SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **March 2009**, with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY L. SCHAPIRO, CHAIRMAN

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

57 Documents

Commissioner Paredes Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2849 / March 2, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13387

In the Matter of M.A.G. CAPITAL, LLC AND DAVID F. FIRESTONE Respondents.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against M.A.G. Capital, LLC and David F. Firestone. ("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 Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

A. SUMMARY

This case concerns violations of Section 206(2) of the Advisers Act by M.A.G. Capital, LLC ("M.A.G."), a registered investment adviser, and its principal, David F. Firestone ("Firestone"). On forty-four separate occasions between May 2003 and September 2006, M.A.G. took warrants from three hedge funds that it advises (the "Funds") without compensating the Funds for them. The Funds had purchased the warrants and other securities in PIPEs transactions (private investment in public equity). As part of these transactions, M.A.G. took, as compensation for itself, warrants that were being paid for by its clients, the Funds. M.A.G. did not adequately disclose that the warrants that M.A.G. took were being paid for by the Funds and that M.A.G. was not compensating the Funds for these warrants. The net value of the warrants retained by M.A.G. was approximately $18.9 million.

In May 2006, the Los Angeles Regional Office's ("LARO") examination staff examined M.A.G. and cited various deficiencies, including warrant-taking in PIPEs transactions. The warrant-taking issue was raised with M.A.G. in the examination staff's May 25, 2006 exit interview and again in a September 20, 2006 deficiency letter. Although M.A.G. tried to improve its disclosure of the warrant-taking after the exit interview, M.A.G. continued to take warrants from the Funds until it received the September 20 deficiency letter and halted the practice.

B. RESPONDENTS

1. **M.A.G. Capital, LLC**, based in Los Angeles, California, has been in business since 2002, and has been registered with the Commission as an investment adviser since January 13, 2006 (File No. 801-65139). M.A.G. has five employees, and, as of March 31, 2008, it had approximately $33.6 million in assets under management. M.A.G. has no disciplinary history.

2. **David F. Firestone**, age 42, lives in Laguna Niguel, California. He is the president and sole owner of M.A.G. Firestone held NASD Series 7, 63, and 65 licenses, but allowed them to expire in or around 2003. Firestone has no disciplinary history.

C. FACTS

1. Background: M.A.G.'s Operations and the Funds

M.A.G. specializes in short-term investments in privately placed convertible debt and equity securities, as well as derivative instruments such as warrants and options. It serves fifty-four high-net-worth individuals through two domestic hedge funds, Mercator Momentum Fund, L.P. ("MMF I") and Mercator Momentum Fund III ("MMF III") (there is no MMF II). In addition, it serves eighteen institutional clients through an off-shore hedge fund domiciled in the British Virgin Islands, the Monarch Pointe Fund ("Monarch") (collectively, the "Funds"). As of March 31, 2008, MMF I and MMF III had assets of $4.1 million and $3.8 million, respectively, and Monarch had assets of $25.7 million.

2. M.A.G. Took Warrants from the Funds

Between May 2003 and September 2006, M.A.G. took warrants from the Funds in forty-four separate PIPEs transactions that involved investments by one or more of the Funds. In seven of the forty-four transactions, M.A.G. exercised the warrants for the underlying common stock, and in three of those seven transactions, M.A.G. sold the underlying stock for total proceeds of $7,477,292. The number of warrants that M.A.G. took varied with each transaction. As of December 31, 2006, the warrants (including exercised) that MAG had taken represented approximately 37% of MMF I's, 28% of MMF III's, and 19% of Monarch's respective net asset values (pre-remediation).

The PIPEs transactions generally involved the Funds' purchase of bundles, or units, of convertible preferred securities and warrants. The Funds paid for the warrants as part of the bundle of securities sold by the issuers in the transactions. Pursuant to subscription agreements between M.A.G., the Funds, and the PIPEs issuers, M.A.G. took a portion of the warrants in each transaction. Firestone and other officers of M.A.G. signed these subscription agreements on behalf of the Funds. M.A.G. did not compensate the Funds for the warrants that it took.

