sites in interactive data format using the eXtensible Business Reporting Language (XBRL). The interactive data would be provided as an exhibit to periodic reports and registration statements, as well as to transition reports for a change in fiscal year. The proposed rules are intended not only to make financial information easier for investors to analyze, but also to assist in automating regulatory filings and business information processing. Interactive data has the potential to increase the speed, accuracy, and usability of financial disclosure, and eventually reduce costs.

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DATES: Comments should be received on or before August 1, 2008.

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-11-08 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-11-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: James C. Lopez, Legal Branch Chief, Division of Corporation Finance at (202) 551-3790; Mark W. Green, Senior Special Counsel (Regulatory Policy), Division of Corporation Finance at (202) 551-3430; Jeffrey W. Naumann, Assistant Director, Office of Interactive Disclosure at (202) 551-5352; or Melanie Jacobsen, 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: We propose to add Rules 405 and 406 to Regulation S-T,[1] and revise Item 601[2] of Regulation S-K,[3] Rules 11,[4] 201,[5] 202,[6] 305,[7] 401,[8] and 402[9] of Regulation S-T, Rule 144[10] under the Securities Act of 1933 (Securities Act),[11] and Rules 13a-14[12] and 15d-14[13] under the Securities Exchange Act of 1934 (Exchange Act).[14] We also

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[1] 17 CFR 232.10 et seq.

[2] 17 CFR 229.601.

[3] 17 CFR 229.10 et seq.

[4] 17 CFR 232.11.

[5] 17 CFR 232.201.

[6] 17 CFR 232.202.

[7] 17 CFR 232.305.

[8] 17 CFR 232.401.

[9] 17 CFR 232.402.

[10] 17 CFR 230.144.

[11] 15 U.S.C. 77a et seq.

[12] 17 CFR 240.13a-14.

[13] 17 CFR 240. 15d-14.

[14] 15 U.S.C. 78a et seq.

propose to revise Forms S-3,[15] S-8,[16] and F-3[17] under the Securities Act and Forms 20-F[18] and 6-K[19] under the Exchange Act.

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[15] 17 CFR 239.13.

[16] 17 CFR 239.16b.

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[18] 17 CFR 249.220f.

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I. INTRODUCTION AND BACKGROUND

A. Introduction

Over the last several decades, developments in technology and electronic data communication have significantly decreased the time and cost of filing disclosure documents with us. Technological developments also have facilitated greater transparency in the form of easier access to, and analysis of, financial reporting and disclosures. Most notably, in 1993 we began to require electronic filing on our Electronic Data Gathering, Analysis and Retrieval System (EDGAR).[20] Since then, widespread use of the Internet has vastly decreased the time and expense of accessing disclosure filed with us.

[20] In 1993, we began to require domestic issuers to file most documents electronically. Release No. 33-6977 (Feb. 23, 1993) [58 FR 14628]. Electronic filing began with a pilot program in 1984. Release No. 33-6539 (June 27, 1984) [49 FR 28044].

We continue to update our filing standards and systems as technologies improve. These developments assist us in our goal to promote efficient and transparent capital markets. For example, since 2003 we have required electronic filing of certain ownership reports[21] filed on Forms 3,[22] 4,[23] and 5[24] in a format that provides interactive data, and recently we adopted similar rules governing the filing of Form D.[25] In addition, recently we have encouraged, and in some cases required, public reporting companies and mutual funds to provide disclosures and communicate with investors using the Internet.[26] Now, as part of our continuing efforts to assist filers as well as investors who use Commission disclosures, we propose to require that financial statements be provided in a format that makes the information they contain interactive.

Our proposal builds on our voluntary filer program, started in 2005,[27] that allowed us to evaluate the merits of interactive data. The voluntary program allows companies to submit financial statements on a supplemental basis in interactive format as exhibits to specified filings under the Exchange Act and the Investment Company Act of 1940 (Investment Company Act).[28] Companies that participate in the program still are required to file their financial statements in American Standard Code for Information Interchange (ASCII) or HyperText Markup Language

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[21] Release No. 33-8230 (May 7, 2003) [68 FR 25788 and 37044 (correction)] (required electronic filing of ownership reports) and Release No. 33-8891 (Feb. 6, 2008) [73 FR 10592] (required electronic filing of Form D [17 CFR 239.500]).

[22] 17 CFR 249.103 and 274.202.

[23] 17 CFR 249.104 and 274.203.

[24] 17 CFR 249.105.

[25] 17 CFR 239.500.

[26] See, e.g., Release No. 34-56135 (July 26, 2007) [72 FR 42222]; Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148]; Release No. 34-52056 (July 19, 2005) [70 FR 44722]; Release No. 33-8861 (November 21, 2007) [72 FR 67790]; and Release No. 34-57172 (Jan. 18, 2008) [73 FR 4450].

[27] Release No. 33-8529 (Feb. 3, 2005) [70 FR 6556].

[28] 15 U.S.C. 80a-1 et seq.

(HTML).[29]

In 2007, we extended the program to enable mutual funds voluntarily to submit in interactive data format supplemental information contained in the risk/return summary section of their prospectuses.[30] Over 75 companies have participated in the voluntary program. These companies span a wide range of industries and company characteristics, and have a total public float of over $2 trillion.

Financial reporting based on interactive data would create new ways for investors, analysts, and others to retrieve and use financial information in documents filed with us. For example, users of financial information could download it directly into spreadsheets, analyze it using commercial off-the-shelf software, or use it within investment models in other software formats. Through interactive data, what is currently static, text-based information can be dynamically searched and analyzed, facilitating the comparison of financial and business performance across companies, reporting periods, and industries.

Interactive data also could provide a significant opportunity to automate regulatory filings and business information processing, with the potential to increase the speed, accuracy, and usability of financial disclosure. Such automation could eventually reduce costs. A company that uses a standardized interactive data format at earlier stages of its reporting cycle could reduce the need for repetitive data entry and, therefore, the likelihood of human error. In this way, interactive data may improve the quality of information while reducing its cost.

Also, to the extent investors currently are required to pay for access to annual or quarterly report disclosure that has been extracted and reformatted into an interactive data format by

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[29] HTML is a standardized language commonly used to present text and other information on Web sites.

[30] Release No. 33-8823 (July 11, 2007) [72 FR 39290].

third-party sources, the availability of interactive data in Commission filings could allow investors to avoid additional costs associated with third party sources.

We believe that requiring issuers to file their financial statements using interactive data format would enable investors, analysts, and the Commission staff to capture and analyze that information more quickly and at less cost than is possible using the same financial information provided in a static format. Any investor with a computer would have the ability to acquire and download interactive financial data that have generally been available only to large institutional users. The proposed interactive data requirements would not change what is currently reported, but would add a requirement to include financial statements in a new format as an exhibit. Thus, the proposal to require that filers provide financial statements using interactive data will not alter the disclosure or formatting standards of periodic reports, registration statements,[31] or transition reports,[32] which would continue to be available as they are today for those who prefer to view the traditional text-based document.

Throughout this release, we solicit comment on many issues concerning the use of interactive data, including specifically whether financial information in interactive data format should be required as exhibits to Securities Act registration statements and Exchange Act periodic and transition reports filed with us. We are seeking comment from investors, registrants, accountants, analysts and any other parties or individuals who may be affected by the

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[31] Although registration statements can be filed under federal securities laws other than the Securities Act, we use the term "registration statement" in this release only to refer to those filed under the Securities Act unless we expressly state otherwise.

[32] Transition reports generally must be filed when an issuer changes its fiscal closing date. The transition report covers the resulting transition period between the closing date of its most recent fiscal year and the opening date of its new fiscal year. Rule 13a-10 [17 CFR 240.13a-10]; Rule 15d-10 [17 CFR 240.15d-10]. Unless otherwise stated, when we refer to Exchange Act reports, periodic reports, or "reports," we mean quarterly and annual periodic reports as well as transition reports.

use of interactive disclosure in Commission filings, and any other members of the public.

B. Current Filing Technology and Interactive Data

Companies filing electronically are required to file their registration statements, quarterly and annual reports, and transition reports in ASCII or HTML format.[33] Also, to a limited degree, our electronic filing system uses other formats for internal processing and document-type identification. For example, our system uses eXtensible Markup Language (XML) to process reports of beneficial ownership of equity securities on Forms 3, 4, and 5 under Section 16(a) of the Exchange Act.[34]

Electronic formats such as HTML, XML, and XBRL are open standards[35] that define or "tag" data using standard definitions. The tags establish a consistent structure of identity and context. This consistent structure can be recognized and processed by a variety of different software applications. In the case of HTML, the standardized tags enable Web browsers to present Web sites' embedded text and information in predictable format. In the case of XBRL, software applications, such as databases, financial reporting systems, and spreadsheets, recognize and process tagged financial information.

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[33] Rule 301 under Regulation S-T [17 CFR 232.301] requires electronic filings to comply with the EDGAR Filer Manual, and Section 5.1 of the Filer Manual requires that electronic filings be in ASCII or HTML format. Rule 104 under Regulation S-T [17 CFR 232.104] permits filers to submit voluntarily as an adjunct to their official filings in ASCII or HTML unofficial PDF copies of filed documents. Unless otherwise stated, we refer to filings in ASCII or HTML as traditional format filings.

[34] 15 U.S.C. 78p(a).

[35] The term "open standard" is generally applied to technological specifications that are widely available to the public, royalty-free, at minimal or no cost.

XBRL was derived from the XML standard. It was developed and continues to be supported by XBRL International, a collaborative consortium of approximately 550 organizations representing many elements of the financial reporting community worldwide in more than 20 jurisdictions, national and regional. XBRL U.S., the international organization's U.S. jurisdiction representative, is a non-profit organization that includes companies, public accounting firms, software developers, filing agents, data aggregators, stock exchanges, regulators, financial services companies, and industry associations.[36] In 2006, the Commission contracted with XBRL U.S. to develop the standard list of tags necessary for financial reporting in interactive format consistent with U.S. GAAP and Commission regulations.

Financial reporting in interactive format requires a standard list of tags. These tags are similar to definitions in an ordinary financial dictionary, and they cover a variety of financial concepts that can be read and understood by software applications. For financial statements prepared in accordance with U.S. GAAP, a filer would use the list of tags for U.S. financial statement reporting.[37] This list of tags contains descriptive labels, definitions, authoritative references to U.S. GAAP and Commission regulations where applicable, and other elements, all of which provide the contextual information necessary for interactive data[38] to be recognized and processed by software.[39]

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[36] XBRL U.S. supports efforts to promote interactive financial and business data specific to the U.S., including U.S. GAAP.

[37] Unless stated otherwise, when we refer to the "list of tags for U.S. financial statement reporting" we mean the interactive data taxonomy as approved by XBRL U.S. that is based on U.S. GAAP, Commission regulations, and common financial reporting practices used in the preparation of financial statements in the U.S.

[38] The proposed rules would define the interactive data necessary to create human-readable disclosure as the "interactive data file," which would be required with every interactive data submission. The EDGAR Filer Manual would identify any necessary supporting files.

[39] For example, contextual information would identify the entity to which it relates, usually by using the filer's CIK number. A hypothetical filer converting its traditional electronic disclosure of $1,000,000 of net sales would have to

Applying data tags to financial statements is accomplished using commercially available software that guides a preparer in mapping information in the financial statements to the appropriate tags in the standard list. Each element in the standard list of tags has a standard label. A company can therefore match the standard labels to each caption in its financial statements. Occasionally, because filers have considerable flexibility in how financial information is reported under U.S. reporting standards, it is possible that a company may wish to use a non-standard financial statement line item that is not included in the standard list of tags.[40] In this situation, a company would create a company-specific element, called an extension.

For example, what a company identifies in its traditional format financial statements as "operating revenues" may be associated with an element that has "net revenues" as the standard label. In this situation, a company would need to change, or extend, the standard label to become "operating revenues" when tagging that disclosure with the element.[41]

A company may choose to tag its own financial statements using commercially available software, or it may choose instead to outsource the tagging process. In the event a company relies upon a service provider to tag the company's financial statements, the company would want to carefully review the tagging done by the service provider in order to make sure that the tagged financial statements are accurate and consistent with the information the company presents in its traditional format filing.

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create interactive data that identify what the 1,000,000 represents, net sales, and the currency in which it is disclosed, dollars. The contextual information would include other information as necessary; for example, whether it relates to an annual report or quarterly report, the financial reporting period, continuing or discontinued operations, or actual, restated, forecast, pro forma or other type of disclosure.

[40] In other cases, without a relevant and appropriate tag in the list of tags, a company would be required to create an extension in order to provide interactive data that appears the same as the corresponding portion of traditional format filing.

[41] Unless otherwise stated, extensions, whether relating to an element or a label, are not part of the standard list of tags.

Similarly, to create interactive data-formatted financial statements prepared in accordance with IFRS as issued by the IASB, a filer would use the IFRS list of tags.[42] The IFRS list of tags contains descriptive labels, authoritative references to IFRS where applicable, and other elements and concepts that provide the contextual information necessary for interactive data to be recognized and processed by software. The International Accounting Standards Committee Foundation (IASCF) has developed the IFRS list of tags.[43] To create interactive data using the IFRS list of tags, an issuer generally would need to follow the same mapping, extension and tagging process as would a company that uses the list of tags for U.S. financial statement reporting. As further discussed below, the IASCF is collaborating with XBRL U.S. and other parties to align practices designed to develop the IFRS list of tags. This collaboration involves the development of the appropriate scope for the IFRS list of tags' content and technology architecture.[44]

Because financial statements in interactive data format, referred to as the interactive data file,[45] are intended to be processed by software applications, the unprocessed data is not readable. Thus, viewers are necessary to convert the interactive data file to human readable format. Some viewers are similar to Web browsers used to read HTML files.

The Commission's Web site currently provides links to four viewers that allow the public

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[42] Unless stated otherwise, when we refer to the "IFRS list of tags" we mean the list of tags for financial statements prepared in accordance with IFRS as issued by the IASB.

[43] See http://www.iasb.org/xbrl/index.html. The IASCF released the 2008 taxonomy (list of tags) on March 31, 2008. See IASB Press Release, The IASC Foundation publishes IFRS Taxonomy 2008, (March 31, 2008).

[44] As previously noted, in 2006 we contracted with XBRL U.S. to develop the standard tags necessary for financial reporting in interactive format consistent with U.S. GAAP and Commission regulations. That contract has been completed.

[45] See note 40 above.

to easily read company disclosures filed using interactive data.[46] These viewers demonstrate the capability of downloading interactive data into software such as Microsoft Excel as well as into other applications that are widely available on the Internet. In addition, we are aware of other applications under development that may provide additional and advanced functionality.

C. The Commission's Multiyear Evaluation of Interactive Data and Overview of Proposed Rules

In 2004, we began assessing the benefits of interactive data and its potential for improving the timeliness and accuracy of financial disclosure and analysis of Commission filings.[47] As part of this evaluation, we adopted rules in 2005 permitting filers, on a voluntary basis, to provide financial disclosure in interactive data format as an exhibit to certain filings on our electronic filing system. The voluntary program has been based on an earlier version of the list of tags for U.S. financial statement reporting, which does not include a full array of standard elements for financial statement footnotes and schedules. After more than two years of increasing participation, over 75 companies have chosen to provide interactive data financial reporting.[48]

During this time, we have kept informed of technology advances and other interactive data developments. We note that several U.S. and foreign regulators have begun to incorporate interactive data into their financial reporting systems. The Federal Deposit Insurance Corporation (FDIC), the Federal Reserve, and the Office of the Comptroller of the Currency

[46] See viewers available at http://www.sec.gov/xbrl.

[47] See Press Release No. 2004-97 (July 22, 2004).

[48] A viewer for the voluntary program is available at http://www.sec.gov/spotlight/xbrl/xbrlwebapp.shtml. This viewer, one of several funded by the Commission to demonstrate interactive data, maintains a running total of companies and filers submitting data as part of the voluntary program. As of April 17, 2008, 78 companies had submitted 350 interactive data reports.

(OCC) require the use of XBRL.[49] As of 2006, approximately 8,200 U.S. financial institutions were using XBRL to submit quarterly reports to banking regulators.[50] Countries that have required or instituted voluntary or pilot programs for XBRL financial reporting include Australia, Belgium, Canada, China, Denmark, France, Germany, Ireland, Israel, Japan, Korea, Luxembourg, the Netherlands, New Zealand, Norway, Singapore, Spain, Sweden, Thailand and the United Kingdom.[51]

We also have kept informed of relevant advances and developments by hosting roundtables on the topic of interactive data financial reporting,[52] creating the Commission's Office of Interactive Disclosure,[53] and meeting with international securities regulators to discuss, among other items, timetables for implementation of interactive data initiatives for financial reporting.[54] Also, staff of the Commission have attended meetings of the Advisory Committee on Improvements to Financial Reporting (CIFiR) in which the committee discussed proposals for financial reporting using interactive data.[55] We also have reviewed written statements and public

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[49] Since 2005, the FDIC, Federal Reserve, and the OCC have required the insured institutions that they oversee to file their quarterly Consolidated Reports of Condition and Income (called Call Reports) in interactive data format using XBRL. Call Reports, which include data about an institution's balance sheet and income statement, are used by these federal agencies to assess the financial health and risk profile of the financial institution.

[50] See Improved Business Process Through XBRL: A Use Case for Business Reporting, available at http://www.xbrl.org/us/us/FFIEC%20White%20Paper%2002Feb2006.pdf.

[51] See XBRL International Progress Report (November 2007), available at http://www.xbrl.org/ProgressReports/2007_11_XBRL_Progress_Report.pdf.

[52] See materials available at http://www.sec.gov/spotlight/xbrl/xbrl-meetings.shtml.

[53] See Press Release No. 2007-213 (October 9, 2007).

[54] See Press Release No. 2007-227 (November 9, 2007).

[55] For example, CIFiR conducted an open meeting on March 14, 2008 in which it heard reactions from an invited panel of participants to CIFiR's developed proposal regarding required filing of financial information using interactive data. An archived webcast of the meeting is available at http://sec.gov/about/offices/oca/cifir.shtml. The March 14, 2008 panelists presented their views and engaged with CIFiR members regarding issues relating to requiring interactive data tagged financial statements, including tag list and technological developments, implications for large and small public companies, needs of investors, necessity of assurance and verification of

comments received by CIFiR on its XBRL developed proposal.[56]

Building on our experience monitoring the voluntary program, and our participation in the other initiatives described above, we are now proposing rules to require financial reporting using interactive data. The proposed rules would apply to domestic and foreign public companies that prepare their financial statements in accordance with U.S. GAAP, and foreign private issuers[57] that prepare their financial statements in accordance with IFRS as issued by the IASB. Interactive data would be required to be provided on a company's Web site[58] and with the filer's Securities Act registration statements,[59] annual reports, quarterly reports if applicable,[60] and transition reports.[61] We believe this has the potential to provide advantages for the investing

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such tagged financial statements, and legal implications arising from such tagging. Also, CIFiR has provided to the Commission an interim progress report that contains a developed proposal that the Commission, over the long term, require the filing of financial information using interactive data once specified conditions are satisfied. See Progress Report of the Advisory Committee on Improvements to the Financial Reporting to the United States Securities and Exchange Commission (Feb. 14, 2008) (Progress Report), available at http://www.sec.gov/about/offices/oca/acifr/acifr-pr-021408-final.pdf. CIFiR's developed proposal is discussed more fully in Part II.C.2 below.

[56] The XBRL developed proposal appears in chapter 4 of the Progress Report. Written statements of panelists at the March 14, 2008 meeting and public comments received on the Progress Report are available at http://sec.gov/comments/265-24/265-24.shtml.

[57] Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)] defines "foreign private issuer" as a foreign issuer other than a foreign government that either has 50 percent or less of its outstanding voting securities held of record by U.S. residents or, if more than 50 percent of its outstanding voting securities are held by U.S. residents, about which none of the following is true: (1) a majority of its executive officers or directors are U.S. citizens or residents; (2) more than 50 percent of its assets are located in the U.S.; or (3) the issuer's business is administered principally in the U.S.

[58] The proposed Web site posting requirement would apply only to the extent a filer already maintains a corporate Web site.

[59] Interactive data would be required as an exhibit to a Securities Act registration statement that contains financial statements, such as a Form S-1 [17 CFR 239.11] used in connection with an initial public offering. Interactive data would not be required as an exhibit to a Securities Act registration statement that does not contain financial statements, such as a Form S-3 filed by an issuer that is eligible to and does incorporate by reference all required financial statements from its periodic reports.

[60] Foreign private issuers filing on Form 10-Q would be required to provide financial statements in quarterly reports using interactive data.

[61] The proposed rules would not include any investment company that is registered under the Investment Company Act or any "business development company," as defined in Section 2(a)(48) of that Act [15 U.S.C. 80a-2(a)(48)]. Business development companies are a category of closed-end investment companies that are not required to register

public by making financial data more accessible, timely, inexpensive and easier to analyze.

By enabling filers to further automate their financial processes, interactive data may eventually help filers improve the speed at which they generate financial information, while reducing the cost of filing and potentially increasing the accuracy of the data. For example, with standardized interactive data tags, registration statements and periodic reports may require less time for information gathering and review. Also, standardized interactive data tagging may enhance the ability of an issuer's in-house financial professionals to identify and correct errors in the issuer's registration statements and periodic reports filed in traditional electronic format. Filers also may gain benefits not directly related to public financial disclosures. For example, filers that use interactive data may be able to consolidate enterprise financial information more quickly and potentially more reliably across operating units with different accounting systems. However, we recognize that at the outset, filers would most likely prepare their interactive data as an additional step after their financial statements have been prepared.

The principal elements of the proposal are as follows:

- Domestic and foreign large accelerated filers[62] that use U.S. GAAP and have a worldwide public common equity float above $5 billion[63] as of the end of their most recently completed second fiscal quarter would provide to the Commission a new

under that Act. The proposed rules also would not include any entity that reports under the Exchange Act and prepares its financial statements in accordance with Article 6 of Regulation S-X [17 CFR 210.6-01 et seq.]. The proposed rules would not apply to these entities because the standard list of tags for investment management is not yet fully developed.

[62] Exchange Act Rule 12b-2 [17 CFR 240.12b-2] generally defines "large accelerated filer" as an issuer that has common equity held by unaffiliated persons with a value of at least $700 million, has been subject to the Exchange Act's periodic reporting requirements for at least 12 months, has filed at least one annual report, and is not eligible to use the disclosure requirements available to smaller reporting companies for its periodic reports.

[63] As of the end of 2006, the $5 billion cutoff would establish a category of approximately 500 filers.

exhibit.[64] The exhibit would contain their financial statements,[65] and any applicable financial statement schedules in interactive data format. The requirement would apply beginning with fiscal periods ending on or after December 15, 2008.[66]

- All other domestic and foreign large accelerated filers using U.S. GAAP would be subject to the same interactive data reporting requirements the following year, beginning with fiscal periods ending on or after December 15, 2009.
- All remaining filers using U.S. GAAP, including smaller reporting companies,[67] and all foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB,[68] would be subject to the same interactive data reporting requirements beginning with fiscal periods ending on or after December 15, 2010.[69]
- Filers providing financial statements in interactive data format would be required to use the most recent and appropriate list of tags released by XBRL U.S. or the IASCF as required by the EDGAR Filer Manual. Filers also would be required to tag a limited

[64] The exhibit would be required with such filers' registration statements, quarterly, if applicable, and annual reports, and transition reports.

[65] When we refer to financial statements, we mean the face of the financial statements and accompanying footnotes. The face of the financial statements refers to the statement of financial position (balance sheet), income statement, statement of comprehensive income, statement of cash flows, and statement of owners' equity, as required by Commission regulations. References to the financial statements as required for interactive data reporting include any required schedules to the financial statements, unless we expressly state otherwise.

[66] The proposed schedule is premised on the rules being adopted this fall in time for affected filers to implement this schedule, and could be adjusted depending on when the Commission adopts any final rules.

[67] Item 10(f)(1) of Regulation S-K [17 CFR 229.10(f)(1)], Rule 405 under the Securities Act [17 CFR 230.405] and Rule 12b-2 under the Exchange Act [17 CFR 240.12b-2] define the term "smaller reporting company," in general, as a company that has common equity securities held by non-affiliates with a market value of less than $75 million or, if that value cannot be calculated, had less than $50 million in revenue in the prior fiscal year.

[68] The proposed rules would not require foreign private issuers that prepare their financial statements in accordance with a variation of IFRS as issued by the IASB to provide interactive data.

[69] We do not propose to require foreign private issuers to provide in interactive data format interim financial information contained in Form 6-K or any financial information prepared in accordance with non-U.S.GAAP that must be reconciled to U.S. GAAP in the foreign private issuer's Exchange Act reports.

number of document and entity identifier elements, such as the form type, company name, and public float. As with interactive data for the financial statements, these document and entity identifier elements would be formatted using the appropriate list of tags as required by the EDGAR Filer Manual.[70]

- A filer required to provide financial statements in interactive data format to the Commission also would be required to post those financial statements in interactive data format on its corporate Web site on the same day it filed or was required to file the related registration statement or report with the Commission, whichever is earlier.[71]
- The proposed rules would not alter the requirements to provide financial statements and any required financial statement schedules with the traditional format filings.[72]
- Financial statements in interactive data format would be provided as exhibits identified in Item 601(b) of Regulation S-K and Form 20-F.
- Financial statement footnotes and financial statement schedules initially would be tagged individually as a block of text. After a year of such tagging, a filer also would be required to tag the detailed disclosures within the footnotes and schedules.
- Viewable interactive data as displayed through software available on the Commission's

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[70] The appropriate list of tags for document and entity identifier elements would be a list released by XBRL U.S., but would not be specific to U.S. GAAP or IFRS as issued by the IASB and would be required to be used by all issuers required to submit interactive data regardless of whether reporting in U.S. GAAP or IFRS as issued by the IASB.

[71] The day the registration statement or report is submitted electronically to the Commission may not be the business day on which it was deemed officially filed. For example, a filing submitted after 5:30 p.m. generally is not deemed officially filed until the following business day. Under the proposed rules, the Web posting would be required to be posted at any time on the same day that the related registration statement or report is deemed officially filed or required to be filed, whichever is earlier.

[72] When we established the voluntary program, we stated in the adopting release that the interactive data submission would be supplemental to filings and not replace the required traditional electronic format of the financial information it contains. We also said that volunteers would be required to continue to file their traditional electronic filings. See Part II.D of Release No. 33-8529 (Feb. 3, 2005) [70 FR 6556, 6559].

Web site, and to the extent identical in all material respects to the corresponding portion of the traditional format filing, would be subject to all the same liability provisions of the federal securities laws as the corresponding data in the traditional format part of the official filing.

- Data in the interactive data file submitted to us generally would be subject to the federal securities laws in a manner similar to that of the voluntary program and, as a result, would be
  - excluded from the officer certification requirements under Rules 13a-14 and 15d-14 of the Exchange Act;[73]
  - deemed not filed for purposes of specified liability provisions; and
  - protected from liability for failure to comply with the proposed tagging and related requirements if the interactive data file either
    - met the requirements; or
    - failed to meet those requirements, but the failure occurred despite the issuer's good faith and reasonable effort, and the issuer corrected the failure as soon as reasonably practicable after becoming aware of it.
- The proposed rules would require the financial information and document and entity identifier elements to be tagged according to Regulation S-T and the EDGAR Filer Manual.[74]
- The initial interactive data exhibit of a filer would be required within 30 days of the

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[73] 17 CFR 240.13a-14 and 17 CFR 240.15d-14.

[74] Proposed Rule 405 of Regulation S-T would directly set forth the basic tagging requirements and indirectly set forth the rest of the tagging requirements through the requirement to comply with the EDGAR Filer Manual. Consistent with proposed Rule 405, the Filer Manual would contain the technical tagging requirements.

earlier of the due date or filing date of the related report or registration statement, as applicable. In year two, a filer would have a similar 30 day grace period for its first interactive data exhibit that includes detailed tagging of its footnotes and schedules. All other interactive data exhibits would be required at the same time as the rest of the related report or registration statement.

- Filers that do not provide or post required interactive data on the date required would be deemed not current with their Exchange Act reports and, as a result, would not be eligible to use the short forms S-3, F-3, or S-8, or elect under Form S-4 or F-4 to provide information at a level prescribed by Form S-3 or F-3. Similarly, such filers would not be deemed to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144.[75] A filer that was deemed not current solely as a result of not providing an interactive data exhibit when required would be deemed current and timely upon providing the interactive data. Therefore it would regain the ability to incorporate by reference, short form registration statement eligibility, and current status for purposes of determining adequate current public information under Rule 144. As such, it would not lose its status as having "timely" filed its Exchange Act reports solely as a result of the delay in providing interactive data.
- Although we have not proposed at this time to require interactive data for executive compensation disclosure because a definitive list of tags for this purpose is not yet completed, we are soliciting comment on the usefulness to investors and others of such interactive data, as well as the extent of the related costs and associated questions.
- We anticipate that if the proposed rules become effective, companies that are not

[75] 17 CFR 230.144.

required to provide interactive data until a later time would have the option to do so earlier.

- We also anticipate that the voluntary program would be modified, if the proposed rules are adopted, to permit investment companies to participate, but to exclude non-investment company participation. As a result, the voluntary program would continue for the financial statements of investment companies that are registered under the Investment Company Act, and business development companies and other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X. The voluntary program also would continue for the risk/return summary section of mutual fund prospectuses.[76]

II. DISCUSSION OF THE PROPOSED AMENDMENTS

A. Submission of Financial Information Using Interactive Data

For several years XBRL U.S. and its related entities have developed and refined the list of tags to classify and define financial information in accordance with U.S. financial reporting practices and Commission regulations.[77] Many investors, auditors, accountants, and others, including companies that have been providing interactive data disclosure in the voluntary program, have helped in this process.

Interactive data financial statements using the list of tags for U.S. financial statement reporting have been submitted voluntarily to us by over 75 companies, some of which have done so since the start of the voluntary program approximately three years ago. The list of tags for

[76] See Release No. 33-8823 (July 11, 2007) [72 FR 39290]. On May 21, 2008, the Commission voted to propose rules that would require interactive data for the risk/return summary section of mutual fund prospectuses. See Press Release No. 2008-94 (May 21, 2008)

[77] See Press Release No. 2006-158 (Sept. 25, 2006).

U.S. financial statement reporting has improved significantly since the original version available for the voluntary program.[78] During this period, there has been a growing development of software products for users of interactive data, as well as of applications to assist companies to tag their financial statements using interactive data.[79] The growing number of software applications available to preparers and consumers is helping make interactive data increasingly useful to both institutional and retail investors, as well as to other participants in the U.S. and global capital markets. On this basis, we believe interactive data, and in particular the XBRL standard, have become widespread and that the updated list of tags for U.S. financial statement reporting is now sufficiently advanced to require that U.S. GAAP-reporting companies provide their interactive financial statements in interactive data format.[80]

With respect to the list of tags for IFRS financial reporting, the IASCF has, over several years, developed a list of tags designed to classify and define financial information in accordance with international accounting standards as promulgated by the IASB. Over the course of the past year, the IASCF has worked to strengthen the development of its list of tags by forming an XBRL Advisory Committee and an XBRL Quality Reporting Team, both consisting of international representatives from investors, auditors, accountants, regulators and others. On March 31, 2008, the IASCF published a near final version of the list of tags for IFRS financial

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[78] When we adopted the voluntary program, the list of tags for U.S. GAAP financial statement reporting contained approximately 4,000 data elements. The list of tags released on April 28, 2008 contains approximately 13,000 data elements, with the most significant additions relating to the development of elements for standard U.S. GAAP footnote disclosure.

[79] See Press Release No. 2007-253 (Dec. 5, 2007).

[80] As previously noted in Part I.C, however, the proposed rules would not apply to investment companies registered under the Investment Company Act and other entities. See footnote 61 above.

reporting,[81] which is subject to public comment through May 30, 2008.[82] In addition, the IASCF is collaborating with XBRL U.S. and other parties to align practices designed to develop the IFRS list of tags. This collaboration involves the development of the appropriate scope for the IFRS list of tags' content and technology architecture. On this basis, we believe that the updated IFRS list of tags will be sufficiently advanced to require that foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB provide their financial statements in interactive data format under the phase-in schedule we are proposing.

As discussed in more detail below, our proposed rules would set forth a phase-in period beginning with domestic and foreign large accelerated U.S. GAAP filers with a worldwide public common equity float above $5 billion as of the end of their most recently completed second fiscal quarter. These large accelerated filers would be subject to the proposed rules beginning with their Securities Act registration statements, periodic reports, and transition reports that contain financial statements for fiscal periods ending on or after December 15, 2008. Although it would not be required, we encourage other U.S. GAAP filers to provide financial information in interactive data format during the phase-in period. We also encourage foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB to provide financial information in interactive data format during the phase-in period. In each instance, these filers' voluntary interactive data submissions would be under the proposed rules instead of the existing rules of the voluntary program.

We are proposing that filers be required to provide the same information in interactive

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[81] Unless stated otherwise, when we refer to the "list of tags for IFRS financial reporting" we mean the interactive data taxonomy that is based on IFRS as issued by the IASB.

[82] See Press Release, The IASC Foundation publishes IFRS Taxonomy 2008 (March 31, 2008), available at http://www.iasb.org/News/Press+Releases/The+IASC+Foundation+publishes+IFRS+Taxonomy+2008.htm.

data format that companies have been providing in the voluntary program,[83] together with the following items: the footnotes to the financial statements; any applicable schedules to the financial statements; financial statements for Securities Act registration statements; and document and entity identifier tags, such as company name and public float. As was the case in the voluntary program, the proposed requirement for interactive data reporting is intended to be disclosure neutral. We do not intend the rules to result in companies providing more, less, or different disclosure for a given disclosure item depending upon the format whether ASCII, HTML, or XBRL.

We propose to continue requiring the existing electronic formats now used in filings because we believe it is necessary to monitor the usefulness of interactive data reporting to investors and the cost and ease of providing interactive data before attempting further integration of the interactive data format. However, the proposed rules would treat viewable interactive data as displayed through software available on the Commission's Web site, and interactive data generally,[84] as part of the official filing, instead of a supplement as is the case in the voluntary program. Further evaluation will be useful with respect to the availability of inexpensive, sophisticated interactive data viewers. Currently there are many software providers and financial printers that are developing interactive data viewers. We anticipate that these will become widely available and increasingly useful to investors.

We expect that the open standard feature of XBRL format will facilitate the development of applications and software, and that some of these applications may be made available to the

[83] Unlike the voluntary program, unless otherwise stated, an interactive data file would be required to be provided with the traditional format filing to which it relates. Companies would not be permitted to provide the interactive data file with a Form 8-K or 6-K.

[84] As further discussed below in Part II.C, interactive data generally would be deemed not filed for purposes of specified liability provisions.

public for free or at a relatively low cost. The expected continued improvement in this software would give the public increasingly useful ways to view and analyze company financial information. After evaluating the use of the new interactive data technologies, software, and lists of tags, we may consider proposing rules to eliminate financial statement reporting in ASCII or HTML format. Or we may consider proposing rules to require a filing format that integrates ASCII or HTML with XBRL.

We believe XBRL is the appropriate interactive data format with which to supplement ASCII and HTML. Our experience with the voluntary program and feedback from company, audit, and software communities point to XBRL as the appropriate open standard for the purposes of this rule. As a derivative of the XML standard, XBRL data would be compatible with a wide range of open source and proprietary XBRL software applications. As discussed above, many XBRL-related products exist for analysts, investors, public and private companies, and others to more easily create and compare financial data; still others are in development, and that process would likely be hastened by public company reporting using interactive data. Comments on our 2004 concept release and proposed rules in 2004 and 2007 generally supported interactive data and XBRL in particular.[85] Several other factors support our views regarding XBRL's broad and growing acceptance, internationally as well as in the U.S. For example, as

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[85] Release No. 33-8497 (Sept. 27, 2004) [69 FR 59111] (Concept Release); Release No. 33-8496 (Oct. 1, 2004) [69 FR 59098]; Release No. 33-8781 (Feb. 12, 2007) [72 FR 6676]. See, e.g., letter from Deloitte & Touche LLP regarding the Adopting Release and letter from PR Newswire Association LLC regarding the Concept Release. We also note that participants in the voluntary program provided positive feedback with respect to possible required use of XBRL. For example, the vast majority of voluntary program participants that submitted responses and views to a questionnaire answered in the affirmative to the question "Based on your experience to date, do you think it would be advisable for the Commission to continue to explore the feasibility and desirability of the use of interactive data on a more widespread and, possibly, mandated basis?" See question V.f in the Interactive Data Voluntary Program Questionnaire available at http://www.sec.gov/cgi-bin/XBRL_Questionnaire.

noted above, in addition to the use of XBRL by other U.S. agencies,[86] several foreign securities regulators have adopted voluntary or required XBRL financial reporting.[87] We understand that several U.S. public and private companies use XBRL in connection with financial reporting or analysis.[88]

Request for Comment:

- Should we adopt rules that require each filer's financial statements to be provided in interactive data format? If we do so, should we include a phase-in period or temporary exception for detailed tagging of the financial statement footnotes? Should schedules to the financial statements be tagged? What are the principal factors that should be considered in making these decisions? Is it useful to users of financial information to continue to have, in addition to interactive data, duplicate, human-readable financial statements in ASCII or HTML format?
- What opportunities exist to improve the display of financial statements prepared using interactive data? For example, if the technology is sufficiently developed, should we propose rules to encourage or require a format that embeds interactive data tags in HTML so that the entire set of financial statements can be viewed in a browser? How should these affect any continued requirement to file ASCII- or HTML-formatted financial statements? What obstacles exist to making such improvements in the display of XBRL information?
- Is it appropriate to require public companies to provide interactive data using XBRL?

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[86] See note 49 above. Also we note CIFiR's support of XBRL as referenced above in Part B.2

[87] For example, such countries include Canada, China, Israel, Japan, Korea and Thailand.

[88] Whenever we seek comment in this release, we request that commenters distinguish in their responses, as appropriate, between the proposed requirements applicable to U.S. GAAP filers and those applicable to foreign

Alternatively, in place of such a requirement, should the Commission instead wait to see whether interactive data reporting by public companies is voluntarily adopted? Without a requirement, would the development of products for producing and using interactive data from private and public companies meet the needs of investors, analysts, and others who seek interactive data? Would a large percentage of public companies provide interactive data voluntarily, and following the same standard, if not required to do so?

- If we do not adopt the proposed rules and instead wait to see whether companies on their own expand their use of interactive data, would such data be less comparable among companies? Is there a "network effect," such that interactive data would not be useful unless many or all filers provide their financial statements using interactive data? Would the development of software for retail investors to obtain and make use of such data be slowed without a requirement that companies provide interactive data?
- What advantages are there to investors having the company responsible for preparing financial information in interactive data format, as opposed to a model in which third parties independently prepare the information in interactive format and charge a fee for it?
- Do commenters agree that compared to reports using ASCII and HTML, interactive data would require less manually-transferred data? If so, do commenters believe that the proposed rules would result in less human error and therefore contribute to reduced costs?
- If we require interactive data reporting and the proposed rules result in more effective and efficient financial reporting with reduced human error and cost, would fees charged

private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB, regardless of whether our question distinguishes between or references one or both of these types of issuers.

by financial printers or other service providers be likely reduced to reflect such lower costs?

- If we adopt rules requiring interactive data financial reporting, is the XBRL standard the one that we should use? Are any other standards becoming more widely used or otherwise superior to XBRL? What would the advantages of any such other standards be over XBRL?
- Is the XBRL format for interactive data sufficiently developed to require its use at this time with regard to both US GAAP and IFRS as issued by the IASB? If not, what indicators should we use to determine when it has become sufficiently developed to require its use?
- Are vendors likely to develop and make commercially available software applications or Internet products that will be able to deliver the functionality of interactive data to retail investors?
- How important is it that many different types of viewers with varying levels of sophistication and functionality be available to investors? In addition to the free viewer provided on the SEC Web site, are there likely to be other such products available at low or no cost?
- If we require interactive data financial reporting, what are the principal challenges facing the eventual integration of such reporting with the current filing formats, ASCII and HTML, so that filing in all three formats would no longer be necessary?

B. Phase-in under the Proposed Rules

1. Overview

The proposed rules initially would require interactive data reporting only by domestic and

foreign large accelerated filers that use U.S. GAAP and have a worldwide public common equity float above $5 billion as of the end of their most recently completed second fiscal quarter.[89] If the rules are adopted by this fall, we anticipate that the first required submissions would be for periods ending on or after December 15, 2008. For calendar year companies, this would first apply to their December 31, 2008 annual reports filed on Form 10-K or 20-F and any Securities Act registration statement that contains financial statements for a period ended on or after December 15, 2008.[90] We are sensitive to concerns that undue expense and burden should not accompany the adoption of required interactive data financial reporting. We therefore propose a 30-day grace period for each filer's initial interactive data submission, and a 30-day grace period in year two of each filer's interactive data reporting when its footnotes and schedules initially would be required to be tagged in detail.[91]

Filers under the proposed rules would be required to convert their financial statements into an interactive data file using the list of tags for U.S. financial statement reporting or the IFRS list of tags, in either case as approved for use by the Commission. The submission also would be required to include any supporting files as prescribed by the EDGAR Filer Manual. Interactive data would be required for the entirety of the financial statements, although tagging of the footnotes and schedules by increasing level of detail would be phased in the following year. We are not proposing at this time that filers be required to provide interactive data for their

[89] This would amount to approximately 500 companies. We propose the end of the most recently completed second fiscal quarter because that date is consistent with when a filer is required to determine its status as an accelerated and large accelerated filer.

[90] For companies with a September 30 fiscal year end, the requirement would first apply to their December 31, 2008 quarterly report filed on Form 10-Q and any Securities Act registration statement that contains financial statements for a period ended on or after December 15, 2008.

[91] We discuss more fully at Part II.C liability related to required submissions of interactive data in general and the continuation of some of the limitations on liability used in the voluntary program in particular.

Management's Discussion and Analysis, executive compensation, or other financial, statistical or narrative disclosure. We solicit comment, however, on the advisability of permissible optional interactive data for financial disclosures that are not part of the current lists of tags for U.S. GAAP financial statement reporting and IFRS financial reporting.

We also solicit comment on the usefulness to investors of interactive data of executive compensation and the burden such reporting would have on companies. For example, we solicit comment on whether the scope of interactive data available on the Executive Compensation Reader, which we posted on our Web site on December 21, 2007,[92] would be an appropriate level of executive compensation data. Our requests for comment regarding interactive data and executive compensation follow up and expand on previous requests in 2006.[93] We also note substantial interest in interactive disclosure of executive compensation, for example a draft list of tags for executive compensation that has been made available for public comment[94] and financial Web pages that link to our Executive Compensation Reader to provide streamlined Internet viewers of executive compensation. We ask detailed questions at the end of Part II.B.3.a.[95]

The following tables identify the registration statements and periodic reports that would be required to include interactive data according to the company's filing status.[96]

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[92] See Press Release No. 2007-268 (Dec. 21, 2007).

[93] Release No. 33-8655 (Jan. 27, 2006). Two commenters addressed this series of questions. One commenter supported tagging executive compensation disclosure using XBRL; the other commenter believed it would not be helpful.

[94] See "Broadridge Releases Draft XBRL Proxy Statement Taxonomy for Public Comment," Reuters December 4, 2007.

[95] See Part II.B.3.a, below.

[96] Transition reports that contain financial statements of the type and for the periods specified also would be required to be submitted in interactive data format under the proposed rules. Note that these dates apply to the initial required interactive data disclosure and that detailed tagging of the financial statement footnotes and schedules would not be required for an additional year, as described below in section II.B.3.a.

Domestic and Foreign Large Accelerated Filers Using U.S. GAAP with Worldwide Public Common Equity Float above $5 Billion as of the End of Their Most Recently Completed Second Fiscal Quarter	Registration statements containing financial statements for a period ending on or after December 15, 2008, Form 10-Q[97] for quarterly periods or Form 10-K[98] or 20-F[99] for annual periods ending on or after December 15, 2008
All Other Large Accelerated Filers Using U.S. GAAP	Registration statements containing financial statements for a period ending on or after December 15, 2009, Form 10-Q for quarterly periods or Form 10-K or 20-F for annual periods ending on or after December 15, 2009
All Remaining Filers Using U.S. GAAP	Registration statements containing financial statements for a period ending on or after December 15, 2010, Form 10-Q for quarterly periods or Form 10-K or 20-F for annual periods ending on or after December 15, 2010

97 17 CFR 249.308a.

98 17 CFR 249.310.

99 17 CFR 249.220f.

Foreign Private Issuers with Financial Statements Prepared in Accordance with IFRS as Issued By the IASB	Registration statements containing financial statements for a period ending on or after December 15, 2010 or Form 20-F for annual periods ending on or after December 15, 2010

2. Companies and Filings Covered by Proposed Rules and Phase-in

The proposed rules would cover all companies reporting in either U.S. GAAP, including smaller reporting companies and foreign private issuers that report in U.S. GAAP or, in the case of foreign private issuers, in accordance with IFRS as issued by the IASB.[100] The proposed phase-in would require domestic and foreign large accelerated filers that report in U.S. GAAP and meet the minimum worldwide common equity float of greater than $5 billion to provide their initial interactive data submissions in year one of the phase-in period discussed above. All other U.S. GAAP filers that meet the definition of large accelerated filer would be required to provide their initial interactive data submissions in year two of the phase-in period. All remaining U.S. GAAP filers, including smaller reporting companies and companies not previously subject to periodic reporting requirements, would be required to provide their initial interactive data submissions in year three of the phase-in period.

Foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB would be required to provide their initial interactive data submissions in year three of the phase-in period.

[100] As noted in Part I.C, however, the proposed rules would not apply to investment companies registered under the Investment Company Act, business development companies, or other entities that report under the Exchange Act and prepare their financial statements in accordance Article 6 of Regulation S-X.

The additional phase-in time for all but the largest accelerated filers is intended to permit companies to plan and implement their data tagging with the benefit of the experience of year one filers. It also is intended to enable us to monitor implementation and, if necessary, make appropriate adjustments during the phase-in period. In the case of IFRS filers, the phase-in also would provide the necessary time for development and testing of the list of tags for IFRS financial reporting.

Our multiyear experience with the voluntary program has helped us understand the extent to which a filer would incur additional costs to create and submit its existing financial disclosures in interactive data format. Based on that experience, we believe that the process of converting a filer's existing ASCII or HTML financial statements into interactive data would not impose a significant burden or cost. The voluntary program clearly demonstrated that companies can, if they choose, tag their financial statements using currently available software without need of outside services or consultants; alternatively, they could rely on financial printers, consultants, and software companies for assistance, although they would retain ultimate responsibility for both their financial statements and their tagged data. As discussed in more detail in the cost-benefit analysis below,[101] we believe that modest first-year costs for a company would decrease in subsequent periods, particularly once footnote tagging is implemented. We also believe that these costs would be justified by interactive data's benefits. As with domestic registrants, we believe foreign private issuers that report in U.S. GAAP or prepare their financial statements in accordance with IFRS as issued by the IASB would be able to comply with the rules without incurring significant costs.