An example of a typical PIPEs transaction in which M.A.G. took warrants is an August 2004 $5.5 million investment, comprised of a private offering of 55,000 shares of convertible preferred stock and 330,000 warrants. MMF I paid $1,292,500 to the PIPES issuer and received 12,925 shares and 62,040 warrants. MMF III paid $1,485,000 and received 14,850 shares and 71,280 warrants. Monarch paid $2,722,500 and received 27,225 shares and 130,680 warrants. M.A.G. paid nothing and yet received the remaining 66,000 warrants, or 20% of the warrants issued in the offering.

Beginning in October 2004 and January 2005, respectively, MMF I's and MMF III's PPMs disclosed that "in connection with financing a Portfolio Company, the Partnership and the General Partner may receive warrants to purchase common stock of the Portfolio Company." This disclosure, however, was inadequate because it did not convey the nature of M.A.G.'s self-interest. Specifically, M.A.G. did not disclose that the warrants that M.A.G. took were being paid for by the Funds and that M.A.G. was not compensating the Funds for these warrants. Monarch's PPMs never disclosed the warrant-taking.

3. The LARO Exam Staff Puts M.A.G. On Notice Regarding Warrant-Taking

In January 2006, M.A.G. registered with the Commission as an investment adviser. In May 2006, the LARO's examination staff conducted a routine examination of M.A.G. and found a number of deficiencies. The most egregious deficiency was M.A.G.'s warrant-taking and failure to adequately disclose this activity.

a. The May 25, 2006 Exit Interview

On May 25, 2006, the examiners met with Firestone to provide him with a summary overview of the deficiencies they found during the examination. The examiners told Firestone that, among other deficiencies, they were concerned about M.A.G.'s warrant-taking in the PIPEs transactions and lack of adequate disclosure to the Funds' investors.

During and after the interview, Firestone and others at M.A.G. discussed the warrant-taking issue and how best to address it. M.A.G. tried to address the issue by revising the disclosure distributed to investors in the MMF I and MMF III funds. M.A.G. sent out a revised PPM in July 2006 to all MMF I and MMF III investors, as well as a cover letter to MMF I and MMF III investors highlighting the changes. The revised disclosure stated, in bold, that with respect to due diligence fees, "[t]he amount of the due diligence fee may be payable in the form of cash, warrants to purchase common stock of the Portfolio Company or other securities," and with respect to fees for possible post-investment activity, that:

> [M.A.G.] may receive a fee, typically payable in the form of cash, or warrants to purchase shares of Portfolio Company stock or other securities, for the possible provision of the [post-investment] activities described above. Such fee, if any, may be charged either concurrent with an investment in a Portfolio Company or subsequent to such investment, at [M.A.G.'s] discretion. Such fee, if received in the form of warrants, is designed to incentivize [M.A.G.] to maximize the value of the underlying stock in the Portfolio Company. The exercise price of warrants typically will be greater than the fair market value of the underlying stock at the time of receipt of such warrants.

This revised July 2006 disclosure, however, still failed to alert the Funds that the warrants that M.A.G. took were being paid for by the Funds and that M.A.G. was not compensating the Funds for these warrants. M.A.G. did not add warrant disclosure to the Monarch PPM because Firestone believed that Monarch's investors knew that M.A.G. received warrants.

b. The September 20, 2006 Deficiency Letter

On September 20, 2006, the examiners sent a deficiency letter to M.A.G. The first concern raised in the deficiency letter was M.A.G.'s warrant-taking and failure to adequately disclose the warrant-taking. M.A.G. responded by immediately halting the practice of warrant-taking in PIPEs transactions. Between the May 25 exit interview and M.A.G.'s receipt of the September 20 deficiency letter, M.A.G. had continued to take warrants in four PIPEs transactions.