We expect that smaller companies, which generally are disproportionately affected by

[101] See Part V.

regulatory costs, also would be able to provide their reports in interactive data format without undue effort or expense. While interactive data reporting involves changes in reporting procedures mostly in the initial reporting periods, we expect that these changes would provide efficiencies in future periods. As a result, there may be potential net savings to the filer, particularly if interactive data become integrated into the filer's financial reporting process. While we recognize that requiring interactive data financial reporting would likely result in start-up expenses for smaller companies, these expenses may be substantially lower than those of larger filers, given that smaller filers tend to have simpler financial statements than larger companies, with fewer elements and disclosures to tag. In addition, we expect that both software and third-party services will be available to help meet the needs of smaller filers. We also intend that the third year phase-in for smaller reporting companies would permit them to learn from the experience of the earlier filers. It would also give them a longer period of time across which to spread first-year data tagging costs.

As noted above,[102] CIFiR has issued a Progress Report that contains a developed proposal that the Commission phase in the requirement that companies file financial statements using interactive data after the satisfaction of specified preconditions relating to:

- successful testing of the list of tags for U.S. financial statement reporting;
- the capacity of reporting companies to file interactive data using the new list of tags for U.S. financial statement reporting; and
- the ability of the Commission's electronic filing system to provide an accurate human-readable version of the interactive data.[103]

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[102] See Part I.C above.

[103] We are giving careful consideration to CIFiR's developed proposal. We believe that the factors they cite as preconditions will occur before the start of a requirement to provide interactive data. We expect to consider the

The Progress Report's developed proposal recommends that we phase in financial statements using interactive data by requiring the largest 500 domestic registrants,[104] as determined by the value of shares held by unaffiliated persons, to furnish (rather than file) interactive data for the face of their financial statements and, in block-tagged form,[105] the footnotes to the financial statements. The Progress Report's developed proposal also recommends that, one year after we impose this requirement on the first group of registrants, we impose the same requirement on the remaining domestic registrants that fall within the definition of "large accelerated filer." Finally, the Progress Report's developed proposal recommends that, once the specified conditions have been satisfied and the second phase-in period has been implemented, we evaluate whether and when to require that the domestic large accelerated filers file rather than furnish financial statements in interactive data format, as well as the inclusion of all other reporting companies.

We have carefully considered the Committee's thoughtful developed proposal, including the recommended phase-in of 500 initial companies and delayed consideration of non-accelerated and other filers until after two years. We propose a phase-in schedule similar to the one for which the Committee calls.[106] However, instead of waiting until after the second year

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factors in connection with determining whether to adopt the proposed interactive data submission requirements with regard to companies that prepare their financial statements in accordance with U.S. GAAP. We also expect to consider the same factors for companies that prepare their financial statements in accordance with IFRS as issued by the IASB.

[104] The developed proposal does not address foreign companies. We do not believe that whether a U.S. GAAP reporting company is domestic or foreign should determine the applicability of the proposed rules, and therefore foreign companies using U.S. GAAP would be included in the phase-in schedule along with their domestic counterparts. As noted, foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB also are included in the proposal, although they would not be phased in until year three.

[105] By "block" text we mean that the entire footnote or other discrete item, such as a schedule or table, would be tagged as an individual element.

[106] As previously noted, the proposed worldwide public float cutoff of $5 billion would result in approximately 500 companies subject to the proposed rules in year one.

to determine whether to propose extending the applicability of the rules to all filers, the proposed rules would establish a phase-in for the remaining companies' required interactive data submissions that would begin in the third year. Based on participants' experience with the voluntary program and our consultations with filers, software providers and filing intermediaries, we believe the proposed rules would accelerate the improvement and availability of inexpensive software. This, in turn, would generate more options and assistance for non-accelerated filers, smaller reporting companies, and foreign private issuers so that they could become proficient in the use of interactive data without undue burden.

Although including a larger number of filers in the initial phase-in might increase the overall commercial and analytical value of the interactive data, which in turn would likely increase the supply of software for analyzing and presenting interactive data to analysts and investors, we believe the establishment of a firm schedule for all U.S. GAAP- and IFRS-reporting companies to file their financial statements using interactive data would serve nearly as well to stimulate the further development of interactive data-related software and services while also affording most companies additional time to learn from the experience of others.

We also believe that concurrently adopting a phase-in for non-accelerated filers, smaller reporting companies, and foreign private issuers using IFRS as issued by the IASB would establish an appropriate and measured timeline, which we would be able to monitor and, if necessary, reconsider during the first two years of the phase-in.

Request for Comment:

- Is the proposed schedule for implementation of interactive data tagging appropriate?

- Should we delay the first required interactive data submissions until the second half of 2009 or later? What benefits would there be to advancing or delaying implementation of the proposed rules? How much lead time do large accelerated filers need to familiarize themselves with interactive data and the process of mapping financial statements using the list of tags for U.S. financial statement reporting or IFRS financial reporting?
- Should the initial submission required by the proposed rules be a periodic report? If so, should it be a Form 10-Q for domestic issuers?[107] Would this be an easier report for companies to prepare, or would it be best for companies to begin providing interactive data with respect to the fiscal year end financial statements?
- Instead of a cut-off using a worldwide public common equity float of $5 billion at the end of the issuer's most recently completed second fiscal quarter, would an initial phase-in including all large accelerated filers or large accelerated filers with a smaller public float better accomplish the goals outlined in the release? If we use a public float, should it be $5 billion or some other amount lower or higher than the proposed cut-off, such as $3 billion or $10 billion? Would some other cut-off, or some other schedule be preferable? Would it be better to measure the public float as of a time other than the end of the issuer's most recently completed second fiscal quarter and, if so, when?

[107] We note that when the Commission adopted the electronic filing requirements, the first required electronic filing was a Form 10-Q rather than a registration statement or Form 10-K. Release No. 33-6977 (Feb. 23, 1993) [58 FR 14628].

- Would the initial phase-in include enough companies to encourage potential vendors of interactive data products and services to invest in the development and marketing of new and improved products and services? If not, how would such a level affect the markets for both filer and investor products and services?
- Should the phase-in schedules differ as between U.S. GAAP non-accelerated and smaller reporting companies and foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB?
- Is the proposed third year phase-in approach for companies other than large accelerated filers necessary or sufficient for them to familiarize themselves with interactive data and the process of mapping financial statements using the list of tags for U.S. financial statement reporting or IFRS financial reporting?
- Is the proposed third year phase-in sufficient for smaller reporting companies and foreign private issuers to allocate the necessary resources and meet the proposed requirements, or would a more delayed schedule be appropriate?
- Should smaller reporting companies and foreign private issuers reporting in U.S. GAAP be subject to the proposed rules at all? Should compliance with the proposed rules be solely voluntary for smaller reporting companies or foreign private issuers reporting in U.S. GAAP?
- Would requiring interactive data from foreign private issuers reporting in U.S. GAAP create a disincentive for these issuers to use U.S. GAAP in preparing their financial statements? Is this offset by the proposed requirement that foreign private issuers reporting in IFRS as issued by the IASB use interactive data within three years? Should the requirements extend only to foreign private

issuers reporting in U.S. GAAP that file on domestic forms?

- Should foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the IASB be subject to the new rules, as proposed? Should the proposed rules also apply to foreign private issuers that prepare their financial statements in their local GAAP and reconcile to U.S. GAAP for Exchange Act reporting purposes if their home jurisdictions have developed interactive data reporting programs? Would the proposed rules' current exclusion of such issuers create a disincentive for foreign private issuers to use IFRS as issued by the IASB for their Exchange Act reporting?
- Are there extra burdens that foreign private issuers reporting in U.S. GAAP or IFRS as issued by the IASB would incur under the proposed rules? Do any such burdens necessitate a one year or other delay in the proposed phase-in requirement as and when it otherwise would apply to them?
- Do foreign private issuers using foreign filing agents have comparable or sufficient access to interactive data software and support services?
- Should the proposed new rules apply to a Canadian issuer's financial statements prepared in accordance with U.S. GAAP and filed with the Commission under cover of Form 40-F?[108] Should the proposed new rules apply to a Canadian issuer's registered offering on Form F-9[109] or F-10, or any other forms available

[108] 17 CFR 249.240f. Certain Canadian foreign private issuers file registration statements and annual reports under the Multijurisdictional Disclosure System, which permits eligible Canadian companies to use their disclosure documents prepared in accordance with Canadian requirements in filings with the Commission.

[109] 17 CFR 239.39.

under the Multijurisdictional Disclosure System?[110]

- Should we permit or require foreign private issuers filing their annual financial statements using U.S. GAAP also to provide in interactive data format any interim financial information that they furnish on Form 6-K? If so, what factors should we consider in determining whether to require or permit such submissions? Should such a requirement be phased in? What are the answers to these questions if the foreign private issuer uses IFRS as issued by the IASB?
- Should investment companies registered under the Investment Company Act, business development companies or other entities that report under the Exchange Act and prepare their financial statements in accordance with Article 6 of Regulation S-X be subject to the proposed rules? Is the current investment management list of tags sufficiently developed for required use by these companies?
- The Commission recently proposed to accelerate the filing deadline for annual reports filed on Form 20-F by foreign private issuers under the Exchange Act by shortening the filing deadline from 6 months to within 90 days after the foreign private issuer's fiscal year-end in the case of large accelerated and accelerated filers, and to within 120 days after a foreign private issuer's fiscal year-end for all other issuers, after a two-year transition period.[111] In light of this rule proposal, should we lengthen the proposed phase-in deadlines for foreign private issuers, for example, by one year if the issuer is not a large accelerated filer?

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[110] 17 CFR 239.40.

[111] Release No. 33-8900 (Feb. 29, 2008) [73 FR 13404].

3. Documents and Information Covered by the Proposed Rules

a. Financial Statements and Financial Statement Schedules

The proposed rules would require interactive data tagging of a filer's complete financial statements and any required financial statement schedules.[112] As with the voluntary program, the proposed rules would require companies to provide the interactive data in an exhibit. Interactive data would be required for all periods included in the filer's financial statements. The proposed rules would not, however, require interactive data submissions for other financial statements that may be required of filers, including those provided pursuant to Rules 3-05, 3-09, 3-10, 3-14, and 3-16 of Regulation S-X.[113]

As with the voluntary program, the proposed rules would require that the line item descriptions and amounts presented on the face of the financial statements in the traditional format filing be the same as in the interactive data format. Also, the rules would prohibit partial presentation of face financial statements in interactive data format. For example, excluding comparative financial information for prior periods would not be permitted. Unlike the voluntary program, our proposed rules require companies using U.S. GAAP or foreign private issuers using IFRS as issued by the IASB to provide tagged data for the footnotes and schedules to the financial statements. At the time of our adopting release for the voluntary program in 2005, we stated that we recognized technical issues made it difficult to tag the notes to the financial statements. We did, however, provide volunteers with the option of tagging the notes to

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[112] As previously noted, proposed Rule 405 of Regulation S-T would directly set forth the basic tagging requirements and indirectly set forth the rest of the tagging requirements through the requirement to comply with the EDGAR Filer Manual. Consistent with proposed Rule 405, the EDGAR Filer Manual would contain the detailed tagging requirements.

[113] 17 CFR 210.3-05, 17 CFR 210.3-09, 17 CFR 210.3-10, 17 CFR 210.3-14, 17 CFR 210.3-16.

the financial statements.[114] Since the time of the adopting release, the necessary list of tags has been completed and the available software has advanced sufficiently to require that the financial statement footnotes and schedules be included in the proposed rules.

The voluntary program adopting release recommended that if participants voluntarily provided footnotes in interactive data format, then they should provide enough detail so that the tagging would be of practical value to users. The release stated that a single tag for the entire group of footnotes in a filing would cover too much information to be useful to the user. We still believe that one tag for the entire group of footnotes would be confusing and provide little benefit. Tagging each footnote separately, however, would allow users the ability to compare footnote disclosure between periods and across filers while minimizing the burden on preparers. We are therefore proposing that the footnote disclosures in the traditional format filing be the same as in the interactive data format. This would be accomplished by tagging the footnotes using four different levels of detail:

(i) each complete footnote tagged as a single block of text;

(ii) each significant accounting policy within the significant accounting policies footnote tagged as a single block of text;

(iii) each table within each footnote tagged as a separate block of text; and

(iv) within each footnote, each amount (i.e., monetary value, percentage, and number) separately tagged and each narrative disclosure required to be disclosed by U.S. GAAP (or IFRS as issued by the IASB, if applicable), and Commission regulations separately tagged.

To allow filers time to become familiar with tagging footnotes, we are proposing that in each filer's first year of interactive data reporting only level (i) would be required. All four levels would be required starting one year from the filer's initial required submission in

[114] See section II.E. of Securities Act Release No. 8529 (February 3, 2005) [70 FR 6556, 6559].

interactive data. In year two, when a filer would first be required to tag its footnotes and schedules using multiple levels of detail, the filer would be given an additional 30 days beyond the due date or filing date of its report or registration statement to file the interactive data exhibit. Subsequent interactive data exhibits using all of the levels would be required at the same time as the rest of the related report or registration statement. We believe the one-time 30 day grace period would help a filer comply with the more detailed tagging requirements.

We propose requiring these various levels of detailed tagging for the financial statement footnotes after considering the range of needs of investors, analysts, and other consumers of financial information. We believe the block-text tagging required under levels (i) through (iii) would satisfy the need of those who desire disclosures within the context of an entire footnote or an entire table. The detail tagging of individual amounts and narrative disclosures within the footnotes required under level (iv) would satisfy the need of those who desire to analyze specific pieces of information or data.

The requirement that in the second year a filer tag separately each amount within a footnote (i.e., monetary value, percentage, and number) and each narrative disclosure required to be disclosed by U.S. GAAP (or IFRS as issued by the IASB, if applicable), and Commission regulations should not affect a filer's decisions regarding what to disclose in its traditional format filing. We are aware of questions as to whether the contextual information or data elements chosen from the standard list of tags could potentially reveal information that the rest of the related registration statement or periodic report would not otherwise make known. However, we do not believe that the contextual information or data elements chosen should provide any additional substantive disclosure.

To clarify the intent of the rules, we propose to include an instruction to proposed Rule

405 of Regulation S-T stating that the rules require a disclosure format, but do not change substantive disclosure requirements. The rules also would state clearly that the information in interactive data format should not be more or less than the information in the ASCII or HTML part of the related registration statement or report.

In connection with their annual and transition reporting on Forms 10-K or 20-F, filers may be required under existing financial reporting requirements to include certain supplementary financial statement schedules with their financial statements. The form and content of these schedules are governed by Article 12 of Regulation S-X.[115] The list of tags for U.S. financial statement reporting enables companies to tag individual facts in these financial statement schedules, or to block tag each entire schedule.

We propose that filers also be required to include with their interactive data any financial statement schedules prescribed by Article 12 of Regulation S-X. These financial statement schedules would be tagged using two different levels of detail; only the first level would be required in the first year. Both levels would be required starting one year from the filer's initial required submission in interactive data format. Similar in concept to the tagging approach proposed for the financial statement footnotes,, the required levels of detail would be: (i) each complete financial statement schedule tagged as a block of text; and (ii) each amount (i.e., monetary value, percentage, and number) separately tagged and each narrative disclosure required to be disclosed by Commission regulations separately tagged.

A filer may revise its previously filed financial statements for a variety of reasons, such as the retrospective application of a new accounting principle or the correction of an error. Our proposed rules would require a filer to provide revised interactive data at the same time it files

[115] See Rules 5-04 and 7-05 of Regulation S-X and Items 17 and 18 of Form 20-F.

the revised financial statements with the traditional format filing.[116] Under the proposed rules, filers also would be required to provide interactive data for transition reports on Forms 10-Q, 10-K, or 20-F.

Request for Comment:

- Are the proposed four levels of detail appropriate for footnote tagging? What alternative footnote disclosure items or criteria do commenters recommend we establish for tagging footnotes? Why would those be more appropriate than what we propose?
- Should we require all four levels for footnotes in the first year instead of using the phase-in approach for the more detailed tagging? Should detailed tagging of a filer's footnotes and schedules not be required until more than one year after its initial interactive data submission, for example, in year three or four?
- Are the proposed two levels of detail appropriate for financial statement schedule tagging? If not, what alternatives would be more appropriate?
- Should we require both levels for financial statement schedules in the first year instead of using the phase-in approach for more detailed tagging?
- Is the most detailed level of tagging too prescriptive, or is it too broad? Would it help to achieve comparability among filers? Would it impose an unnecessary burden on filers in preparing their XBRL data compared to the potential benefit to consumers of data? What problems or obstacles may be encountered in applying the proposed requirement?

[116] Revised interactive data would be required so that the financial information would be the same in both the traditional format filing and the interactive data file. If the financial statements are not revised in connection with an amended registration statement, periodic report, or transition report, the exhibit index would indicate that the interactive data file was already provided.

- Would the most detailed level of tagging result in the creation of a high number of company-specific extensions? If so, would the additional effort needed to create new extensions diminish once a filer has tagged at this level of detail? Should the tagging requirement instead be only to require detailed tagging to the extent a standard tag already exists in the standard list of tags?
- Does the proposed rule provide adequate and effective guidance on how to tag information in the footnotes to the financial statements? For example, would it be feasible for companies to identify the narrative disclosure required by U.S. GAAP or IFRS as issued by the IASB that needs to be tagged separately? Should it be more principles-based? If so, what should those principles be?
- Do the standards we propose for tagging provide clear enough guidance for preparers so that we can expect to achieve consistency among filers?
- Should schedules to the financial statements be omitted from our proposed rule? If so, why?
- What additional costs and burdens would there be with detailed tagging of the financial statement footnotes and financial statement schedules as opposed to "block" tagging?
- Would investors and other users of tagged data benefit from the tagging of individual amounts (i.e., monetary values, percentages, and numbers) and narrative disclosures within each footnote together with block text?
- Should we require that filers reporting in U.S. GAAP, or in IFRS as issued by the IASB, tag their document and entity[117] information? Would this information be

[117] See footnote 70 above.

useful in interactive data format?

- Is it reasonable to expect that requiring interactive data-formatted financial statements in general or footnotes in particular will not change the discretionary content that companies provide in the traditional format filing? Would the availability of tagged data possibly cause competitive pressures on filers to choose to make more disclosures that are permissible, encouraged, or otherwise not required by Commission regulations? Alternatively, might the availability of tagged data possibly cause filers to choose to curtail such disclosures? What types of disclosures would those be?
- Should transition reports not be subject to the proposed rules? If not, why not?
- Would users of financial information find tagged financial statement schedules useful for analytical purposes?
- Should the proposed rules require interactive data submissions for a filer's financial information provided under Form 8-K and 6-K, such as earnings releases or interim financial information? If so, what level of tagging detail would be appropriate, and would a reasonable grace period from the date of the Form 8-K or 6-K to the deadline for interactive data (e.g., one, three, or five days) address concerns that filers require additional time to provide interactive data for such financial information? Does financial information provided under Form 8-K or 6-K, such as earnings releases, present additional burdens compared to other forms that would warrant excluding them from the proposed rules?
- Should the proposed rules require interactive data submissions for other financial statements that may be provided by filers, including those provided pursuant to

Rules 3-05, 3-09, 3-10, 3-14 and 3-16 of Regulation S-X? If so, how should a requirement be phased in?

- Should we provide an opportunity for non-investment company issuers to submit voluntarily interactive data format information other than that which they would be required to submit as interactive data? If so, should we permit such interactive data format information to be subject to provisions governing the proposed required filing of interactive data? Should we instead permit such interactive data format information to be submitted under a modified voluntary program that would apply to such information in a manner similar to the way it applies to XBRL-Related Documents under the current voluntary program?
- Should we require or permit interactive data submissions for executive compensation? Would interactive data of executive compensation be useful to investors? Approximately how much additional cost would interactive reporting of executive compensation require of companies?
- If we were to require or permit interactive data for executive compensation, should all narrative and numerical disclosure required in the traditional electronic filing[118] be required in interactive data format? If we were to require only a subset of the required disclosure, what subset should be required? For example, would it be appropriate to required tagging of only the Summary Compensation Table and other tables as applicable? Would it present an accurate picture of the compensation? How should an interactive data requirement for executive compensation treat the footnotes and narrative disclosure?

[118] See Item 402 of Regulation S-K, 17 CFR 229.402.

- If we were to require or permit interactive data for executive compensation, should we require the same data provided by the Executive Compensation Reader currently available on our Web site?[119]

- If we were to require or permit interactive data for executive compensation, should the interactive data be filed with the proxy statement, which often contains the executive compensation disclosure, or as an amendment to the Form 10-K, which often incorporates the executive compensation disclosure by reference?[120] Would it diminish significantly the value to investors if interactive data for executive compensation were not required to be submitted until, for example, 30 or 45 days after it was required to be submitted in traditional format? If there were such a 30- or 45-day delay in the requirement, would it be advisable to permit the delayed submission to be made in an exhibit to a Form 8-K or to an amendment on Form 10-K?

- How should a requirement to provide interactive data for executive compensation apply to foreign private issuers?[121]

- Should we require or permit interactive data submissions for other financial, statistical or narrative disclosure, such as beneficial ownership of management and five percent or greater shareholders or tabular disclosure of contractual

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[119] The Executive Compensation Reader displays the Summary Compensation Table disclosure of 500 large companies that followed the new executive compensation rules in reporting 2006 compensation information in their proxy statements filed with the Commission. By using the reader, an investor can view amounts included in the Summary Compensation Table Stock Awards and Option Awards columns based on either the full grant date fair value of the awards granted during the fiscal year, or the compensation cost of awards recognized for financial statement reporting purposes with respect to the fiscal year, and recalculate the Total Compensation column accordingly.

[120] General Instruction G.3. to Form 10-K.

[121] Item 6.B of Form 20-F.

obligations?[122]

b. Registration Statements Covered by the Proposed Rules

We are proposing that, subject to the phase-in period described above, all registration statements filed under the Securities Act, including initial public offerings, be required to include interactive data when financial statements are included directly in the registration statement, rather than being incorporated by reference. This would include all periods included in the registration statement as required by Regulation S-X and our rules. We believe analysts, investors, the public, and others would benefit from the enhanced ability of interactive data to locate and compare financial data included in registration statements. Under the proposed rules, interactive data would be required for the acquiring company, the filer, but not for the company being acquired, in the context of a business combination. The additional burden of configuring disclosure from traditional electronic format into interactive data format in the context of a registered offering is not anticipated to significantly add to the time or expense of companies filing registration statements.[123]

Request for Comment:

- Should registration statement financial information be subject to the new rules, as proposed? In particular, should registrants making initial public offerings in year three (and later years) of the phase-in period be required to provide interactive data if, as would be typical, they were not already required to file periodic reports subject to the

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[122] 17 CFR 229.403, 17 CFR 229.303(a)(5).

[123] As noted above, if an amended registration statement is filed that does not involve any change in the financial statements, the interactive data exhibit would not be required to be re-filed. The exhibit index would simply note that the exhibit had already been filed.

requirement to submit an interactive data exhibit?[124] Should we permit rather than require interactive data to be provided in initial public offerings or other registration statements?

- If we require interactive data, should the proposed rules apply to registration statement financial information based on the size of the registrant (for example, distinguishing between large accelerated filers and smaller reporting companies)?
- Should the proposed rules require filers to include interactive data with respect to all filings of the registration statement when the registration statement is filed multiple times due to amendments? If not, which filings of the registration statement should be subject to the interactive data submission requirement? Should we, for example, limit the Securities Act filings that would require interactive data to those that contain a preliminary prospectus that is circulated?[125] Should the proposed rules apply to a final prospectus supplement filed under Securities Act Rule 424?[126] If we require interactive data with filings that do not currently include exhibits, such as final prospectuses, should we require that the interactive data be provided as schedules or exhibits? Once interactive data are provided with a registration statement, should we limit the requirement to provide interactive data for amendments to only the amendments that reflect substantive changes from or additions to the financial information? Would

[124] An issuer might already be required to submit periodic reports subject to the requirement to submit an interactive data exhibit without ever having made an initial public offering registered under the Securities Act. An issuer could be in that position, even during year one of the phase-in, for example, if the issuer became publicly held as a result of the type of spin-off Staff Legal Bulletin No. 4 (Sept. 16, 1997) describes as not requiring registration under the Securities Act.

[125] The instruction to Item 501(b)(3) of Regulation S-K [17 CFR 229.501(b)(3)] addresses disclosure requirements applicable to specified circulated preliminary prospectuses.

[126] 17 CFR 230.424. Currently, Rule 424 prospectuses do not have a provision for exhibits, so additional EDGAR programming would be needed.

revising interactive data that previously were provided in connection with a registration to reflect changes to the registration statement involve much burden?

- Should interactive data be required only in connection with initial public offering registration statements under the Securities Act, rather than, as proposed, all Securities Act registration statements?
- In a registration statement on Form S-4 or F-4, or proxy statement relating to a proposed merger, should interactive data be required for the company being acquired as well as the acquiring company? Should interactive data of the company being acquired be required only if that company already is subject to interactive data reporting under the proposed rules?
- Should we also require interactive data to be provided in connection with Exchange Act registration statements on Form 10 and Form 20-F?

4. Initial Filing Grace Period

As noted above, interactive data would be required at the same time as the rest of the filing to which it relates. Each company's initial interactive data submission, however, would be permitted as an amendment to a registration statement within 30 days of the date of filing or as an amendment to Form 10-K, 20-F, or 10-Q within 30 days of the due date for filing of the rest of the related report. In addition, as discussed above in Part II.B.3.a, in year two when a filer would first be required to tag its footnotes and schedules using all levels of detail, the interactive data exhibit would be required within 30 days of the due date or filing date of the related report or registration statement, as applicable.

Currently in the voluntary program, filers may provide the interactive data at the time of

filing or at any later time, without a deadline.[127] We believe that, consistent with our view regarding the value of widespread market use of the interactive data, companies should be required to provide the interactive data at the time the registration statement or report is required to be filed. We do not believe this timing requirement would place undue pressure on filers. We believe, for example, based on our experience with the voluntary program, that the time period for the quarterly or annual report is sufficient for filers to convert their ASCII or HTML financial statements into interactive data format.

Request for Comment:

- Should we permit interactive data information to be provided later than the related filing for the first year, rather than just the first filing? Should we provide a grace period for the first filing as to which the issuer is required to tag financial statement footnotes in detail? Is a grace period not needed?
- Should any grace period either for the first filing or for subsequent filings be for fewer or more than 30 days, such as five, 20 or 45 days? What would the impact of a grace period be on the usefulness of interactive data?

5. Web Site Posting of Interactive Data

We believe interactive data, consistent with our proposed rules, should be easily accessible for all investors and other market participants. As such disclosure becomes more widely available, advances in interactive data software, online viewers, search engines and other Web tools may in turn facilitate access and usability of the data. Encouraging widespread accessibility to filers' financial information furthers our mission to promote fair, orderly, and

[127] The voluntary program permits filers to provide the initial and any such restated financial information in interactive data format using Form 8-K. The proposed rules, however, would require that interactive data be provided as an exhibit to the filing itself, including any restated Forms 10-K, 10-Q, or 20-F.

efficient markets, and facilitate capital formation. We believe Web site availability of the interactive data would encourage its widespread dissemination, thereby contributing to lower access costs for users. We therefore propose that each filer covered by the proposed rules be required to provide the same interactive data on its corporate Web site, if it has one, that would be required to be provided to the Commission on the earlier of the day it filed or was required to file the related registration statement or report, as applicable.[128]

We believe access to the interactive data on corporate Web sites would enable search engines and other data aggregators to more quickly and cheaply aggregate the data and make them available to investors because the data would be available directly from the filer, instead of through third-party sources that may charge a fee. To help further our goals of decreasing user cost and increasing availability, we do not propose to allow companies to comply with the Web posting requirement by including a hyperlink to the documents available electronically on the Commission's Web site.

We believe this requirement would be consistent with the increasing role that corporate Web sites perform in supplementing the information filed electronically with the Commission by delivering financial and other disclosure directly to investors. For example, we note that since 2003 issuers with corporate Web sites have been required to post on their Web sites beneficial ownership reports filed with respect to their securities on Forms 3, 4, and 5 under Section 16(a) of the Exchange Act.[129] We also note that many companies provide on their Web sites access to

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[128] Proposed Rule 405 would contain the Web site posting requirement. We also propose to provide, however, that Web site posting of the interactive data would not be required until the end of any applicable grace period that would apply to the submission of the interactive data to the Commission. Similarly, we propose to provide that Web site posting of the interactive data would not be required before submission of the interactive data when submission of the data is delayed in accordance with and during the term of any applicable hardship exemption provided under Rule 201 or 202 as proposed to be revised. Proposed revisions to Rules 201 and 202 are more fully discussed below in Part II.E.

[129] Section 16(a)(4)(C) [15 U.S.C. 78p(a)(4)(C)], Rule 16a-3(k) [17 CFR 240.16a-3(k)].

their periodic reports, proxy statements, and other Commission filings.[130] This proposal would expand such Web site posting by requiring companies with Web sites to post their interactive data as well.[131]

Request for Comment:

- Should we adopt rules that require each filer to post interactive data from registration statements and periodic and transition reports on its corporate Web site, if it has one?
- What advantages, if any, would dual Internet and EDGAR availability have for users, search engines, software developers, and others involved in the extraction and processing of financial data? Would it be helpful if our Web site provided the option to download the interactive data submission from our Web site or the issuer's Web site? Would it add a significant burden if an issuer were required to submit with its interactive data the URL that would link specifically to that interactive data as posted on the issuer's Web site or, alternatively, link to a part of the issuer's Web site from which there would be easy access to the interactive data as posted there? What would facilitate the realization of any advantages of Web site posting, for example the use of a standardized URL for interactive data? Would a standardized URL add significant cost to posting?

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[130] Companies filing registration statements and accelerated filers and large accelerated filers in their periodic reports are required to disclose whether or not they make available free of charge on or through their Web site, if they have one, their annual report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K, and amendments to those reports. Companies that do not make their reports available in that manner also must disclose the reasons they do not do so and whether they voluntarily provide electronic or paper copies of their filings free of charge upon request. See Item 101(e) of Regulation S-K.

[131] As further discussed in Part II.E, we propose that a company that failed to post its interactive data as required would be deemed ineligible to use short form registration Forms S-3, S-8, and F-3 and would be deemed not to have adequate public information available for purposes of Rule 144(c)(1) unless and until it posted.

- Instead of requiring Web site posting, should we require that filers disclose in their registration statements or reports whether or not they provide free access to their interactive data on their corporate Web sites and, if not, why not?
- What impact would be realized by filers that do not currently provide Web sites? Would the proposed rules affect whether filers create or maintain Web sites?
- Would Web site posting decrease the time and cost required for aggregators of financial information and users to access disclosure formatted using interactive data?
- If we require Web site posting of interactive data, should we also require that the Web site include language stating that the entire registration statement, or periodic report also is available for free at the Commission's Web site?
- If we require Web site posting of interactive data, should we require, as proposed, that each filer provide the interactive data on its corporate Web site on the same day as the related filing, instead of at the same time?

C. Accuracy and Reliability of Interactive Data

1. Voluntary Program

To help ensure the accuracy of interactive data in the voluntary program, the data has undergone validation upon receipt by our electronic filing system separate from the normal validation of the traditional format filing.[132] Potential liability also helps ensure the accuracy and reliability of the data. Although the voluntary program has provided limited protections from

[132] If the traditional format filing meets its validation criteria, but any interactive data fail their own validation criteria, all interactive data are removed and the traditional format filing is accepted and disseminated without the interactive data file.

liability under the federal securities laws[133] and excluded interactive data from being subject to officer certification requirements under Exchange Act Rules 13a-14 and 15d-14,[134] interactive data in the voluntary program are subject to the anti-fraud provisions of the federal securities laws. The voluntary program also encourages participants' efforts to create accurate and reliable interactive data that is the same as the corresponding disclosure in the traditional electronic format filing by providing that a participant is not liable for information in its interactive data that reflects the same information that appears in the corresponding portion of the traditional format filing, to the extent that the information in the corresponding portion of the traditional format filing was not materially false or misleading. To further encourage reasonable efforts to provide accurate interactive data, the voluntary program treats interactive data that do not reflect the same information as the official version as reflecting the official version if the volunteer meets several conditions. The volunteer must have made a good faith and reasonable attempt to reflect the same information as appears in the traditional format filing and, as soon as reasonably practicable after becoming aware of any difference, the volunteer must amend the interactive data to cause them to reflect the same information.[135]

2. Use of Technology to Detect Errors

Complete, accurate, and reliable financial statements and other disclosures are essential to investors and the proper functioning of the securities markets. Our proposed requirement to submit interactive data with registration statements and reports is designed to provide investors with new tools to obtain, review, and analyze information from public filers more efficiently and

[133] Rule 402 under Regulation S-T provides these liability protections.

[134] See Rules 13a-14(f) [17 CFR 240.13a-14(f)] and 15d-14(f) [17 CFR 240.15d-14(f)].

[135] 17 CFR 232.402(b).

effectively. To satisfy these goals, interactive data must meet investor expectations of reliability and accuracy. Many factors, including company policies and procedures buttressed by incentives provided by the application of technology by the Commission, market forces and the liability provisions of the federal securities laws, help further those goals.

Building on the validation criteria referenced above for interactive data in the voluntary program, we plan to use validation software to check interactive data for compliance with many of the applicable technical requirements and to help the Commission identify data that may be problematic. For example, we expect the validation software to

- check if required conventions (such as the use of angle brackets to separate data) are applied properly for standard and, in particular, non-standard special labels and tags;
- identify, count, and provide the staff with easy access to non-standard special labels and tags;[136]
- identify the use of practices, including some the XBRL U.S. Preparers Guide contains, that enhance usability;[137]
- facilitate comparison of interactive data with disclosure in the corresponding traditional format filing;
- check for mathematical errors; and
- analyze the way that companies explain how particular financial facts relate to one another.[138]

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[136] For example, if a company uses the word "liabilities" as the caption for a value data tagged as "assets," the software would flag the filing and bring it to the staff's attention. In contrast, if the company used "Total Assets" or "Assets, Total," the software would identify the use of these terms as a low risk discrepancy.

[137] The XBRL U.S. Preparers Guide, available from the XBRL U.S. Web site, would provide guidance to facilitate preparing information in the interactive data format that we propose to require.

[138] The technology used to show these relationships is known as a "linkbase." The Commission will seek to ensure that linkbases not only comply with technical requirements but are not used to evade accounting standards.

The availability of interactive data to the staff may also enhance its review of company filings. After the FDIC required submission of interactive data, it reported that its analysts were able to increase the number of banks they reviewed by 10% to 33%, and that the number of bank reports that failed to fully meet filing requirements fell from 30% to 0%. These bank reports require information that is more structured and less varied than the information we would require. As a result, the FDIC's efficiency gains from the use of interactive data likely would be greater than ours.

We believe analysts, individual investors and others outside the Commission that use the interactive data submitted to us also will make use of software and other tools to evaluate the interactive data and, as a result, market forces will encourage companies to provide interactive data that accurately reflects the corresponding traditional format data in the traditional format filing. For example, the use of non-standard special labels or tags (extensions) could introduce errors, but we expect the open source and public nature of interactive data and the list of tags for U.S. financial statement reporting would enable software easily to detect and identify any modifications or additions to the approved list of tags. We believe such software and other technology will be widely available for free or at reasonable cost. Investors, analysts, and other users therefore would be able to identify the existence and evaluate the validity of any such modifications or additions. We also anticipate that companies preparing their interactive data and investors, analysts, and other users would use such devices to search for and detect any changes made to the standard list of tags. Because analysts and other users would rapidly discover mistakes or alterations not consistent with the desired use of interactive data, filers would have a powerful incentive to prepare such data with care and promptly to correct any errors.

With this proposal, we seek the rapid adoption and use of interactive data without imposing unnecessary cost and expense on filers. We therefore propose that the interactive data itself provided to us generally would be subject to a liability regime under the federal securities laws similar to that governing the voluntary program. We also propose that viewable interactive data as displayed through software available on the Commission's Web site, as described above and further discussed below, would be subject to the same liability under the federal securities laws as the corresponding portions of the traditional format filing.[139]

Interactive data would be subject to the following liability-related provisions:

- deemed not filed or part of a registration statement or prospectus for purposes of Sections 11 and 12 of the Securities Act;
- deemed not filed for purposes of Section 18 of the Exchange Act and Section 34(b) of the Investment Company Act;
- not otherwise subject to the liabilities of these sections;
- subject to other liability under these Acts for the substantive content of the financial disclosures (as distinct from compliance with proposed Rule 405) in the same way and to the same extent as traditional format part of the related official filing. The content of the financial disclosure refers, for example, to the numerical values in the financial statements or footnotes and the statements in the footnotes. The Rule 405 requirements generally refer to the process of tagging and formatting the content of the financial statements for the interactive data file;

[139] Proposed Rule 406 of Regulation S-T would set forth the liability applicable to interactive data and viewable interactive data that is displayed through software available on the Commission's Web site. Proposed Rule 406 also would clarify that disclosures in the traditional format part of the related official filing with which the interactive data appear as an exhibit remain subject to the federal securities laws as in the past and that nothing in proposed Rule 405 of Regulation S-T (setting forth content, format and other requirements related to interactive data) or

- deemed filed for purposes of (and, as a result, benefit from) Rule 103 under Regulation S-T;[140]
- protected from liability under these Acts for failure to comply with the requirements of proposed Rule 405 if the interactive data either:
  - met the requirements of proposed Rule 405 of Regulation S-T; or
  - failed to meet those requirements but the failure occurred despite the issuer's good faith and reasonable effort and the issuer corrected the failure as soon as reasonably practicable after becoming aware of it; and
- excluded from the officer certification requirements under Exchange Act Rules 13a-14 and 15d-14.

None of the proposed liability-related provisions for interactive data submitted to the Commission, however, would affect the application of the anti-fraud provisions under the federal securities laws, whether the interactive data is submitted to the Commission or posted on an issuer's Web site.

Rule 405 is being proposed, in part, under the Commission's authority to specify information required to be submitted to the Commission in, for example, registration statements and periodic reports. To encourage accurate filing of interactive data without fear of making good faith errors, the Commission is proposing Rule 406. Although not expressly addressed in proposed Rule 406, the Commission would have the authority to enforce compliance with proposed Rule 405 because it has the authority to enforce compliance with any of its rules.

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proposed Rule 406 would affect the liability otherwise applicable to the traditional format data. Proposed revised Rules 13a-14(f) and 15d-14(f) would exclude interactive data from the officer certification requirements.

[140] The viewed data would be deemed filed for purposes of Rule 103 under Regulation S-T [17 CFR 232.103] and, as a result, in general, the issuer would not be subject to liability for electronic transmission errors beyond its control

We believe these liability-related provisions strike an appropriate balance between avoiding unnecessary cost and expense and encouraging accuracy in light of the nature of the interactive data to which they apply and the additional accuracy incentives that may be provided by our validation software and market forces.

Other aspects of the proposal would supplement the Commission's objective of supplying reliable and accurate information to investors. First, the financial statements and other disclosures in the traditional format part of the related official filing with which the interactive data appear as an exhibit would continue to be subject to the usual liability provisions of the federal securities laws. For example, the traditional format part of the related official filing would continue to be subject to Section 10(b) and Rule 10b-5[141] of the Exchange Act and, in the appropriate circumstance, to section 11 of the Securities Act. Form 10-K would continue to be considered filed, while the information required by Items, 1, 2, and 3 of Form 10-Q would continue to be considered furnished for purposes of Section 18 of the Exchange Act.[142]

Second, we propose that the usual liability provisions of the federal securities laws also would apply to human-readable interactive data that is identical in all material respects to the corresponding data in the traditional format filing[143] as displayed by a viewer that the Commission provides. Under these circumstances, for example, a Form 10-K's viewable interactive data would be deemed filed and subject to Section 18 of the Exchange Act, consistent with the liability applicable to the corresponding part of the traditional format Form 10-K, and a

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if the issuer corrects the problem through an amendment as soon as reasonably practicable after the issuer becomes aware of the problem.

[141] 17 CFR 240.10b-5.

[142] General Instruction F. Form 10-Q: "Filed Status of Information Presented."

[143] The human-readable interactive data would be identical to the corresponding data in the traditional format filing if the filer complied with the interactive data tagging requirements of proposed Rule 405.

Form 10-Q's viewable interactive data would be deemed furnished and not subject to Section 18 of the Exchange Act, consistent with the liability applicable to the corresponding part of the traditional format Form 10-Q. And a Securities Act registration statement's viewable interactive data as displayed through software available on the Commission's Web site and identical in all material respects to the corresponding data in the traditional format filing would be subject to Section 11 of the Securities Act. In that regard, such viewable interactive data disclosure therefore would have exactly the same potential liability as the corresponding portions of the traditional format part of the filing. We believe applying liability for such viewable interactive data displayed through software on the Commission's Web site would further investors' interests in filers providing accurate interactive data under our proposal.

We expect that each filer would be in the best position to determine the appropriate manner in which to assure the accuracy of the interactive data it would be required to submit and the viewable interactive data that would result. We also expect that software providers and other private sector third parties would help develop procedures and tools to help in that regard. As an adjunct to those private sector efforts, we plan to make available to filers, on an optional basis, the opportunity to help assure accuracy by making a test submission with the Commission or using software we provide to create viewable interactive data.

A filer would have the opportunity to submit an interactive data exhibit as part of a test submission just as a filer can make test submissions today.[144] The validation system would process the test submission with an interactive data exhibit similar to the way it processes test submissions today. If it found an error, it would advise the filer of the nature of the error and as to whether the error was major or minor. As occurs in the voluntary program, a major error in an

[144] The EDGAR Filer Manual addresses test submissions primarily at Section 6.6.5 of Volume II.

interactive data exhibit that was part of a live filing would cause the exhibit to be held in suspense in the electronic filing system while the rest of the filing would be accepted and disseminated if there were no major errors outside of the interactive data exhibit. If that were to happen, the filer would need to revise the interactive data exhibit to eliminate the major error and submit the exhibit as an amendment to the filing to which it is intended to appear as an exhibit. A minor error in an interactive data exhibit that was part of a live filing would not prevent the interactive data exhibit from being accepted and disseminated together with the rest of the filing if there were no major errors in the rest of the filing. We believe it would be appropriate to accept and disseminate a filing without the interactive data exhibit submitted with it if only the exhibit has a major error, in order to disseminate at least as much information at least as timely as would have been disseminated were there no interactive data requirement.

We are not proposing that filers be required to involve third parties such as auditors or consultants in the creation of the interactive data provided as an exhibit to a filer's periodic reports or registration statements, including assurance. We are taking this approach after considering various factors, including:

- the availability of a comprehensive list of tags for U.S. financial statement reporting from which appropriate tags can be selected, thus reducing a filer's need to develop new elements;[145]
- the availability of user-friendly software with which to create the interactive data file;
- the multi-year phase-in for each filer, the first year of which entails the relatively straightforward process of tagging face financial statements, as was done during the voluntary program, and block tagging footnotes and financial statement schedules;

[145] We expect the same would be true with respect to the tags for reporting under IFRS as issued by the IASB.

- the availability of interactive data technology specifications, and of other XBRL U.S., and XBRL International resources for preparers of tagged data;
- the advances in rendering/presentation software and validation tools for use by preparers of tagged data that can identify the existence of certain tagging errors;
- the expectation that preparers of tagged data will take the initiative to develop sufficient internal review procedures to promote accurate and consistent tagging; and
- the filer's and preparer's liability for the accuracy of the traditional format version of the financial statements that will also be provided using the interactive data format.

Request for Comment:

- Do the proposed rules strike an appropriate balance to promote the availability of reliable interactive data without imposing undue additional costs and burdens? If not, what balance of liability will best encourage filers to prepare reliable interactive data without subjecting them to undue fear of mis-tagging? How does the "extensibility" of interactive data, i.e., a filer's ability to customize the standard list of tags to correspond more closely to the company's particular financial information, affect your answer?
- What are the risks to investors under the proposed liability rules? Will investors still find the interactive data sufficiently reliable to use it?
- Should interactive data be subject to liability if a filer does not tag its financial information in a manner consistent with the standards approved by the Commission, irrespective of the filer's good faith effort? If the answer is yes, what should the filer's liability be for such errors, and should liability attach even if the mistake is inadvertent? What if the error is the result of negligent tagging

practices, but there was no affirmative intent to mislead?

- If interactive data are subject to liability as proposed, is it necessary or appropriate for viewable interactive data to be subject to liability as and to the extent proposed or otherwise? Should the answer depend on the degree of liability to which the interactive data are subject? Should viewable interactive data be subject to liability in a manner or to an extent different than as proposed?
- Should any or all interactive data be encompassed within the scope of officer certifications? Is there any reason to treat interactive data differently from traditional format data in this respect?
- Should any or all interactive data be deemed filed for purposes of Section 34(b) of the Investment Company Act and, if so, should it be regardless of compliance with proposed rule 405 or a filer's good faith and reasonable efforts to comply?
- Should the liability for interactive data be exactly the same as it is for XBRL-Related Documents under the voluntary program?
- Would software be commercially available and reasonably accessible to all required interactive data filers, investors and analysts that would make detection of tagging errors, such as the use of inappropriate tags or improper extensions, easy and cost-effective? If so, would such monitoring by investors and analysts likely discourage the improper use of extensions or negligent conduct in the tagging process?
- Would the use of software to search for and detect any differences between a filer's interactive data and the Commission-approved interactive data tags,

financial statement captions, and other attributes depend on the degree of analyst coverage or investor interest?

- Should a rule expressly state that the Commission retains the authority to enforce compliance with proposed Rule 405?
- Should we require the involvement of auditors, consultants, or other third parties in the tagging of data? If assurance should be required, what should be its scope, and should any such requirement be phased in?
- Should we phase in increasing levels of liability over time? Are the proposed limitations on liability necessary and appropriate at the outset, for example, the first year that a company is subject to the interactive data requirement, but inappropriate at a later time? Should we require that interactive data be subject to more liability later?
- Should the validation software, as contemplated, cause an interactive data exhibit with a major error to be held in suspense in the electronic filing system while the rest of the filing would be accepted and disseminated if there were no major errors outside of the interactive data exhibit? In that case, should the validation software hold the entire filing in suspense or reject or accept the entire filing or interactive data exhibit?

3. Integration of Interactive Data and Business Information Processing

As the technology associated with interactive data improves, issuers may integrate interactive data technology into their business information processing. When this integration occurs, the preparation of financial statements may become interdependent with the interactive data tagging process. As this occurs, an issuer and its auditor should evaluate these changes in

the context of their reporting on internal control over financial reporting.[146] However, the evaluation would not require an auditor to separately report on an issuer's interactive data provided as an exhibit to a filers' reports or registration statements.

SAS 8 (AU Section 550) was issued in December 1975 to address an auditor's consideration of information in addition to audited financial statements and the independent auditor's report on the audited financial statements included in documents that are published by an entity (e.g., an annual periodic report). Similarly, paragraph 18(f) of SAS 100 (AU Section 722) addresses an auditor's consideration of other information that accompanies interim financial statements included in quarterly periodic reports. With respect to registration statements, SAS 37 (AU Section 711) was issued in April 1981 to address the auditor's responsibilities in connection with filings under the federal securities statutes. With respect to our proposed rules, an auditor would not be required to apply AU Sections 550, 722, or 711 to the interactive data provided as an exhibit in a company's reports or registration statements, or to the viewable interactive data.