D. LEGAL DISCUSSION

1. Violations of Section 206(2) of the Advisers Act

Section 206(2) of the Advisers Act makes it unlawful for an investment adviser "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." An investment adviser has a fiduciary duty to act in good faith in all dealings with its clients. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979).

Scienter is not a required element of Section 206(2); negligence suffices for liability. See Capital Gains Research Bureau, Inc., 375 U.S. at 195; Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981). An investment adviser is accountable for the actions of its principals. See SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1089 n.3, 1096-97 nn.16-18 (2d Cir. 1972) (company's scienter imputed from individuals who control it).

2. M.A.G.'s Primary Violation

M.A.G. willfully violated Section 206(2) of the Advisers Act by fraudulently taking warrants from bundles of securities the Funds had purchased in forty-four PIPEs transactions. Specifically, M.A.G. took, as compensation for itself, warrants that were being paid for by the Funds. In doing so, M.A.G. breached its fiduciary duty to the Funds. M.A.G.'s eventual disclosure of the warrant-taking practice in MMF I's and MMF III's PPMs is not a defense to the violation because M.A.G. never adequately disclosed that the warrants that M.A.G. took were being paid for by the Funds and that M.A.G. was not compensating the Funds for these warrants. In addition, M.A.G. never included any disclosure in Monarch's PPMs. Accordingly, M.A.G. violated Section 206(2) of the Advisers Act.

3. Firestone's Aiding and Abetting and Causing M.A.G.'s Violation

Firestone, as a person associated with an investment adviser, may be charged as an aider and abettor under Section 203(e) of the Advisers Act and as a cause of the violation under Section 203(k) of the Advisers Act. Aiding and abetting liability requires a showing that there was a primary violation; the respondent substantially assisted in the primary violation; and the respondent had a general awareness, or reckless disregard, of the wrongdoing and of his role in furthering it. See In re Clarke T. Blizzard and Rudolph Abel, Advisers Act Rel. No. 2253, 2004 SEC LEXIS 1298, at *16 & n.10 (June 23, 2004). A finding that a respondent willfully aided and abetted violations of the securities laws necessarily makes that respondent a "cause" of those violations. Id. at *16 n.10. The willfulness requirement does not require an intent to violate the law but merely an intent to do the act that constitutes the violation. Wonsover v. SEC, 205 F.3d 408, 413-15 (D.C. Cir. 2000).

Firestone willfully aided and abetted and caused M.A.G.'s primary violation of Section 206(2) of the Advisers Act. First, Firestone substantially assisted in the violation by directing that M.A.G. take the warrants in the PIPEs transactions. Second, Firestone had a general awareness, or at a minimum a reckless disregard, of the wrongdoing and of his role in it because he instituted the warrant-taking practice and knew that M.A.G. did not compensate the Funds for the warrants that it took.

E. RESPONDENTS' REMEDIAL EFFORTS

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

IV.

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

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

A. Respondents cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act;

B. Respondents are censured.

C. Respondents M.A.G. Capital, LLC and David F. Firestone shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $100,000 and $50,000, respectively, to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. 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 M.A.G. Capital LLC and David F. Firestone as the 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 Andrew Petillon, Associate Director, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Floor, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 9010/March 3, 2009

Securities Exchange Act of 1934
Release No. 59487/March 3, 2009

ORDER REGARDING REVIEW OF FASB ACCOUNTING SUPPORT FEE FOR 2009 UNDER SECTION 109 OF THE SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act of 2002 (the "Act") provides that the Securities and Exchange Commission (the "Commission") may recognize, as generally accepted for purposes of the securities laws, any accounting principles established by a standard setting body that meets certain criteria. Consequently, Section 109 of the Act provides that all of the budget of such a standard setting body shall be payable from an annual accounting support fee assessed and collected against each issuer, as may be necessary or appropriate to pay for the budget and provide for the expenses of the standard setting body, and to provide for an independent, stable source of funding, subject to review by the Commission. Under Section 109(f) of the Act, the amount of fees collected for a fiscal year shall not exceed the "recoverable budget expenses" of the standard setting body. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board ("FASB") and its parent organization, the Financial Accounting Foundation ("FAF"), satisfied the criteria for an accounting standard setting body under the Act, and recognizing the FASB's financial accounting and reporting standards as "generally accepted" under Section 108 of the Act.[1] As a consequence of that recognition, the Commission undertook a review of the FASB's accounting support fee for calendar year 2009. In connection with its review, the Commission also reviewed the budget for the FAF and the FASB for calendar year 2009.