4. Continued Traditional Format and Interactive Data Cautionary Disclosure

The proposed rules would not eliminate or alter existing filing requirements that financial statements and financial statement schedules be filed in traditional format. We believe investors and analysts may wish to use these electronic formats to obtain an electronic or printed copy of

[146] Exchange Act Rules 13a-15(f) [17 CFR 240.13a-15(f)] and 15d-15(f) [17 CFR 240.15d-15(f)] define the term "internal control over financial reporting," in general, as a process designed by or under the supervision of specified persons and effected by the issuer's board of directors, management and other personnel "to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with [GAAP] and includes [specified] policies and procedures." Rules 13a-15 and 15d-15 generally require specified issuers to maintain internal control over financial reporting and require the management of those issuers to evaluate the effectiveness of the issuer's internal control over financial reporting. In addition, the certifications specified by Item 601(b)(31) of Regulation S-K and Instruction B(e) of Form 20-F that relate to these specified issuers, generally must address the establishment, maintenance, design, changes in and deficiencies and material weaknesses related to the issuer's internal control over financial reporting.

the entire registration statement or Form 10-Q, 10-K, or 20-F, either in addition to or instead of disclosure formatted using interactive data. In addition, we propose to no longer require or permit the cautionary disclosure from the voluntary program for required interactive data, which states that investors should not rely on the interactive data information in making investment decisions. We believe that such language would be inconsistent with the proposal that interactive data be part of the related registration statement or report.

Request for comment:

- Should the proposed rules eliminate the requirement that the financial information be submitted in traditional format, in addition to interactive data format? Should cautionary language from the voluntary program be eliminated or modified and, if not, why not?

D. Required Items

1. Data Tags

To comply with the proposed rules, filers using U.S. GAAP would be required to tag their financial information using the most recent list of tags for U.S. financial statement reporting, as released by XBRL U.S. and required by the EDGAR Filer Manual.[147] Each company would be required to use one or more of the five standard industry-specific lists identified in the EDGAR Filer Manual, as is appropriate for its business.[148]

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[147] The latest list of data tags for U.S. financial statement reporting was released on April 28, 2008 and is available at http://xbrl.us/pages/us-gaap.aspx. See XBRL U.S. Press Release, XBRL US Finalizes US GAAP Taxonomies and Preparers Guide with Delivery to SEC, (May 2, 2008).

[148] We note that the vast majority of companies would fall under the Commercial and Industrial industry group. Additional guidance on the industry-specific lists is expected to appear in the EDGAR Filer Manual.

Regular updates to the list of tags for U.S. financial statement reporting will likely be posted annually and be available for downloading. In addition, interim extensions may be made available for download in order to reflect changes in accounting and reporting standards. To provide companies sufficient time to become familiar with any such updates, we anticipate giving advance notice before requiring use of an updated list of tags. Based on experience to date with the most recent update to the list of tags, we believe that it is sufficiently developed to support the interactive data disclosure requirements in the proposed rules.

Similarly, filers using IFRS as issued by the IASB would be required to tag their financial information using the most recent list of tags for international financial reporting, as released by the IASCF and specified in the EDGAR Filer Manual.[149]

One of the principal benefits of interactive data is its extensibility—that is, the ability to add to the standard list of tags in order to accommodate unique circumstances in a filer's particular disclosures. The use of customized tags, however, may also serve to reduce the ability of users to compare similar information across companies. In order to promote comparability across companies, our proposed rules would limit the use of extensions to circumstances where the appropriate financial statement element does not exist in the standard list of tags. We are also proposing that wherever possible, preparers change the label for a financial statement element that exists in the standard list of tags, instead of creating a new customized tag. For example, the standard list of tags for U.S. GAAP includes the financial statement element "gross profit." The list does not include "gross margin," because this is definitionally the same as "gross profit"—both are generally used to mean "excess of revenues over the cost of revenues."

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[149] The International Accounting Standards Committee Foundation has been developing the IFRS financial reporting tag list since 2002. See http://www.iasb.org/xbrl/index.html. The 2008 version of the IFRS financial reporting tag list is planned to be finalized in June 2008 and updated annually for changes in accounting and reporting standards.

A filer using the label "gross margin" in its income statement should use the tag corresponding to the financial statement element "gross profit." It can then change the label for this item on the standard list to "gross margin."

Under Item 401(c) of Regulation S-T, voluntary filers' interactive data elements must reflect the same information as the corresponding traditional format elements. Further, no data element can be "changed, deleted or summarized" in the interactive data file. We do not propose to change this equivalency standard for financial statements provided in interactive data format as required by the proposed rules.

Request for Comment:

- Is our focus on comparability appropriate? Instead of stressing ease of financial statement comparability, should our rules permit greater use of customized data tags?
- Should we codify any other principles to encourage comparability without unduly reducing the extensibility of interactive data?

2. Regulation S-T and the EDGAR Filer Manual

We propose to require that filers provide interactive data in the form of exhibits to the related registration statements or reports.[150] Interactive data would be required to comply with our Regulation S-T[151] and the EDGAR Filer Manual. The EDGAR Filer Manual is available on our Web site. It includes technical information for making electronic filings to the Commission. Volume II of this manual includes guidance on the preparation, submission, and validation of

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[150] The requirement to submit XBRL data as an exhibit would appear in Item 601(b)(101) of Regulation S-K and Item 101 of the Instructions to Exhibits of Form 20-F.

[151] Proposed Rule 405 of Regulation S-T would directly set forth the basic tagging and posting requirements for the XBRL data and require compliance with the EDGAR Filer Manual. Consistent with proposed Rule 405, the EDGAR Filer Manual would contain the detailed tagging requirements.

interactive data submitted under the voluntary program. Before adoption of our proposed rules, we plan to update our manual with additional instructions for filers of interactive data.

In addition to both Regulation S-T, which would include the rules we are proposing, and the instructions in our EDGAR Filer Manual, filers may access other sources for guidance in tagging their financial information. These include the XBRL U.S. Preparers Guide; user guidance accompanying tagging software; and financial printers and other service providers. New software and other forms of third-party support for tagging financial statements using interactive data are also becoming widely available.

Request for Comment:

- What specific guidance should be provided in Regulation S-T for interactive data filers?
- Does the XBRL U.S. Preparers Guide provide useful guidance to promote consistent tagging between periods and among various companies?
- Is the user guidance accompanying tagging software, and the guidance available from financial printers and other service providers helpful for filers to tag their financial statements? What other sources of guidance might prove useful?

E. Consequences of Non-Compliance and Hardship Exemption

We propose that if a filer does not provide the required interactive data submission, or post the interactive data on the company Web site, by the required due date, the filer would be unable to use short form registration statements on Forms S-3, F-3, or S-8.[152] This

[152] Forms S-3, F-3, and S-8 are regarded as short form registration statements because they enable eligible issuers to register securities for offer and sale under the Securities Act by providing information in a more streamlined manner than they otherwise could. In order to be eligible to use these short forms, an issuer must meet specified requirements, including being current in its filing of Exchange Act reports. In general, an issuer is current if it has filed all of its required Exchange Reports for the twelve months before filing the registration statement. Filers that

disqualification would last for so long as the interactive data are not provided. During the period of disqualification, the filer would be deemed not to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144.[153] Once a filer complies with the interactive data submission and posting requirements—provided it previously filed its financial statement information in traditional format on a timely basis—it would be deemed to have timely filed all of its periodic reports.

We believe that precluding the use of short form registration statements during any period of failure to comply would appropriately direct attention to the proposed interactive data reporting requirement. And allowing filers to reestablish their current and timely status by later complying with the interactive data reporting requirement would strike a reasonable balance of negative consequences and recognition that the company's traditional format reports would have been filed.

Consistent with the treatment of other applicable reporting obligations, we propose to provide hardship exemptions for the inability to timely electronically submit interactive data. Rule 201 under Regulation S-T provides for temporary hardship exemptions. Rule 202 under Regulation S-T provides for continuing hardship exemptions.

Rule 201 generally provides a temporary hardship exemption from electronic submission of information, without staff or Commission action, when a filer experiences unanticipated

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are unable to use short form registration also are unable to incorporate by reference certain information into Forms S-4 and F-4. See Item 12 of Form S-4 and F-4.

[153] Rule 144 under the Securities Act creates a safe harbor for the resale of securities under the exemption from Securities Act registration set forth in Section 4(1) of the Securities Act [15 U.S.C. 77d(1)]. In order for some resales of securities to comply with Rule 144, the issuer of the securities must be deemed to have adequate current public information available as specified by Rule 144(c)(1) [17 CFR 230.144(c)(1)]. Rule 144(c)(1) deems an issuer required to file reports under the Exchange Act to have adequate public information available if it is current in its filing of Exchange Act periodic reports. In general, an issuer would be deemed current for this purpose if it has filed all of its required Exchange Act periodic reports for the twelve months before the sale of securities for which the Rule 144 safe harbor is sought.

technical difficulties that prevent timely preparation and submission of an electronic filing. The temporary hardship exemption permits the filer to initially submit the information in paper but requires the filer to submit a confirming electronic copy of the information within six business days of filing the information in paper. Failure to file the confirming electronic copy by the end of that period results in short form ineligibility.[154]

We recognize the inherently electronic nature of interactive data. In light of this and the consequences to an issuer of not timely submitting interactive data, we propose to revise Rule 201 to provide a temporary hardship exemption. This exemption would apply without staff or Commission action if a filer experiences unanticipated technical difficulties that prevent the timely preparation and electronic submission of interactive data. The proposed temporary hardship exemption would cause the filer to be deemed current for purposes of incorporation by reference, short form registration, and Rule 144 for a period of up to six business days from the date the interactive data were required to be submitted.[155] If the filer did not electronically submit the interactive data by the end of that period, from the seventh business day forward the filer would not be deemed current until it did electronically submit the interactive data.

Rule 202 permits a filer to apply in writing for a continuing hardship exemption if information otherwise required to be submitted in electronic format cannot be so filed without undue burden or expense. If the staff, through authority delegated from the Commission, grants the request, the filer must file the information in paper by the applicable due date and file a confirming electronic copy if and when specified in the grant of the request.

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[154] Rule 201 of Regulation S-T.

[155] The information would not have to be filed in paper first, as this would be meaningless in the case of interactive data.

We propose to revise Rule 202 to provide that a grant of a continuing hardship exemption for interactive data would not require a paper submission and that filer would be deemed current until the end of the period for which the exemption is granted. Rule 202 also would provide that, if the exemption was granted for only a specified period rather than indefinitely, the filer would be deemed current up to the end of that period. If the filer did not electronically submit the interactive data by the end of that period, from the next business day forward the filer would not be deemed current until it did electronically submit the interactive data. Similarly, we propose to revise Rule 202 to provide an essentially mirror-image exemption from the proposed requirement for an issuer that has a corporate Web site to post the interactive data on its Web site.

Request for Comment:

- Are the consequences for failure to comply with the interactive data submission requirements appropriate?
- Should the proposed rules treat companies that do not comply as not current? Should the proposed rules provide similar treatment whether the failure to comply relates to interactive data submission, or to corporate Web site posting?
- Alternatively, should the proposed rules go further and treat companies that do not comply as not timely?
- Should the proposed rules treat a filer's compliance with interactive data reporting as an express condition to the filer's registration statement's being declared effective?
- Does our proposed rule strike the correct balance of positive and negative consequences when a filer meets its requirements to provide traditional format documents but fails to provide interactive data?

- Do commenters believe that the proposed revisions to the hardship exemptions would be sufficient to cover unanticipated technical difficulties associated with interactive data? If insufficient, why would they be insufficient and how should the hardship exemptions be tailored to address technical difficulties associated with interactive data? For example, would six business days be an appropriate period for the temporary hardship exemption to apply? If not, would a shorter or longer period be appropriate, and why?

III. GENERAL REQUEST FOR COMMENTS

We request comment on the specific issues we discuss in this release, and on any other approaches or issues that we should consider in connection with the proposed amendments. We seek comment from any interested persons, including those required to file information with us on the EDGAR system, as well as investors, disseminators of EDGAR data, industry analysts, EDGAR filing agents, and any other members of the public.

IV. PAPERWORK REDUCTION ACT

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995, or PRA.[156] The purpose of the proposed amendments is to make financial information easier for investors to analyze and to assist issuers in automating regulatory filings and business information processing. We are submitting the proposed amendments to the Office of Management and Budget (OMB), for review in accordance with the PRA.[157] An agency may not conduct or sponsor, and a person is not

[156] 44 U.S.C. 3501 et seq.

[157] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

required to respond to, an information collection unless it displays a currently valid OMB control number.

The title for the new collection of information the proposed amendments would establish is "Interactive Data" (OMB Control No. 3235-XXXX). This collection of information relates to already existing regulations and forms adopted under the Securities Act and the Exchange Act that set forth financial disclosure requirements for registration statements and periodic reports. The proposed amendments would require issuers to submit specified financial information to the Commission and post it on their corporate Web sites, if any, in interactive data form. The specified financial information already is and would continue to be required to be submitted to the Commission in traditional format under existing registration statement and periodic report requirements. Compliance with the proposed amendments would be mandatory according to the phase-in schedule previously described.[158] Issuers not yet phased-in, however, could comply voluntarily with the proposed amendments. The information required to be submitted would not be kept confidential by the Commission.

B. Reporting and Cost Burden Estimates

1. Registration Statement and Periodic Reporting

Form S-1 (OMB Control No. 3235-0065), Form S-3 (OMB Control No. 3235-0073), Form S-4 (OMB Control No. 3235-0324), and Form S-11 (OMB Control No. 3235-0067) prescribe information that a filer must disclose to register certain offers and sales of securities under the Securities Act. Form F-1 (OMB Control No. 3235-0258), Form F-3 (OMB Control No. 3235-0256) and Form F-4 (OMB Control No. 3235-0325) prescribe information that a foreign private issuer must disclose to register certain offers and sales of securities under the

[158] See Part II.B.

Securities Act. Form 10-K (OMB Control No. 3235-0063) prescribes information that a filer must disclose annually to the market about its business. Form 10-Q (OMB Control No. 3235-0070) prescribes information that a filer must disclose quarterly to the market about its business. Form 20-F (OMB Control No. 3235-0288) is used by a foreign private issuer both to register a class of securities under the Exchange Act as well as to provide its annual report required under the Exchange Act.

The information required by the new collection information we propose, would correspond to specified financial information now required by these forms and would be required to appear in exhibits to these forms and on filers' corporate Web sites. The compliance burden estimates for the proposed collection of information are based on the proposed phase-in, beginning with approximately 500 large accelerated filers subject to the rules in the first year, followed by approximately 1300 more filers in year two and approximately 10,200 more filers in year three.

Based on estimates from the voluntary filer participant questionnaire results, we estimate that interactive data filers would incur the following average

- Internal burden hours to tag the face financials:
  - 125 hours for the first filing under the proposed requirements; and
  - 17 hours for each subsequent filing.
- Out-of-pocket cost for software and filing agent services: $6140 for each filing.

Based on qualitative assessments of time, we estimate that interactive data filers would incur the following average internal burden hours:

- Footnotes
  - 7 hours to block tag for each filing made during the first year under the proposed requirements;
  - 100 hours to detail tag for the first filing made in the second year under the proposed requirements; and
  - 50 hours to detail tag for each subsequent filing.
- Schedules
  - 1 hour to block tag for each filing made during the first year under the proposed requirements;
  - 10 hours to detail tag for the first filing made in the second year under the proposed requirements; and
  - 5 hours to detail tag for each subsequent filing.
- Web site Posting: 4 hours to post all interactive data submissions made during each year.

Based on the number of filers we expect to be phased in each of the first three years under the proposed requirements, the number of filings that we expect those filers to make that would require interactive data[159] and the internal burden hour and out-of-pocket cost estimates described, we estimate that the average yearly burden of the proposed requirements over the first three years would be 1,164,690 internal hours per year and $129 million in out-of-pocket

[159] We include in the number of filings that would require interactive data both initial filings and amended filings but we estimate that the burden incurred in connection with an amended filing would be one half the burden that would be incurred if the amended filing were an initial filing.

expenses per year and would be incurred by an average of 4708 filers for an average yearly burden per filer of 247.4 internal hours and $27,400 in out-of-pocket expenses.

By the fifth year under the proposed requirements, filers to be phased in generally will have been subject to the proposed requirements for at least two years. As a result, filers generally would incur burdens applicable to interactive data filings made after the first filing in which the filer detail tagged footnotes and schedules. Consequently, we estimate that in the fifth year under the proposed requirements, the burden on filers would be 3,743,683 internal hours and $330.9 million in out-of-pocket expenses and would be incurred by 11,893 filers for an average burden per filer of 314.8 internal hours and $27,800 in out-of-pocket expenses.[160]

2. Regulation S-K and Regulation S-T

Regulation S-K (OMB Control No. 3235-0071) specifies information that a registrant must provide in filings under both the Securities Act and the Exchange Act. Regulation S-T (OMB Control No. 3235-0424) specifies the requirements that govern the electronic submission of documents. The proposed changes to these items would add and revise rules under Regulations S-K and S-T. The filing requirements themselves, however, are included in the forms and we have reflected the burden for these new requirements in the burden estimate for the forms. These rules in Regulations S-K and S-T do not impose any separate burden. We assign one burden hour each to Regulations S-K and S-T for administrative convenience to reflect the fact that these regulations do not impose any direct burden on companies.

[160] We provide an estimate of the burden in the fifth year under the proposed requirements because we believe the burden in the fifth year may help indicate what the burden would be under the proposed requirements on an ongoing basis.

C. Request for Comments

We solicit comment on the expected Paperwork Reduction Act effects of the proposed amendments, including the following:

- the accuracy of our estimates of the additional burden hours that would result from adoption of the proposed amendments;
- whether the proposed new collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- ways to enhance the quality, utility and clarity of the information to be collected;
- ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- any effects of the proposed amendments on any other collections of information not previously identified.

Any member of the public may direct to us any comments concerning these burden estimates and suggestions for reducing the burdens. 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 Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303, with reference to File No. [S7-11-08]. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. [S7-11-08], and be submitted to the Securities and Exchange Commission, 100 F Street, NE, Washington,

DC 20549. 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.

V. COST-BENEFIT ANALYSIS

The proposed rules would require submission of interactive data-formatted financial statements and other financial information and the posting of such information on an issuer's corporate Web site, if any, according to a phase-in schedule. The proposed rules likely would result in the benefits and costs described below. We base our belief on an economic analysis of data obtained from several sources, including voluntary program participant responses to a staff-prepared questionnaire, information on the experience of issuers that participated in an interactive data pilot program in Japan (covering a larger sample of issuers), and interviews conducted with parties knowledgeable about interactive data technology in order to learn their views on issues including those that might affect the interpretation of the questionnaire responses.[161]

Interactive data are intended to remove a barrier in the flow of information between issuers and users of information that is conveyed through corporate financial reports. This should enable less costly dissemination of information and thereby improve the allocation of capital. The cost of implementation will depend primarily on the costs of transition by issuers to the new mode of reporting. The magnitudes of these benefits and costs from any individual issuer's adoption of interactive data reporting will depend on the number of other issuers who also adopt and on the availability of supporting software and other infrastructures that enable analysis of the information. To the extent that submitted information allows investors to make

[161] The proposed required program, similar to the voluntary program and the pilot program in Japan, would require use of interactive data in XBRL format.

investment decisions based on market-wide comparison and analysis, the value to the investors of the reported information tends to increase with the total number of issuers adopting the regime. Likewise, issuers' incentives to report their information using interactive data depends on the interest level of the investors in this mode of reporting. By mandating implementation, the rule will expand the network of adopters and thereby create positive network externalities of reported information for the investors.

A. Benefits of Interactive Data Submission and Web Site Posting

The proposed rules have the potential to benefit investors both directly and by facilitating the exchange of information between issuers and the analysts and other intermediaries who receive and process the financial reports of public companies.

1. Information Access

Benefits of the proposed rulemaking accrue from the acceleration of market-wide adoption of interactive data format reporting. The magnitudes of the benefits thus depend on the value to investors of the new reporting regime relative to the old reporting regime and on the extent to which the mandated adoption speeds up the market-wide implementation.

Requiring issuers to file their financial statements using the interactive data format would enable investors, analysts, and the Commission staff to capture and analyze that information more quickly and at a lower cost than is possible using the same financial information provided in a static format.[162] Even though the new regime does not require any new information to be disclosed or reported, certain benefits accrue when issuers use an interactive data format to report their financial reports. These include the following. Through interactive data, what is currently static, text-based information can be dynamically searched and analyzed, facilitating

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[162] See Part I.

the comparison of financial and business performance across companies, reporting periods, and industries. Any investor with a computer would have the ability to acquire and download interactive financial data that have generally been available only to large institutional users. For example, users of financial information could download it directly into spreadsheets, analyze it using commercial off-the-shelf software, or use it within investment models in other software formats. Also, to the extent investors currently are required to pay for access to annual or quarterly report disclosure that has been extracted and reformatted into an interactive data format by third-party sources, the availability of interactive data in Commission filings could allow investors to avoid additional costs associated with third party sources.

The magnitude of this informational benefit varies, however, with the availability of sophisticated tools that will allow investors to analyze the information. The growing development of software products for users of interactive data is helping to make it increasingly useful to both institutional and retail investors.[163] For example, currently there are many software providers and financial printers that are developing interactive data viewers. We anticipate that these will become widely available and increasingly accessible to investors. We expect that the open standard feature of the interactive data format will facilitate the development of applications, software, and that some of these applications may be made available to the public for free or at a relatively low cost. The continued improvement in this software would allow increasingly useful ways to view and analyze company financial information.

Interactive data also could provide a significant opportunity for issuers to automate their regulatory filings and business information processing, with the potential to increase the speed,

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[163] Press Release No. 2007-253 (Dec. 5, 2007).

accuracy, and usability of financial disclosure. This reporting regime may in turn reduce filing and processing costs.

By enabling filers to further automate their financial processes, interactive data may eventually help filers improve the speed at which they generate financial information. For example, with standardized interactive data tags, registration statements and periodic reports may require less time for information gathering and review.

Because a substantial portion of each financial report makes use of the same information, a filer that uses a standardized interactive data format at earlier stages of its reporting cycle may also increase the accuracy of its financial disclosure by reducing the need for repetitive data entry that could contribute human error and enhancing the ability of an filer's in-house financial professionals to identify and correct errors in the issuer's registration statements and periodic reports filed in traditional electronic format.

A filer that uses a standardized interactive data format at earlier stages of its reporting cycle also may increase the usability of its internal financial information. Through interactive data, a filer can dynamically search and analyze what is currently static, text-based internal financial information, facilitating the comparison of financial and business performance across business units and reporting periods. For example, filers that use interactive data may be able to consolidate enterprise financial information more quickly and potentially more reliably across operating units with different accounting systems.[164] There has been a growing development of software products to assist filers to tag their financial statements using interactive data helping make interactive data increasingly useful.[165]

Filers that automate their regulatory filings and business information processing in a manner that facilitates their generation and analysis of internal financial information could, as a result, realize a reduction in costs.

2. Market Efficiency

The proposed requirements could benefit investors by making financial markets more efficient in regard to the following:[166]

- capital formation as a result of public companies' being in a better position to attract investor capital because of greater (less costly) awareness on the part of the investors of issuer financial information; and

[164] However, we recognize that at the outset, filers would most likely prepare their interactive data as an additional step after their financial statements have been prepared.

[165] Press Release No. 2007-253 (Dec. 5, 2007).

[166] We believe the benefits would stem primarily from the requirement to submit interactive data to the Commission and the Commission's disseminating that data. We also believe, however, that the requirement that issuers with corporate Web sites post the interactive data required to be submitted would encourage its widespread dissemination thereby contributing to lower access costs for users and the related benefits described. We solicit comment in Part II.B.5 regarding what advantages, if any, dual Commission and corporate Web site availability would have.

- capital allocation as a result investors' being better able to allocate capital among those issuers seeking it because of interactive data reporting's facilitating innovations in efficient communication of issuer financial information.

a. More Efficient Capital Formation

An increase in the efficiency of capital formation is a benefit that may accrue to the extent that interactive data reduces some of the information barriers that make it costly for companies to find appropriate sources of external finance. In particular, smaller public companies are expected to benefit from enhanced exposure to investors. If interactive data financial reporting increases the availability, or reduces the cost of collecting and analyzing, corporate financial data, then there could be improved coverage of small companies by analysts and commercial data vendors.

At present, many small companies are not included in commercially available products that provide corporate financial data, possibly due to high data collection costs relative to the value of providing coverage. Their absence may reduce the likelihood that they receive coverage by financial analysts who use commercially available products to assess issuer performance. Hence, if interactive data reporting increases coverage of smaller companies by commercially available financial information products, and this increases their exposure to analysts and investors, then lower search costs for capital could result. In other words, smaller companies could realize a lower cost of capital, or less costly financing.

While an increase in coverage should occur for some issuers, it is possible that less than full coverage will remain in more sophisticated products that provide analysis or reporting items beyond basic financial information. This conclusion is based on an assumption that many commercially available product offerings provide valuable information beyond what is reported

in basic financial information, and the costs of providing this additional information for every company may make 100% coverage prohibitive. In particular, the smallest issuers may not offer sufficient market capitalization to make investment worthwhile to larger investors, for whom these commercial products are primarily designed.

So while lower data collection costs are likely to increase the level of coverage that smaller issuers receive from investors and market analysts, there is no certainty that this will extend down to the very smallest set of issuers. As a result, it is possible that the capital-raising benefits of interactive data reporting for some issuers will not be as great as for others. Regardless, we are not aware of any data to suggest that any issuer would be made worse off with respect to analyst and investor coverage as it pertains to capital formation.

b. More Efficient Capital Allocation

An increase in the efficiency of capital allocation may accrue to the extent that interactive data increase the quality of information in financial markets by reducing the cost to access, collect and analyze corporate financial data or improves the content of issuer-reported information.[167] An increase in quality and improvement in content could enable investors to better allocate their capital among issuers.[168]

Information quality in financial markets would likely be higher if interactive data reporting were required than if not, leading to more efficient capital allocation. As a result, of the improved utility of information, investors may be able to better distinguish the merits of various investment choices, thereby facilitating capital flow into the favored investment

[167] In the context of the discussion below, quality refers to the ease with which end-users of financial data can access, collect and analyze the financial data. This issue is separate from the content of issuer-reported information. The higher the quality and the better the content, the more accurately investors can price the underlying securities.

[168] Among the benefits to investors are some that are specific or most valuable to smaller money managers and retail investors, including the ability to acquire and download interactive financial reporting data that have generally been available only to large institutional users, and at substantial expense.

prospects. This outcome is the main tenet of improved market efficiency, whereby providing more widespread access to information concerning the value of a financial asset such as a company's shares results in better market pricing. Consequently, reducing the costs of accessing, collecting and analyzing information about the value of a financial asset facilitates this end.

Requiring companies to provide interactive data would improve the quality of financial information available to end users, and help spur interactive data-related innovation in the supply of financial services products, resulting from a potential increased competition among suppliers of such products due to lower entry barriers as a result of lower data collection costs.

However, we have considered competing views of the informational consequences of interactive data. For example, a requirement to submit interactive data information could decrease the marginal benefit of collecting information and thus reduce the information quality to the extent it reduces third-party incentives to facilitate access to, collect or analyze information. Assuming that markets efficiently price the value of information, the amount of information accessed, collected (or enhanced) and analyzed will be determined by the marginal benefit of doing so.[169] Lowering information collection costs (through a requirement to submit interactive data information) should increase this benefit. If this is so, then there should be no degradation in the level of information quality as a result of changes in third-party provider behavior under an interactive data reporting regime. However, if one competitor in the industry

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[169] Also, we expect that because the proposed rules would require the use of the XBRL interactive data standard, XBRL's being an open standard would facilitate the development of related software, some of which may, as a result, be made available to the public for free or at a relatively low cost and provide the public alternative ways to view and analyze interactive data information provided under our proposed rules.

can subsidize its operations through an alternative revenue stream, both quality and competition may suffer.[170]

Another potential information consequence of the proposed requirements may be changes to the precision and comparability of the information disseminated by data service providers since the interactive data requirements would shift the source of data formatting that allows aggregation and facilitates comparison and analysis from end-users to issuers submitting interactive data. At present, data service providers manually key financial information into a format that allows aggregation. As a result, the data service provider makes interpretive decisions on how to aggregate reported financial items so that they can be compared across all companies. Consequently, when a subscriber of the commercial product offered by a data service provider uses this aggregated data, it can expect consistent interpretation of the reported financial items. In contrast, a requirement for issuers to submit interactive data information would require the issuers to independently decide within the confines of applicable requirements which financial "tag" best describes each financial item – perhaps with the help from a filing agent or consultant – lessening the amount of interpretation required by data aggregators or end-users of the data. Once a tag is chosen, comparison to other companies is straightforward. However, since companies have some discretion in how to select tags, and can choose extensions (new tags) when they can not find an appropriate existing tag, unique interpretations by each company could result in reporting differences from what current data service providers and other end-users would have chosen. This view suggests that the information disseminated by data aggregators

[170] For illustration purposes only, assume that an Internet service company develops an interactive data-based tool that easily provides company financial data for free to all subscribers, and it uses this product as a loss leader to increase viewership and advertising revenue. If the data provided is of the same quality as data provided through subscription to other available commercial products, then there should be no informational efficiency loss. However, if a data aggregator's providing information that improves investor interpretation and goes beyond base financials is possible, but no longer profitable to produce for competitors without the subsidy, then valuable information production may be lost.

may be, on the one hand, less comparable because they have not normalized it across issuers but, on the other hand, more accurate because the risk of human error in the manual keying and interpretation of filed information would be eliminated and more precise because it will reflect decisions by the issuers themselves. Replication of prior methods of interpretation still would be possible, however, because issuers would continue to be required to file financial information in traditional format. As a result, nothing would prohibit data aggregators from continuing to provide normalized data. Nonetheless, interactive data benefits could diminish if other reporting formats are required for clarification in data aggregation.

The content of issuer-reported information may improve because, as previously discussed, an issuer that uses a standardized interactive data format at earlier stages of its reporting cycle may increase the accuracy of its financial disclosure.[171] In contrast, the content of issuer-reported information may improve or decline to the extent that the interactive data process influences what issuers report. While the proposed requirements to submit and post interactive data information are intended to be disclosure neutral, it is possible they would affect what is reported.[172]

B. Costs of Requiring Submission and Posting of Interactive Data

The primary cost of the rulemaking is the cost of filers' implementation of the rule, which includes the costs of submitting and posting interactive data. We discuss this cost element extensively below. In addition, because the rule allows an increase in the flow of financial information being reported directly to analysts and investors, there will be a cost of learning on the part of the investors in using and analyzing financial information at the interactive data level.

[171] See Part V.A.1.

[172] We solicit comment on whether the proposed requirements would affect issuer disclosure in Part II.B.3.a.

As for the cost of implementation of the rule, based on currently available data, we estimate the average direct costs of submitting and posting interactive data-formatted financial statements and other information for all issuers under the proposed rules would, based on certain assumptions, be as follows:

Table 1. Estimated direct costs of submitting interactive data-formatted financial statements and other information

	First submission with block-text footnotes & schedules	Subsequent submission with block-text footnotes & schedules	First submission with detailed footnotes & schedules	Subsequent submission with detailed footnotes & schedules
Preparation face financials[173]	$31,369	$4,312	$4,312	$4,312
Preparation footnotes[174]	$1,750	$1,750	$25,000	$12,500
Preparation schedules	$250	$250	$2,500	$1,250
Software and filing agent services[175]	$6,140	$6,140	$6,140	$6,140
Web site posting[176]	$1,000	$1,000	$1,000	$1,000
Total cost	$40,509	$13,452	$38,952	$25,202

[173] Estimates based on voluntary filer program questionnaire responses, excluding participants with an interactive data-related business interest. These data suggest that the time required for tagging the face financials decreases by approximately 85% between the first and second submissions. A $250 wage rate is assumed for all preparation cost estimates.

[174] The costs associated with block-tagging of footnotes and schedules are assumed to remain constant in subsequent filings. In contrast, anticipated learning benefits from more complicated detailed tagging of footnotes and schedules are assumed to result in a 50% reduction in cost for subsequent filings.

[175] Software licensing and the use of a print agent can be substitutionary – companies can choose to do one or other, or do both – and are thus aggregated.

[176] This is an annual cost, and as such, will not be incurred for subsequent filings within the same year.

The above estimates are generated in part from a limited number of voluntary program participant questionnaire responses. In particular, these responses provided detail on the projected costs of preparing the face financials and for purchasing software or related filing agent services. A more detailed analysis of just the costs associated with voluntary program participation suggests that the estimated direct cost of submitting face financial statements in interactive data format falls within the range of $17,980 to $71,125 per issuer for the first submission.[177] This cost reflects expenditures on interactive data-related software, consulting or filing agent services used, and the market rate for all internal labor hours spent (including training) to prepare, review and submit the first interactive data format information face financial statements. Although the estimate accounts for estimation error resulting from the small sample statistics on which it is based, the future experiences of individual issuers regarding face financial statements still may vary due to differences between the voluntary program and the proposed required program[178] and may vary according to the issuers' size, complexity, prior experience with interactive data, and other factors not apparent from the voluntary program participant responses.[179] The discussion below summarizes the direct cost estimates of

[177] Voluntary program participants were not required to tag financial statement footnotes or schedules related to the financial statements except that registered management investment company participants were required to tag one specified schedule. Similarly, voluntary program participants were not required to post on their corporate Web sites, if any, the interactive data information they submitted. Consequently, the costs of requirements to tag financial statement footnotes and schedules related to financial statements and post interactive data information are not derived from the voluntary program participant questionnaire responses or discussed in our analysis of those responses. Those costs are, instead, derived from informal discussions with a limited number of persons believed to be generally knowledgeable about preparing, submitting and posting interactive data.

[178] For example, the related list of tags would differ between the voluntary and proposed required program. When we adopted the voluntary program, the list of tags for U.S. GAAP financial statement reporting contained approximately 4,000 data elements. The list of tags released on April 28, 2008 contains approximately 13,000 data elements, with the most significant additions relating to the development of elements for standard U.S. GAAP footnote disclosure.

[179] As such, caution should be used when referring to a particular estimate without also acknowledging the potential effect of these factors on future compliance costs.

compliance regarding face financial statements based on voluntary program participant questionnaire responses and the specified assumptions.[180]

- Average cost of first submission from voluntary program questionnaire data is $30,933.
- Average cost of second submission is $9,060 (69% average reduction).
- These average cost estimates increase by 20% after removing voluntary program participants in an interactive data-related business (these participants may have skills and incentives specific to interactive data, unrepresentative of other issuers).
- Due to sampling error,[181] there is a 1% chance that the true costs are underestimated by up to 80%. Assuming this 1% likelihood and after removing participants in an interactive data-related business, estimated cost of first submission is $71,125.
- Smaller financial issuers appear to have less complex financials and labor costs that tend to be 20-30% lower than for other issuers to submit interactive data information.
- There also is some evidence to suggest that the smallest (non-accelerated) issuers might have submission costs or compliance difficulties in excess of other issuers.

This analysis attempts to quantify some of the direct costs that issuers will incur if we require submission and posting of interactive data.[182] Whether issuers choose to purchase and learn how to use software packages designed for interactive data submissions or outsource this task to a third party, internal (labor) resources would be required to complete the task. The cost

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[180] The details of this analysis regarding face financial statements, including the underlying assumptions, concerns on extrapolating these results to a broader set of issuers, and other considerations related to both the costs and benefits of requiring submission of interactive data are provided following the summary.

[181] In general, sampling error is the error that arises as a function of sampling in general and the sample chosen in particular.

[182] Because we are not proposing to require any kind of attestation or audit of interactive data in the rulemaking, the costs from attestation or auditing are not discussed in this analysis.

estimates provided here using voluntary program participant questionnaire responses shed light on the potential dollar magnitude of the costs of requiring interactive data submission other than with regard to tagging schedules and footnotes to financials statements. However, the small size of the participant response and the voluntary nature of participation suggest that the numbers may not reflect the costs that all issuers would incur in a required participation regime.

At present, there are 76 issuers that have participated in the voluntary program. Of these, 35 were provided questionnaires on the details of their cost experience, and 22 responses were collected by the time of this analysis. Table 2 summarizes the average aggregate costs, including software and filing agent service costs and an estimated cost for the internal labor hours required to prepare and submit the interactive data format information. The low and high estimates of the cost for internal labor hours represent billing rates of $130 (internal junior accountant) and $250 (external accountant) per hour respectively.[183] The reported costs are calculated using responses from all voluntary program participants that provided complete responses (20), and are also calculated using only those voluntary program complete responses (15) from participants without an interactive data-related business activity. We also report the estimated bias in the reported cost when interactive data- related businesses are included, calculated as the percent difference between all participants and only those participants with no interactive data-related business activity.

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[183] These estimates are from the Securities Industry and Financial Markets Association's Management & Professional Earnings in the Securities Industry 2007, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

Table 2. Summary of illustrative survey data on the direct cost estimates for voluntary program and confidence intervals (CIs) for voluntary program participants

	All voluntary program participants (N=20)		No interactive data-related business (N=15)		Estimated bias	
	Low	High	Low	High	Low	High
First submission						
Estimated costs	$17,980	$30,933	$21,424	$37,509	19.2%	21.3%
Upper bound using 5% CI	$29,682	$49,749	$36,550	$61,771	23.1%	23.1%
Upper bound using 1% CI	$34,065	$56,635	$42,555	$71,125	37.7%	25.6%
Subsequent submissions						
Estimated costs	$7,408	$9,060	$8,382	$10,452	13.1%	15.4%
Upper bound using 5% CI	$12,691	$15,357	$15,209	$18,494	19.8%	20.4%
Upper bound using 1% CI	$14,687	$17,753	$17,938	$21,737	22.1%	22.4%
Average reduction in cost						
From 1st to 2nd submission	69%		71%			

Although there is a great deal of consistency across the voluntary program questionnaire responses, three considerations become important when extending these questionnaire-based cost estimates from the voluntary program sample to the population of all issuers that would be required to submit interactive data. First, the sample size is small. There are only 22 voluntary program respondents to the questionnaire, representing approximately 0.21% of all issuers that ultimately would be required to submit interactive data.[184] The small sample size reduces the reliability of the cost estimates as a predictor of future costs, a result of sampling error.[185]

[184] This is based on 10,692 domestic and foreign issuers that filed an annual report in 2006. Under our proposed rules, not all foreign private issuers would be required to submit interactive data; only those foreign private issuers that prepare their financial statements in accordance with U.S. GAAP or IFRS as issued by the IASB would be required to submit interactive data. Foreign private issuers that report in accordance with other structures and reconcile to U.S. GAAP would not be required to submit interactive data.

[185] For example, a 1% confidence interval (reported above) measures 80% of the reported mean, such that if a different set of randomly drawn respondents were surveyed about their interactive data cost experience, there is a 1% chance that this new group would have more than an 80% increase in costs from what is estimated in this analysis. As a result, for example, if a different group of randomly drawn voluntary program participants had responded to the questionnaire with their cost experience , there is a 1% chance that the new group would have more than an 80% increase in the lowest cost for the first submission above $34,065.

The second and third factors to consider arise from the fact that the survey respondents may not be representative of the general population of issuers that would comply with a proposed rule. This is known as "sample selection bias." The first of these factors arises from evidence that many voluntary program survey participants have a business interest in interactive data, such as filing agents, other filing service providers, financial services providers , and other consulting agents. Five of the 22 survey respondents had such an affiliation. These issuers may have incentives and skill sets unrepresentative of the average issuer, and as such, may cause their costs to depart from the likely submission cost of the average issuer if interactive data become required. Indeed, after removing the five respondents with an obvious interactive data related business interest, the average cost estimate increased by 20%. Thus, submission costs appear to be lower for issuers that have an interactive data-related business relative to other issuers.

The other effect of sample selection relates to the size of the respondent companies. The voluntary program questionnaire evidence is based on responses of predominantly large issuers, and their cost experience may not be representative of the smaller issuers. As is evident from Figure 1, voluntary program participants are found among the largest of all issuers, with more than 64% in the largest market size decile, and more than 88% considered to be large accelerated filers (measured as greater than $750 million in market capitalization).[186] In contrast, only 1,846 of 10,692 filers (17.4% of all filers) were considered large accelerated filers in 2006.

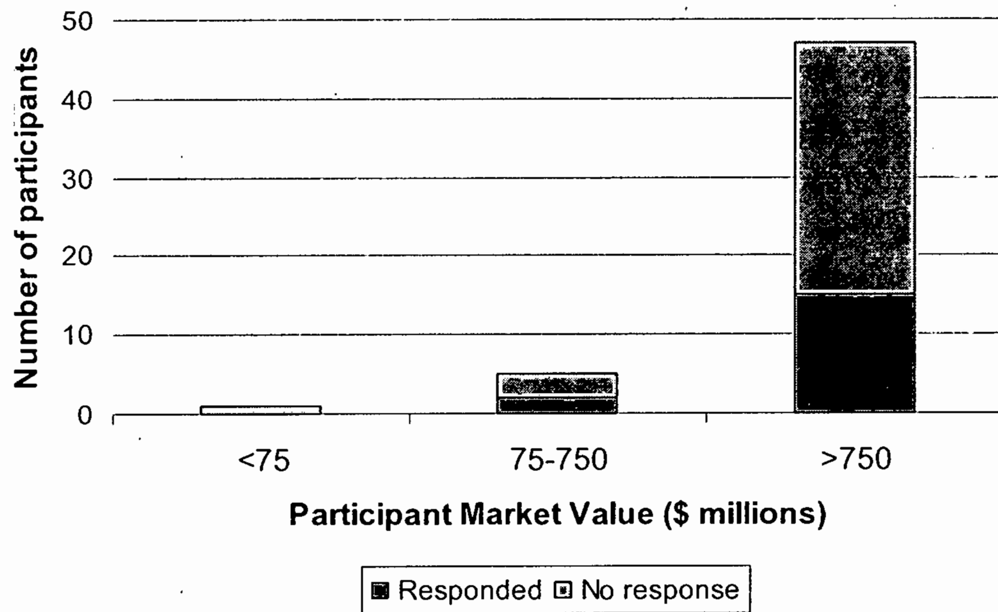
A size bias is plausible, since there are reasons to believe that the reported submission costs vary with the size of the issuer. For instance, larger issuers might have lower interactive

[186] "Large accelerated filers," among other things, have shares held by unaffiliated persons with a value of at least $700 million. Our analysis instead uses as a threshold $750 million in the value of shares held by all persons (market capitalization) as an approximation of the value of shares held by non-affiliates. The use of market capitalization may overestimate the number of large accelerated filers.

data submission costs than smaller issuers, since they have a larger pool of internal resources to draw from, allowing them to more efficiently allocate available skill sets from their labor pools to implement interactive data reporting technology. Moreover, larger organizations might have greater excess capacity in their internal labor pool such that they are better able to absorb the short-term labor needs of "learning" interactive data. If so, the effect of sample selection in this instance may be to underreport the interactive data submission costs for smaller issuers.

Alternatively, smaller issuers could have lower submission costs than larger issuers if their operations are less complex. This reasoning suggests that simpler business operations lead to simpler financial statements, requiring less effort to tag and submit using interactive data. Hence, any reduction in available resources to allocate to interactive data submission may be offset by lesser demand for resources. This view suggests a trade-off in submission costs as issuers become smaller, and as a typical result, less complex.

Figure 1. All Voluntary Filer Program participants by whether they reponded to the questionnaire



1. Survey Results From the Japanese Interactive Data Pilot Program

We have also reviewed evidence from the Japanese interactive data pilot program. Starting in April 2008, Japanese filers are required to report financial statements with their Financial Services Agency (JFSA) using interactive data technology. Before this requirement, 1,233 Japanese companies participated in a pilot program; 768 participants described their interactive data submission experience through a JFSA survey. Unlike the U.S. voluntary program participants, Japanese pilot program participants span a larger issuer size range, including a considerable number of the smallest issuers in the market (see Figure 3).

The survey evidence suggests that smaller Japanese filers required less time to prepare and submit their first interactive data filing than larger Japanese filers, but even so, some of the smallest filers exhibited the greatest compliance difficulty.[187] Figure 2 plots the average number of labor hours required for a Japanese filer to successfully prepare and submit its first interactive data filing, disaggregated by approximate filer size measured by the book value of their capital.[188] The number of labor hours required is approximately 30% higher for the largest filers relative to the smaller, but not smallest, filers. However, the size–labor hour relation is not perfectly linear. The smallest size group deviates from the trend, with the average number of labor hours required being similar to that of larger filers.

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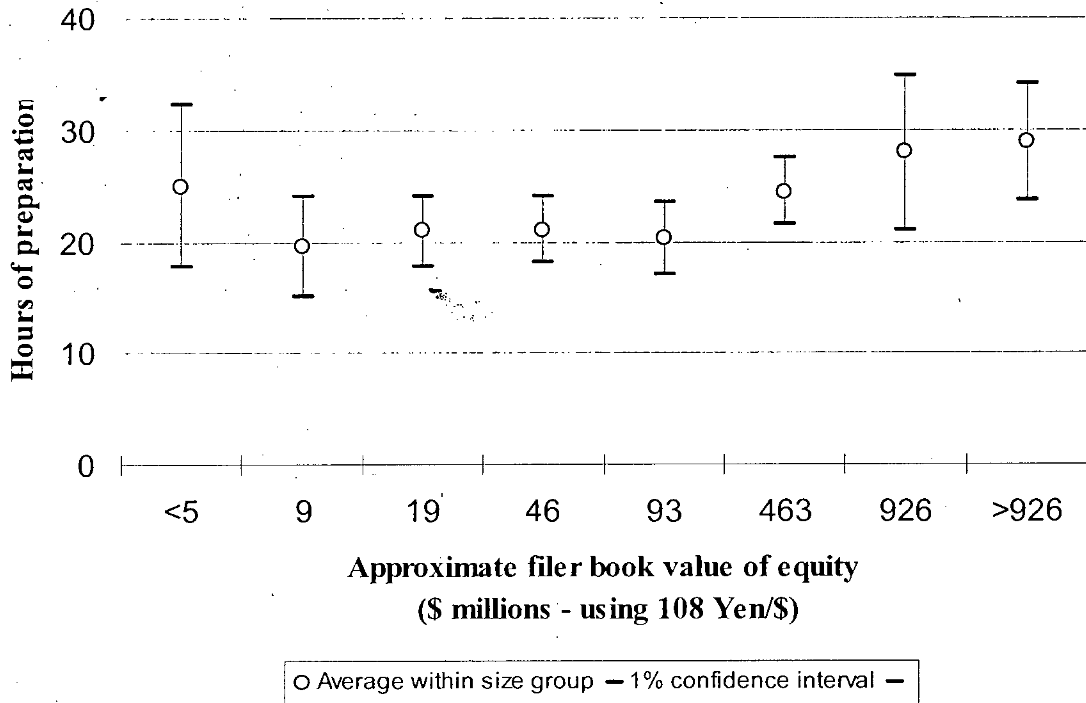
[187] Japanese filers did not tag financial statement footnotes.