Section 109 of the Act also provides that the standard setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB and the Governmental Accounting Standards Board ("GASB"), the FASB's sister organization, which sets accounting standards used by state and local governmental entities. The Commission has been advised by the FAF that neither the FAF, the FASB nor the GASB accept contributions from the accounting profession.

After its review, the Commission determined that the 2009 annual accounting support fee for the FASB is consistent with Section 109 of the Act. Accordingly,

IT IS ORDERED, pursuant to Section 109 of the Act, that the FASB may act in accordance with this determination of the Commission.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

[1] Financial Reporting Release No. 70.

T-

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59508 / March 4, 2009

Omnibus Order Directing the Appointment of Tax Administrator in Administrative Proceedings that Establish Distribution Funds

The Commission's orders in administrative proceedings may lead to the payment of disgorgement and/or penalties for distribution. Such distribution funds may create qualified settlement funds ("QSFs") under Treasury Regulation Section 1.468B-1(c) and have a variety of tax-related obligations. The Division of Enforcement ("Division") has evaluated the proposals received from potential tax administrators for the QSFs and, of those proposals, has determined that Damasco & Associates LLP ("Damasco"), a certified public accounting firm located in Half Moon Bay, California, is best suited to act as tax administrator for the QSFs for calendar years 2009 and 2010 in such administrative proceedings.

Accordingly,

IT IS ORDERED that:

A. Pursuant to the Commission's Rules on Fair Fund and Disgorgement Plans (17 CFR §§ 201.1101, *et seq.*), Damasco is appointed as the tax administrator (the "Tax Administrator") when requested by staff in calendar years 2009 and 2010 in those administrative proceedings where distribution funds have been established. Damasco will have the limited authority and power to: (1) act as the administrator for tax purposes for each QSF; (2) prepare, sign, and file the necessary tax returns and tax-related documents for the QSFs; (3) make the tax payments on behalf of the QSFs; (4) obtain the necessary tax-related documents and identifiers, such as an employer identification number, on behalf of the QSFs; (5) perform other tax-related and reporting duties on behalf of the QSFs as required by Department of the Treasury regulations relating to QSF administrators; and (6) communicate on behalf of the QSFs on matters set forth in this paragraph.

B. The Tax Administrator will, from time to time, have custody or control of monies transferred to the Tax Administrator to make tax payments. Therefore, the Tax Administrator, before taking possession of those monies, will obtain through insurance and through a bond, pursuant to the 2009-2010 Letter Agreement executed between the Commission and the Tax Administrator, coverage against misappropriation (including, but not limited to, negligence) of monies by the Tax Administrator.

C. The Tax Administrator shall submit, at least 30 days prior to any date on which a tax payment is required on behalf of any QSF or as soon as is practicable, documentation showing the amount necessary to satisfy the tax liability of each QSF as well as all other documents supporting such amount, to the following:

1. Where the Respondent has agreed to pay the taxes of the QSF, the Tax Administrator shall submit the documentation to the Respondent, with a copy to: the Commission staff member assigned to the proceeding and to the Assistant Director of the Division's Financial Management Unit.

The Respondent shall pay the amount of the documented taxes to the Tax Administrator by check or wire transfer. The Tax Administrator, in turn, shall be responsible for paying the taxes to the Internal Revenue Service ("IRS") and the relevant state taxing authority, if any, on behalf of the QSF. The Tax Administrator shall provide written confirmation of the payment of the taxes to the Commission staff member assigned to the proceeding and to the Assistant Director of the Division's Financial Management Unit.