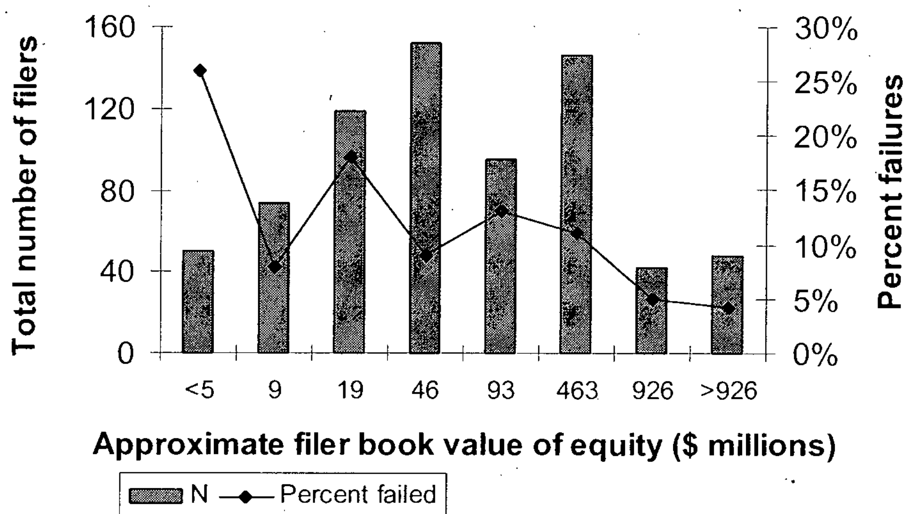
[188] Data provided by the JFSA reported firm sizes according to their book value of equity, in Yen. These values were converted into dollars at a rate of 108 Yen to the dollar. Although the Commission generally measures issuer size based on the market value of outstanding securities, market value is highly correlated to book value of equity. As a result, the use of book value of equity in Figures 2 and 3 should not impact the relevance of inferences drawn from those Figures.

Figure 2. Average number of hours a Japanese filer spent on its first interactive data submission



While the number of labor hours required for the smallest filers is not greater than that of the largest filers, the smaller filers were far more likely to file late, or "fail" (Figure 3). The JFSA classified firms as "failures" for having not completed their first filing in the time required (i.e., before the filing deadline). This smallest filer size group has a failure rate of nearly 25% compared to less than 5% for the largest filer size group.

Figure 3. Percent of Japanese filers that failed to complete their first interactive data filing in a timely manner



The JFSA indicated that most of the "failures" occurred among filers who underestimated the resources required for their first filing, with many of the failing firms (44%) electing to prepare and submit their documents on their own. In contrast, it is estimated that 87% of pilot program firms used a printing company to prepare and submit their documents. Of the Japanese pilot program participants that were classified as having failed to submit, 69% indicated that they would not have a problem for their next submission.

The results of the JFSA survey yield two relevant conclusions. First, smaller, but not the smallest, issuers are likely to have lower submission costs as a result of fewer labor hours required to submit information using interactive data. Second, these submission cost savings may not accrue to the smallest issuers (i.e., those with total equity held by non-affiliates with a market value below $75 million). Moreover, there is a risk that the smallest issuers might have difficulty in complying with a time-specific requirement if implemented too quickly. These findings add to

the evidence from the U.S. voluntary program questionnaire results given that they span a greater issuer size range.

2. U.S. Issuer Document Complexity Also Suggests Lower Costs for Smaller Issuers

Although the Japanese pilot program findings document an important size-related cost consideration, extrapolating these results to what might be expected in a U.S. interactive data required program poses some risk given the potential differences between Japanese and U.S. regulatory regimes and filing requirements. For instance, implementing required interactive data reporting in the United States may be more complex, as a greater number of accounting concepts can be tagged.[189] Indeed, voluntary program results demonstrate an average of 101 hours to complete the first filing, more than three times the time required for the Japanese pilot program participants.

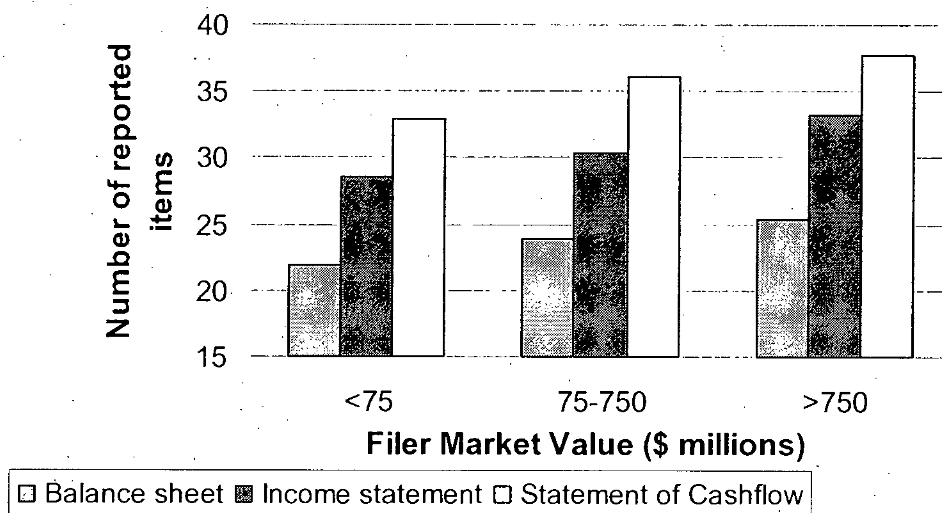
To assess the likelihood that the Japanese survey results can be applied to the proposed program under which interactive data would be required, Form 10-K complexity is examined across issuer size. If reduced complexity in financial reporting is responsible for the lower labor costs among smaller Japanese issuers, then evidence of reduced complexity among Commission issuers as their size decreases would suggest that lower labor costs among small U.S. issuers as well. This analysis uses the number of items reported in a filer's financial document as the measure of document complexity. The evidence in Figure 4 reveals that there is roughly a 15% difference in the number of elements reported by the smallest and largest filers.[190] In other

[189] The technical differences between the two systems are beyond the scope of this analysis.

[190] Edgar Online provided the number of reported items in each of the three main financial tables (balance sheet, income statement, and statement of cash flow) for all U.S. filers from 2001 and 2007, and this was matched to market data from CRSP (Center for Research in Security Prices) to be included in the analysis.

words, U.S. filer document complexity results are consistent with lower compliance costs for smaller firms (leaving aside the very smallest filers).

Figure 4. Average number of reported financial items for all 10-K filings with market data between 2001 - 2007



3. Scalability of Interactive Data-Related Support Services and Technology

The final cost consideration in this section is the scalability of interactive data-related support services and technology. In particular, it is unclear how the market for interactive data support services and technology may change if the Commission required over 10,000 issuers to submit and post interactive data.

The roles of each potential kind of service provider within the interactive data market are likely to develop further and are not yet clear, and there are many potential participants to consider, including the software vendors, financial reporting system providers (i.e., providers of widely used financial products), print/filing agents, auditors and other consultants, as well as the Commission. Until the market of issuers that submit interactive data information grows substantially larger (either by requirement or by expansion of the number of volunteers), it is

difficult to predict how standard solutions will evolve. For example, we do not know whether issuers will adopt solutions that create interactive data submissions using third party software, a so-called "bolt-on" approach, or will seek integrated solutions that enable issuers to prepare interactive data submissions from their existing financial services software. Moreover, filing agents may maintain their role as an intermediary by offering interactive data technology or other service providers may cause that role to change. Others with financial and technical expertise may participate in the technology with unpredictable results.

Combining the uncertainty over the source of future interactive data services with increased demand for these services could result in a new equilibrium market price that is different from what is currently reported by voluntary program participants. This price could be higher if the demand for interactive data services increases (from 76 voluntary program participants to more than 10,000 total participants) at a faster rate than the supply for these same services. For example, we are aware that one interactive data service provider offers a basic package to issuers that costs $15,000, and includes all software resources and training required (it suggests 40 hours is needed) for the issuer to submit its first quarterly interactive data information. This price schedule was based on an expectation of servicing as many as 100 voluntary participants in the first year of the program. However, the main pricing concern for the future is whether this or similar products could be scaled upwards to service a much larger market without material (adverse) impact to the stated price. More broadly, if an interactive data requirement resulted in clients subscribing for interactive data services faster than the rate at which these services can be supplied, then a price increase is the natural discriminator in how to allocate limited resources.

The submission costs discussed in this section suggest that a phase-in program that is implemented too quickly could result in higher than necessary submission costs if the supply of interactive data-related resources is constrained, but the effect would likely diminish as a market place for interactive data services develops. Hence, this concern is mitigated to the extent that issuers are phased in at a rate that allows interactive data service suppliers to keep pace with demand.

D. Comment Solicited

We solicit comment on all aspects of this cost-benefit analysis, including the identification of any additional costs or benefits or, suggested alternatives to, the proposed rules. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

We request comment regarding the costs and benefits to investors, companies, analysts, third party information providers, software providers, filing agents, and others who may be affected by the proposed rules. We are particularly interested in information on the costs and benefits to smaller reporting companies.

In particular, we request comment regarding

- the differences between start-up costs and the costs of providing interactive data on a continuing basis after the initial preparation;
- the cost to prepare interactive data in block-text and detail for footnotes and schedules to financial statements;
- differences in interactive data preparation costs due to differences between U.S. GAAP and IFRS as issued by the IASB and the list of tags related to each; and the cost of Web site posting.

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

Section 23(a)(2) of the Exchange Act[191] 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. Furthermore, Section 2(b)[192] of the Securities Act, Section 3(f)[193] of the Exchange Act, and Section 2(c)[194] of the Investment Company Act require 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.

The proposals to require issuers to submit interactive data to the Commission and post it on their corporate Web sites are intended to make financial information easier for investors to analyze while assisting in automating regulatory filings and business information processing. In particular, we believe that the proposed rules would enable investors and others to search and analyze the financial information dynamically; facilitate comparison of financial and business performance across issuers, reporting periods and industries; and, possibly, provide a significant opportunity to automate regulatory filings and business information processing with the potential to increase the speed, accuracy, and usability of financial disclosure. Further, as discussed in detail above, we believe that the proposals may lead to more efficient capital formation and

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[191] 15 U.S.C. 78w(a)(2).

[192] 15 U.S.C. 77b(b).

[193] 15 U.S.C. 78c(f).

[194] 15 U.S.C. 80a-2(c).

allocation.[195]

We understand that private sector businesses such as those that access financial information and aggregate, analyze, compare or convert it into interactive format have business models and, as a result, competitive strategies that the proposed interactive data requirements might affect. Since interactive data technology is designed to remove an informational barrier, business models within the financial services industry that are currently adapted to traditional format document reporting may change, with possible consequences for the revenue stream of current product offerings due to the competitive effects of such a change. The competitive effects may relate to changes in the accessibility of financial information to investors, the nature of the information that investors receive, and the potential from new entry or innovation in the markets through which financial reports are transmitted from filers to investors. For example, lower entry barriers that result from lower data collection costs may increase competition among suppliers of financial services products and help spur interactive data-related innovation. It is also possible, however, that a requirement to submit interactive data information could decrease the marginal benefit of collecting information and thus cause suppliers of financial services products to produce information that is less robust to the extent the decreased marginal benefit reduces third-party incentives to facilitate access to, collect or analyze information. If markets efficiently price the value of information, the amount of information accessed, collected (or enhanced) and analyzed will be determined by the marginal benefit of doing so.[196] Lowering information collection costs (through a requirement to submit interactive data information)

[195] See Part V.A.2.

[196] Also, we expect that because the proposed rules would require the use of the XBRL interactive data standard, XBRL's being an open standard would facilitate the development of related software, some of which may, as a result, be made available to the public for free or at a relatively low cost and provide the public alternative ways to view and analyze interactive data information provided under our proposed rules.

should increase this benefit. If this is so, then there should be no degradation in the level of information quality as a result of changes in third-party provider behavior under an interactive data reporting regime. However, if one competitor in the industry can subsidize its operations through an alternative revenue stream, both quality and competition may suffer.

For the reasons described more fully above, we believe the liability protections for interactive data would be necessary or appropriate in the public interest and consistent with the protection of investors. Moreover, the protections would also be consistent with the purposes fairly intended by the policy and provisions of the Investment Company Act.

We request comment on whether the proposals, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their views, if possible.

VII. 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 that would require issuers to provide their financial statements to the Commission and on their corporate Web sites in interactive data format.

A. Reasons for, and Objectives of, the Proposed Action

The main purpose of the proposed amendments is to make financial information easier for investors to analyze while assisting in automating regulatory filings and business information processing. Currently, issuers are required to file their registration statements, quarterly and annual reports, and transitional reports in a traditional format that provides static text-based information. We believe that providing the financial statements these filings contain in interactive data format would

- enable investors and others to search and analyze the information dynamically;
- facilitate comparison of financial and business performance across issuers, reporting periods and industries; and
- possibly provide a significant opportunity to automate regulatory filings and business information processing with the potential to increase the speed, accuracy, and usability of financial disclosure.

B. Legal Basis

We are proposing the amendments under Sections 7, 10, 19(a) and 28 of the Securities Act,[197] Sections 3, 12, 13, 14, 15(d), 23(a), 35A and 36 of the Exchange Act,[198] Sections 314 and 319 of the Trust Indenture Act[199] and Sections 6(c), 8, 24, 30 and 38 of the Investment Company Act[200] and Section 3(a) of the Sarbanes-Oxley Act.[201]

C. Small Entities Subject to the Proposed Rules

The proposed amendments would affect issuers that are small entities. Exchange Act Rule 0-10(a) [202] defines an issuer, other than an investment company, to be a "small business" or "small organization" 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.[203] We estimate that there are

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[197] 15 U.S.C. 77g, 77j, 77s(a) and 77z-3.

[198] 15 U.S.C. 78c, 78l, 78m, 78n, 78o(d), 78w(a), 78ll and 78mm.

[199] 15 U.S.C. 77nnn and 77sss.

[200] 15 U.S.C. 80a-6(c), 80a-8,80a-24, 80a-29 and 80a-37.

[201] [P.L. No. 107-204, 116 Stat. 745.]

[202] 17 CFR 240.0-10(a).

[203] Securities Act Rule 157(a) [17 CFR 230.157(a)] generally defines an issuer, other than an investment company, to be a "small business" or "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 and it is conducting or proposing to conduct a securities offering of $5 million or less. For purposes of our analysis of issuers other than investment companies in this Part

approximately 1100 issuers that file reports under the Exchange Act and may be considered small entities.[204] All of these issuers would become subject to the proposed rules in year three of the phase-in.

D. Reporting, Recordkeeping and Other Compliance Requirements

All issuers subject to the proposed rules would be required to submit financial information to the Commission in interactive data format and, if they have a corporate Web site, post the interactive data on their Web site. We believe that, in order to submit financial information in interactive data format, issuers in general and small entities in particular likely would need to prepare and then submit the interactive data by expending internal labor hours in connection with either or both of

- purchasing, learning and using software packages designed to prepare financial information in interactive format; and
- hiring and working with a consultant or filing agent.[205]

We believe that issuers would incur relatively little cost in connection with the requirement to post the interactive data on the issuer's corporate Web site because the requirement applies only to issuers that already have a corporate Web site.[206]

VII of the release, however, we use the Exchange Act definition of "small business" or "small entity" because that definition includes more issuers than does the Securities Act definition and, as a result, assures that the definition we use would not itself lead to an understatement of the impact of the amendments on small entities.

[204] The estimated number of small entities that report under the Exchange Act is based on 2007 data including the Commission's internal computerized filing system and Thompson Financial's Worldscope database.

[205] Some issuers such as those that have participated in the voluntary program may already prepare financial information in interactive data format or already have the expertise and software to prepare financial information in interactive data format. Those issuers would incur fewer costs as a result of the proposed requirements. Based on our experience with the voluntary program, however, we believe that it would be unlikely that those issuers would include many small entities.

[206] The internal labor and external costs required to comply with the proposed rules are discussed more fully in Parts IV and V above.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that the proposed amendments would not duplicate, or overlap or conflict with, other federal rules.

F. Agency Action to Minimize the Effect on Small Entities

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 proposed amendments, we considered several alternatives, including the following:

- establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- further clarifying, consolidating or simplifying the proposed requirements;
- using performance rather than design standards; and
- providing an exemption from the proposed requirements, or any part of them, for small entities.

We believe that, as to small entities, differing compliance, reporting or non-phase-in timetable requirements, a partial or complete exemption from the proposed requirements or the use of performance rather than design standards would be inappropriate because these approaches would detract from the long-term completeness and uniformity of the interactive data format financial information database. Less long-term completeness and uniformity would reduce the extent to which the proposed requirements would enable investors and others to search and analyze the information dynamically; facilitate comparison of financial and business performance across issuers, reporting periods and industries; and, possibly, provide a significant opportunity to automate regulatory filings and business information processing with the potential

to increase the speed, accuracy, and usability of financial disclosure. We note, however, that small entities would not be subject to the proposed requirements until year three of the phase-in and, as all other issuers, would not be required to tag in detail the footnotes and schedules to their financial statements until their second year subject to the requirements.[207] We solicit comment, however, on whether differing compliance, reporting or timetable requirements, a partial or complete exemption, or the use of performance rather than design standards would be consistent with our described main goal of making financial information easier for investors to analyze while assisting in automating regulatory filings and business information processing.

We are considering whether further clarifying, consolidating or simplifying the proposed interactive data submission and posting requirements would be appropriate. Based in part on our experience with the voluntary program, we believe that the proposed requirements are sufficiently clear and straightforward (although, we seek comment on this).

G. 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.

[207] In this regard, in Part II.B.2 of this release we note that the additional time phase-in time for companies not required to submit interactive data in year one of the phase-in period is intended to permit them to plan for and implement the interactive data reporting process after having the opportunity to learn from the experience of year one filers. We also there solicit comment on the appropriate phase-in schedule for smaller reporting companies (which would include small entities) and note that the additional phase-in time also is intended to enable us to monitor implementation and, if necessary, make appropriate adjustments to the phase-in period.

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.

VIII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the 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 proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- 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.

IX. STATUTORY AUTHORITY AND TEXT OF PROPOSED AMENDMENTS

We are proposing the amendments outlined above under Sections 7, 10, 19(a) and 28 of the Securities Act,[208] Sections 3, 12, 13, 14, 15(d), 23(a), 35A, and 36 of the Exchange Act,[209] Sections 314 and 319 of the Trust Indenture Act[210] and Sections 6(c), 8, 24, 30, and 38 of the

[208] 15 U.S.C. 77g, 77j, 77s(a) and 77z-3.

[209] 15 U.S.C. 78c, 78l, 78m, 78n, 78o(d), 78w(a), 78ll, and 78mm.

[210] 15 U.S.C. 77nnn and 77sss.

Investment Company Act[211] and Section 3(a) of the Sarbanes-Oxley Act.[212]

List of Subjects

17 CFR Parts 229, 230, 232, 239, 240 and 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, we propose to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

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

1. 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.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 229.601 by revising the exhibit table and paragraph (b)(100) and adding paragraph (b)(101) to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

Exhibit Table

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211 15 U.S.C. 80a-6(c), 80a-8, 80a-24, 80a-29, and 80a-37.

212 [P.L. No. 107-204, 116 Stat. 745.]

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	---	---	---
[illegible] Opinion re tax matters	X	X	X	---	X	X	X	X	---	---	---	---	---
[illegible]oting 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	---
[illegible] Other documents or statements to [illegible]ity 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
(101) Interactive Data File	X	X	X	---	X	X	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) * * *

(100) XBRL-Related Documents. Only an electronic filer that prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program and, as a result, may submit XBRL-Related Documents (§232.11 of this chapter) in electronic format as an exhibit to: the filing to which they relate; an amendment to such filing; or a Form 8-K (§249.308 of this chapter) that references such filing, if the Form 8-K is submitted no earlier than the date of filing. Rule 401 of Regulation S-T (§232.401 of this chapter) sets forth further details regarding eligibility to participate in the voluntary XBRL program.

(101) Interactive Data File. An Interactive Data File (§232.11 of this chapter) is:

(i) Required to be Submitted and Posted. Required to be submitted to the Commission and posted on the registrant's corporate Web site, if any, in the manner provided by Rule 405 of Regulation S-T (§232.405 of this chapter) if the registrant does not prepare its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.) and is:

(A) A large accelerated filer (§240.12b-2 of this chapter) that had an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of more than $5 billion as of the last business day of its most recently completed second fiscal quarter that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2008;

(B) A large accelerated filer not specified in paragraph (b)(101)(i)(A) of this Item that prepares its financial statements in accordance with generally accepted accounting principles as

used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2009;

(C) A filer not specified in paragraph (b)(101)(i)(A) or (B) of this Item that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2010; or

(D) A foreign private issuer (§240.3b-4(c) of this chapter) that prepares its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2010.

(ii) Permitted to be Submitted. Permitted to be submitted to the Commission in the manner provided by Rule 405 of Regulation S-T (§232.405 of this chapter) if the registrant:

(A) Prepares its financial statements

(1) In accordance with either

(a) Generally accepted accounting principles as used in the United States; or

(b) International Financial Reporting Standards as issued by the International Accounting Standards Board; and

(2) Not in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.) and

(B) Is not required to be submitted to the Commission under paragraph (b)(101)(i) of this Item.

(iii) Not Permitted to be Submitted. Not permitted to be submitted to the Commission if the registrant prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.).

PART 230 -- GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

3. 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.

* * * * *

4. Amend § 230.144 by revising paragraph (c)(1) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(c) * * *

(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, has filed all required reports under section 13 or 15(d) of the Exchange Act, as applicable, and has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File (§232.11 of this chapter) required to be submitted and posted under either Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter), 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

* * * * *

PART 232 — REGULATION S-T — GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

5. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

6. Amend §232.11 by adding the following definitions in alphabetical order.

§ 232.11 Definition of terms used in part 232.

Interactive Data File. The term Interactive Data File means the machine-readable computer code that presents information in eXtensible Business Reporting Language in electronic format in accordance with §232.405.

Interactive Data in Viewable Form. The term Interactive Data in Viewable Form means the financial statements, financial statement schedules and financial statement footnotes that

(a) Are displayed when an Interactive Data File is converted from machine-readable computer code into human-readable text through software the Commission provides; and

(b) Are displayed through such conversion identically in all material respects to the corresponding financial statements, financial statement schedules and financial statement footnotes in the Related Official Filing.

Related Official Filing. The term Related Official Filing means the ASCII or HTML format part of the official filing with which an Interactive Data File appears as an exhibit.

* * * * *

7. Amend § 232.201 by:

a. Revising paragraph (a);

b. Revising the headings to Notes 1 and 2;

c. Adding paragraph (c); and

d. Adding a Note to paragraph (c).

The revisions and additions read as follows:

§ 232.201 Temporary hardship exemption.

(a) If an electronic filer experiences unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing, other than a Form 3 (§ 249.103 of this chapter), a Form 4 (§ 249.104 of this chapter), a Form 5 (§ 249.105 of this chapter), a Form ID (§§ 239.63, 249.446, 269.7 and 274.402 of this chapter), a Form TA-1 (§ 249.100 of this chapter), a Form TA-2 (§ 249.102 of this chapter), a Form TA-W (§ 249.101 of this chapter), a Form D (§ 239.500 of this chapter) or an Interactive Data File (§232.11 of this chapter), the electronic filer may file the subject filing, under cover of Form TH (§§ 239.65, 249.447, 269.10 and 274.404 of this chapter), in paper format no later than one business day after the date on which the filing was to be made.

* * * * *

(b) * * *

Note 1 to paragraph (b): * * *

Note 2 to paragraph (b): * * *

(c) If an electronic filer experiences unanticipated technical difficulties preventing the timely preparation and

(1) Submission of an Interactive Data File (§232.11) as an exhibit as required by either Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter), the electronic filer still can timely satisfy the requirement to submit the Interactive Data File in the following manner:

(i) Substitute for the Interactive Data File in the required exhibit a document that sets forth the following legend:

IN ACCORDANCE WITH THE TEMPORARY HARDSHIP EXEMPTION PROVIDED BY RULE 201 OF REGULATION S-T, THE DATE BY WHICH THE INTERACTIVE DATA FILE IS REQUIRED TO BE SUBMITTED HAS BEEN EXTENDED BY SIX BUSINESS DAYS; and

(ii) Submit the required Interactive Data File no later than six business days after the Interactive Data File originally was required to be submitted.

(2) Posting on its corporate web site of an Interactive Data File as required by either Item 601(b)(101) of Regulation S-K or Item 101 of the Instructions as to Exhibits of Form 20-F, the electronic filer still can timely satisfy the requirement to post the Interactive Data File by so posting the Interactive Data File within six business days after the Interactive Data File was required to be submitted to the Commission.

Note to paragraph (c): Electronic filers unable to submit or post, as applicable, the Interactive Data File under the circumstances specified by paragraph (c), must comply with the provisions of this section and cannot use Form 12b-25 (§249.322 of this chapter) as a notification of late filing. Failure to submit or post, as applicable, the Interactive Data File as required by the end of the six-business-day period specified by paragraph (c) of this section will result in ineligibility to use Forms S-3, S-8 and F-3 (§§239.13, 239.16b and 239.33 of this chapter) and constitute a failure to have filed all required reports for purposes of the current public information requirements of Rule 144(c)(1) (§230.144(c)(1) of this chapter).

8. Amend § 232.202 by:

a. Revising paragraphs (a), (a)(2), (b)(2), and (b)(3);

b. Revising paragraph (c) and adding paragraphs (c)(1), (c)(2), and (c)(3);

c. Revising paragraph (d) and adding paragraphs (d)(1) and (d)(2);

d. Revising the headings to Notes 1, 2, and 3; and

e. Adding Note 4.

The revisions and additions read as follows:

§ 232.202 Continuing hardship exemption.

(a) An electronic filer may apply in writing for a continuing hardship exemption if all or part of a filing, group of filings or submission, other than a Form ID (§§ 239.63, 249.446, 269.7, and 274.402 of this chapter) or a Form D (§ 239.500 of this chapter), otherwise to be filed or submitted in electronic format or, in the case of an Interactive Data File (§232.11), to be posted on the electronic filer's corporate web site, cannot be so filed, submitted or posted, as applicable, without undue burden or expense. Such written application shall be made at least ten business days before the required due date of the filing(s), submission(s) or posting of the proposed filing, submission or posting date, as appropriate, or within such shorter period as may be permitted. The written application shall contain the information set forth in paragraph (b) of this section.

(1) * * *

(2) If the Commission, or the staff acting pursuant to delegated authority, denies the application for a continuing hardship exemption, the electronic filer shall file or submit the required document or Interactive Data File in electronic format or post the Interactive Data File on its corporate web site, as applicable, on the required due date or the proposed filing or submission date, or such other date as may be permitted.

* * * * *

(b) * * *

(1) * * *

(2) The burden and expense to employ alternative means to make the electronic submission or posting, as applicable;

(3) The reasons for not submitting electronically the document, group of documents or Interactive Data File or not posting the Interactive Data File, as well as the justification for the requested time period.

(c) If the request is granted with respect to:

(1) Electronic filing of a document or group of documents, not electronic submission or posting of an Interactive Data File, then the electronic filer shall submit the document or group of documents for which the continuing hardship exemption is granted in paper format on the required due date specified in the applicable form, rule or regulation, or the proposed filing date, as appropriate and the following legend shall be placed in capital letters at the top of the cover page of the paper format document(s):

IN ACCORDANCE WITH RULE 202 OF REGULATION S-T, THIS (specify document) IS BEING FILED IN PAPER PURSUANT TO A CONTINUING HARDSHIP EXEMPTION.

(2) Electronic submission of an Interactive Data File, then the electronic filer shall substitute for the Interactive Data File in the exhibit in which it was required a document that sets forth one of the following legends, as appropriate:

IN ACCORDANCE WITH A CONTINUING HARDSHIP EXEMPTION OBTAINED UNDER RULE 202 OF REGULATION S-T, THE DATE BY WHICH THE INTERACTIVE DATA FILE IS REQUIRED TO BE SUBMITTED HAS BEEN EXTENDED TO (specify date); or

IN ACCORDANCE WITH A CONTINUING HARDSHIP EXEMPTION OBTAINED UNDER RULE 202 OF REGULATION S-T, THE INTERACTIVE DATA FILE IS NOT REQUIRED TO BE SUBMITTED.

(3) Web site posting by an electronic filer of its Interactive Data File, the electronic filer need not post on its web site any statement with regard to the grant of the request.

(d) If a continuing hardship exemption is granted for a limited period of time for:

(1) Electronic filing of a document or group of documents, not electronic submission or posting of an Interactive Data File, then the grant may be conditioned upon the filing of the document or group of documents that is the subject of the exemption in electronic format upon the expiration of the period for which the exemption is granted. The electronic format version shall contain the following statement in capital letters at the top of the first page of the document: THIS DOCUMENT IS A COPY OF THE (specify document) FILED ON (DATE) PURSUANT TO A RULE 202(d) CONTINUING HARDSHIP EXEMPTION.

(2) Electronic submission or posting of an Interactive Data File, then the grant may be conditioned upon the electronic submission and posting, as applicable, of the Interactive Data File that is the subject of the exemption upon the expiration of the period for which the exemption is granted.

Note 1 to §232.202: * * *

Note 2 to §232.202: * * *

Note 3 to §232.202: * * *

Note 4 to §232.202: Failure to submit or post, as applicable, the Interactive Data File as required by Rule 405 by the end of the continuing hardship exemption if granted for a limited period of time, will result in ineligibility to use Forms S-3, S-8, and F-3 (§§239.13, 239.16b and 239.33 of

this chapter) and constitute a failure to have filed all required reports for purposes of the current public information requirements of Rule 144(c)(1) (§230.144(c)(1) of this chapter).

9. Amend §232.305 by revising paragraph (b) to read as follows:

§ 232.305 Number of characters per line; tabular and columnar information.

* * * * *

(b) Paragraph (a) of this section does not apply to HTML documents, Interactive Data Files (§232.11) or XBRL-Related Documents (§232.11).

10. Amend §232.401 by revising paragraph (a) to add a new first sentence to read as follows:

§ 232.401 XBRL-Related Document submissions.

(a) Only an electronic filer that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et. seq.), a "business development company" as defined in Section 2(a)(48) of that Act, or an entity that reports under the Exchange Act and prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program. * * *

* * * * *

11. Amend §232.402 by removing the phrase "Public Utility Act," from the first sentence of paragraph (b).

12. Reserve §232.403 and §232.404 and add §232.405 and §232.406 to read as follows:

§ 232.403 [Reserved].

§ 232.404 [Reserved].

§ 232.405 Interactive Data File submissions and postings.

Preliminary Notes

1. Sections 405 and 406 of Regulation S-T (§§232.405 and 232.406) apply to electronic filers that submit or post Interactive Data Files. Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) and Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter) specify when electronic filers are required or permitted to submit or post an Interactive Data File (§232.11), as further described below in the Note to Section 405.

2. Section 405 imposes content, format, submission and web site posting requirements for an Interactive Data File, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Filing (§232.11).

3. Section 406 addresses liability related to Interactive Data Files.

(a) Content, Format, Submission and Posting Requirements – General. An Interactive Data File must:

(1) Comply with the content, format, submission and web site posting requirements of this section;

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter), as applicable, as an exhibit to a form that contains the disclosure required by this section;

(3) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, either Item 601(b)(101) of Regulation S-K or Item 101 of the Instructions as to Exhibits of Form 20-F; and

(4) Be posted on the electronic filer's corporate web site, if any, in accordance with, as

applicable, either Item 601(b)(101) of Regulation S-K or Item 101 of the Instructions as to Exhibits of Form 20-F.

(b) Content - Categories of Information Presented. An Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from all of the following categories:

(1) The complete set of the electronic filer's financial statements (which includes the face of the financial statements and all footnotes); and

(2) All schedules set forth in Article 12 of Regulation S-X (§§210.12-01-210.12-29) related to the electronic filer's financial statements.

Note to paragraph (b): It is not permissible for the Interactive Data File to present only partial face financial statements, such as by excluding comparative financial information for prior periods.

(c) Format – Generally. An Interactive Data File must comply with the following requirements, except as modified by paragraph (d) or (e) of this section, as applicable, with respect to the corresponding data in the Related Official Filing consisting of footnotes to financial statements or financial statement schedules as set forth in Article 12 of Regulation S-X:

(1) Data Elements and Labels.

(i) Element Accuracy. Each data element (i.e., all text, line item names, monetary values, percentages, numbers, dates and other labels) contained in the Interactive Data File reflects the same information in the corresponding data in the Related Official Filing;

(ii) Element Specificity. No data element contained in the corresponding data in the Related Official Filing is changed, deleted or summarized in the Interactive Data File;

(iii) Standard and Special Labels and Elements. Each data element contained in the Interactive Data File is matched with an appropriate tag from the most recent version of the standard list of tags specified by the EDGAR Filer Manual. A tag is appropriate only when its standard definition, standard label and other attributes as and to the extent identified in the list of tags match the information to be tagged, except that:

(A) Labels. An electronic filer must create and use a new special label to modify a tag's existing standard label when that tag is an appropriate tag in all other respects (i.e., in order to use a tag from the standard list of tags only its label needs to be changed); and

(B) Elements. An electronic filer must create and use a new special element if and only if an appropriate tag does not exist in the standard list of tags for reasons other than or in addition to an inappropriate standard label; and

(2) Additional Mark-up Related Content. The Interactive Data File contains any additional mark-up related content (e.g., the eXtensible Business Reporting Language tags themselves, identification of the core XML documents used and other technology related content) not found in the corresponding data in the Related Official Filing that is necessary to comply with the EDGAR Filer Manual requirements.

(d) Format – Footnotes - Generally. The part of the Interactive Data File for which the corresponding data in the Related Official Filing consists of footnotes to financial statements must comply with the requirements of paragraphs (c)(1) and (c)(2) of this section, as modified by this paragraph (d), unless the electronic filer is within one of the categories specified in paragraph (f) of this section. Footnotes to financial statements must be tagged as follows:

(1) Each complete footnote must be block-text tagged;

(2) Each significant accounting policy within the significant accounting policies footnote must be block-text tagged;

(3) Each table within each footnote must be block-text tagged; and

(4) Within each footnote, each amount (i.e., monetary value, percentage, and number) must be tagged separately and each narrative disclosure required to be disclosed by generally accepted accounting principles as used in the United States, (or International Financial Reporting Standards as issued by the International Accounting Standards Board, if applicable) and Commission regulations must be tagged separately.

(e) Format – Schedules - Generally. The part of the Interactive Data File for which the corresponding data in the Related Official Filing consists of financial statement schedules as set forth in Article 12 of Regulation S-X must comply with the requirements of paragraphs (c)(1) and (c)(2) of this section, as modified by this paragraph (e), unless the electronic filer is within one of the categories specified in paragraph (f) of this section. Financial statement schedules as set forth in Article 12 of Regulation S-X must be tagged as follows:

(1) Each complete financial statement schedule must be block-text tagged; and

(2) Within each financial statement schedule, each amount (i.e., monetary value, percentage and number) must be tagged separately and each narrative disclosure required by Commission regulations must be tagged separately.

(f) Format – Footnotes and Schedules Eligible for Phased-In Detail. The following electronic filers must comply with paragraphs (c)(1) and (c)(2) of this section as modified by paragraphs (d) and (e) of this section, except that they may choose to comply with paragraph (d)(1) rather than paragraphs (d)(1) through (d)(4) and may choose to comply with paragraph (e)(1) rather than paragraphs (e)(1) and (e)(2):

(1) Any large accelerated filer (§240.12b-2 of this chapter) that had an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of more than $5 billion as of the last business day of its most recently completed second fiscal quarter that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States, if none of the financial statements for which an Interactive Data File is required is for a period that ends on or after December 15, 2009;

(2) Any large accelerated filer not specified in paragraph (f)(1) that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States, if none of the financial statements for which an Interactive Data File is required is for a period that ends on or after December 15, 2010;

(3) Any filer not specified in paragraph (f)(1) or (2) that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States, if none of the financial statements for which an Interactive Data File is required is for a period that ends on or after December 15, 2011; and

(4) Any foreign private issuer (§240.3b-4(c) of this chapter) that prepares its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, if none of the financial statements for which an Interactive Data File is required is for a period that ends on or after December 15, 2011.

(g) Posting. Any electronic filer that maintains a corporate web site and is required to submit an Interactive Data File must post that Interactive Data File on that web site by the end of the business day on the earlier of the date the Interactive Data File is submitted or is required to be submitted.

Note to §232.405: Item 601(b)(101) of Regulation S-K specifies the circumstances

under which an Interactive Data File must be submitted as an exhibit and be posted to the issuer's corporate web site, if any, and the circumstances under which it is permitted to be submitted as an exhibit, with respect to Forms S-1 (§239.11 of this chapter), S-3 (§239.13 of this chapter), S-4 (§239.25 of this chapter), S-11 (§239.18 of this chapter), F-1 (§239.31 of this chapter), F-3 (§239.33 of this chapter), F-4 (§239.34 of this chapter), 10-K (§249.310 of this chapter) and 10-Q (§249.308a of this chapter). Similarly, Item 101 of the Instructions as to Exhibits of Form 20-F specifies the circumstances under which an Interactive Data File must be submitted as an exhibit and be posted to the issuer's corporate web site, if any, and the circumstances under which it is permitted to be submitted as an exhibit, with respect to Form 20-F. Item 601(b)(101) of Regulation S-K and Item 101 of the Instructions as to Exhibits of Form 20-F both prohibit submission of an Interactive Data File by an issuer that prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.).

§ 232.406 Liability for Related Official Filing, Interactive Data in Viewable Form and Interactive Data File.

(a) Liability for Related Official Filing Unaffected. The disclosures in the Related Official Filing are subject to the liability provisions of the Securities Act, Exchange Act, Trust Indenture Act, and Investment Company Act and the rules and regulations under those Acts. Nothing in Rule 405 of Regulation S-T (§232.405) or this Rule 406 changes the liability otherwise applicable to an electronic filer's Related Official Filing.

(b) Liability for Interactive Data in Viewable Form. Interactive Data in Viewable Form are subject to liability under the Securities Act, Exchange Act, Trust Indenture Act, and Investment Company Act and the rules and regulations under those Acts in the same way and to the same extent as the Related Official Filing.

(c) Liability for Interactive Data File. An Interactive Data File submitted to the

Commission:

(1) Will be deemed to comply with Rule 405 if:

(A) The electronic filer makes a good faith and reasonable attempt to comply with Rule 405; and

(B) As soon as reasonably practicable after the electronic filer becomes aware that the Interactive Data File does not comply with Rule 405, the electronic filer amends the Interactive Data File to comply with Rule 405.

(2) That complies or is deemed to comply with Rule 405 is not subject to liability under any provision of the Securities Act, Exchange Act, Trust Indenture Act and Investment Company Act or the rules and regulations under those Acts for failure to comply with Rule 405.

(3) In addition to paragraphs (c)(1) and (c)(2),

(A) Is deemed not filed or part of a registration statement or prospectus for purposes of sections 11 and 12 of the Securities Act (15 U.S.C. 77k and 77l), is deemed not filed for purposes of section 18 of the Exchange Act (15 U.S.C. 78r) and section 34(b) of the Investment Company Act (15 U.S.C. 80a-33(b)), and otherwise is not subject to the liabilities of these sections;

(B) Is deemed filed for purposes of (and thereby benefits from the liability protection provided by) Item 103 of Regulation S-T (§232.103); and

(C) Other than as stated in subparagraph (c)(3)(A), is subject to liability for the substantive content of the financial and other disclosures, as distinct from its compliance with Rule 405, under the Securities Act, Exchange Act, Trust Indenture Act, and Investment Company Act and the rules and regulations under those Acts in the same way and to the same extent as the Related Official Filing.

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

13. 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.

* * * * *

14. Amend §239.13 by revising paragraphs (a)(8), (a)(8)(i) and (a)(8)(ii) to read as follows:

§ 239.13 Form S-3, for registration under the Securities Act of 1933 of securities of certain issuers offered pursuant to certain types of transactions.

* * * * *

(a) * * *

(8) Electronic filings. In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S-T (§232.101 of this chapter) shall have:

(i) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S-T (§232.201 or §232.202(d) of this chapter); and

(ii) Submitted electronically to the Commission and posted on its corporate web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

15. Amend Form S-3 (referenced in §239.13) by revising paragraph I.A.8 and adding

paragraphs I.A.8(a) and I.A.8(b) of the General Instructions 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

* * * * *

GENERAL INSTRUCTIONS

I. * * *

A. * * *

8. Electronic filings. In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S-T (§232.101 of this chapter) shall have:

(a) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S-T (§232.201 or §232.202(d) of this chapter); and

(b) Submitted electronically to the Commission and posted on its corporate web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

16. Amend §239.16b by revising paragraphs (b), (b)(1), and (b)(2) to read as follows:

§ 239.16b Form S-8, for registration under the Securities Act of 1933 of securities to be offered to employees pursuant to employee benefit plans.

(a) * * *

(b) Electronic filings. In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S-T (§232.101 of this chapter) shall have:

(1) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S-T (§232.201 or §232.202(d) of this chapter); and

(2) Submitted electronically to the Commission and posted on its corporate web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

17. Amend Form S-8 (referenced in §239.16b) by revising paragraph A.3 and adding paragraphs A.3(a) and A.3(b) of the General Instructions 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

* * * * *

GENERAL INSTRUCTIONS

A. * * *

1. * * *

2. * * *

3. Electronic filings. In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S-T (§232.101 of this

chapter) shall have:

(a) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S-T (§232.201 or §232.202(d) of this chapter); and

(b) Submitted electronically to the Commission and posted on its corporate web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

18. Amend §239.33 by revising paragraph (a)(6) and adding paragraphs (a)(6)(i) and (a)(6)(ii) to read as follows:

§ 239.33 Form F-3, for registration under the Securities Act of 1933 of securities of certain foreign private issuers offered pursuant to certain types of transactions.

* * * * *

(a) * * *

(6) Electronic filings. In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S-T (§232.101 of this chapter) shall have:

(i) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S-T (§232.201 or §232.202(d) of this chapter); and

(ii) Submitted electronically to the Commission and posted on its corporate web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101)

of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter) during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

19. Amend Form F-3 (referenced in §239.33) by revising paragraph I.A.6 and adding paragraphs I.A.6(i) and I.A.6(ii) of the General Instructions 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

* * * * *

GENERAL INSTRUCTIONS

I. * * *

A. * * *

6. Electronic filings. In addition to satisfying the foregoing conditions, a registrant subject to the electronic filing requirements of Rule 101 of Regulation S-T (§232.101 of this chapter) shall have:

(i) Filed with the Commission all required electronic filings, including electronic copies of documents submitted in paper pursuant to a hardship exemption as provided by Rule 201 or Rule 202(d) of Regulation S-T (§232.201 or §232.202(d) of this chapter); and

(ii) Submitted electronically to the Commission and posted on its corporate web site, if any, all Interactive Data Files required to be submitted and posted under either Item 601(b)(101) of Regulation S-K (§229.601(b)(101) of this chapter) or Item 101 of the Instructions as to Exhibits of Form 20-F (§249.220f of this chapter) during the twelve calendar months and any

portion of a month immediately preceding the filing of the registration statement on this Form.

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

20. 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.

* * * * *

21. Amend §240.13a-14 by revising paragraph (f) and adding paragraphs (f)(1) and (2) to read as follows:

§ 240.13a-14 Certification of disclosure in annual and quarterly reports.

* * * * *

(f) The certification requirements of this section do not apply to

(1) An Interactive Data File, as defined in Rule 11 of Regulation S-T (§232.11 of this chapter); or

(2) XBRL-Related Documents, as defined in Rule 11 of Regulation S-T.

22. Amend §240.15d-14 by revising paragraph (f) and adding paragraphs (f)(1) and (2) to read as follows:

§ 240.15d-14 Certification of disclosure in annual and quarterly reports.

* * * * *

(f) The certification requirements of this section do not apply to:

(1) An Interactive Data File, as defined in Rule 11 of Regulation S-T (§232.11 of this chapter); or

(2) XBRL-Related Documents, as defined in Rule 11 of Regulation S-T.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

23. The authority citation 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.

* * * * *

24. Amend Form 20-F (referenced in §249.220f) by revising paragraph 100 and adding paragraph 101 at the end of "Instructions as to Exhibits" 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

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

100. XBRL-Related Documents. Only a registrant that prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program and, as a result, may submit XBRL-Related Documents (§232.11 of this chapter). Rule 401 of Regulation S –T (§232.401 of this chapter) sets forth further details regarding eligibility to participate in the voluntary XBRL program.

101. Interactive Data File. An Interactive Data File (§232.11 of this chapter) is:

(a) Required to be submitted to the Commission and posted on the registrant's corporate web site, if any, in the manner provided by Rule 405 of Regulation S-T (§232.405 of this chapter) if the Form 20-F is an annual report and the registrant is not specified by paragraph (c) of this Instruction 101 and is:

(i) a large accelerated filer (§240.12b-2 of this chapter) that had an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of more than $5 billion as of the last business day of its most recently completed second fiscal quarter that is a foreign private issuer (§240.3b-4(c) of this chapter) that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2008;

(ii) a large accelerated filer not specified in paragraph (a)(i) of this instruction but is a foreign private issuer that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2009;

(iii) a filer not specified in paragraph (a)(i) or (ii) of this instruction that is a foreign private issuer that prepares its financial statements in accordance with generally accepted accounting principles as used in the United States and the filing contains financial statements of the registrant for a period that ends on or after December 15, 2010; and

(iv) a foreign private issuer that prepares its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board, and the filing contains financial statements of the registrant for a period that ends on or

after December 15, 2010.

(b) Permitted to be submitted to the Commission in the manner provided by Rule 405 of Regulation S-T (§232.405 of this chapter) if the registrant:

(i) Prepares its financial statements

(A) In accordance with either

(1) Generally accepted accounting principles as used in the United States; or

(2) International Financial Reporting Standards as issued by the International Accounting Standards Board; and

(B) Not in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.); and

(ii) Is not required to be submitted to the Commission under paragraph (a) of this Instruction 101.

(c) Not permitted to be submitted to the Commission if the registrant prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.).

* * * * *

25. Amend Form 6-K (referenced in §249.306) by revising paragraph (5) to General Instruction C to read as follows:

Note – The text of Form 6-K does not and this amendment will not appear in the Code of Federal Regulations.

Form 6-K

* * * * *

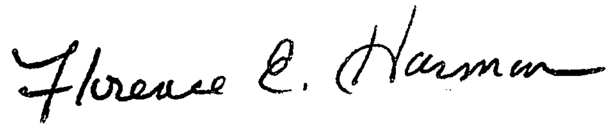
GENERAL INSTRUCTIONS

* * * * *

C. * * *

(5) XBRL-Related Documents. Only a registrant that prepares its financial statements in accordance with Article 6 of Regulation S-X (17 CFR 210.6-01 et. seq.) is permitted to participate in the voluntary XBRL (eXtensible Business Reporting Language) program and, as a result, may submit XBRL-Related Documents (§232.11 of this chapter). XBRL-Related Documents submitted as an exhibit to a Form 6-K must be listed as exhibit 100. Rule 401 of Regulation S –T (§232.401 of this chapter) sets forth further details regarding eligibility to participate in the voluntary XBRL program.

* * * * *



By the Commission.

Florence E. Harmon
Acting Secretary

Dated: May 30, 2008