2. Where the money in the QSF is held by an escrow agent, the Tax Administrator shall submit the documentation to the escrow agent, with a copy to: the Commission staff member assigned to the proceeding and to the Assistant Director of the Division's Financial Management Unit.

Upon approval to disburse by the staff to whom authority is delegated by paragraph F., below, the escrow agent shall disburse to the Tax Administrator, by check or wire transfer from the QSF, the amount of taxes as calculated by the Tax Administrator. Such tax payments shall come first from any earnings or interest in the QSF, and second, if necessary, from the principal of the QSF. The Tax Administrator, in turn, shall be responsible for paying the taxes to the IRS and the relevant state taxing authority, if any, on behalf of the QSF. The Tax Administrator shall provide written confirmation of the payment of the taxes to the Commission staff member assigned to the proceeding and to the Assistant Director of the Division's Financial Management Unit.

3. In all other proceedings, the Tax Administrator shall submit the documentation to the Commission staff member assigned to the proceeding and to the Assistant Director of the Division's Financial Management Unit.

Upon approval to disburse by staff to whom authority is delegated by paragraph F., below, the Commission staff shall disburse to the Tax Administrator, by check or wire transfer from the QSF, the amount of the taxes as calculated and documented by the Tax Administrator. Such tax payments shall come first from any earnings or interest in the QSF and second, if necessary, from the principal of the QSF. The Tax Administrator, in turn, shall be responsible for paying the taxes to the IRS and the relevant state taxing authority, if any, on behalf of the QSF. The Tax Administrator shall provide written confirmation of the payment of the taxes to the Commission staff member assigned to the proceeding and to the Assistant Director of the Division's Financial Management Unit.

D. The Tax Administrator shall comply with all reporting requirements applicable to a QSF as defined in Treasury Regulations Section 1.468B-1(a), as amended, and shall file on a timely basis all required federal, state, and local tax returns, and shall contemporaneously provide copies of such filings to the assigned Commission staff member and to the Assistant Director of the Division's Financial Management Unit.

E. The Tax Administrator shall keep records and bill each QSF for the services provided to it, pursuant to the 2009-2010 Letter Agreement executed between the Commission and the Tax Administrator.

1. In the proceedings in which the Respondent has agreed to pay for the expenses of the QSF, the Tax Administrator will submit the bill to the Respondent for payment by check or wire transfer.

2. Where the money in the QSF is held by an escrow agent, the Tax Administrator will submit the bill to the assigned Commission staff member for approval. Where services have been billed according to the terms of the Tax Administrator's 2009-2010 Letter Agreement with the Commission, and are for an amount less than or equal to $10,000 per case per tax filing per quarter, payment may be approved by staff to whom authority is delegated by paragraph F., below. For bills totaling an amount greater than $10,000 per case per tax filing per quarter, the Commission staff assigned to the proceeding must seek Commission approval for payment. After payment of the Tax Administrator's bill has been approved, the escrow agent is authorized to pay the bill of the Tax Administrator by check or wire transfer from the QSF. Payment shall

come first from any earnings or interest in the QSF and second, if necessary, from the principal of the QSF.

3. In all other proceedings, the Tax Administrator will submit the bill to the assigned Commission staff member and to staff to whom authority is delegated by paragraph F., below. After payment of the Tax Administrator's bill has been approved (which approval shall be as described in paragraph E.2., above), the Commission staff shall pay the bill of the Tax Administrator by check or wire transfer from the QSF. Payment shall come first from any earnings or interest in the QSF and second, if necessary, from the principal of the QSF.

In all proceedings, the fees billed shall be as agreed upon in the Tax Administrator's 2009-2010 Letter Agreement with the Commission, as executed by the Secretary of the Commission on behalf of the Commission.

F. Pursuant to Section 4A of the Securities Exchange Act of 1934 (15 U.S.C. § 78d-1), the authority as set forth in paragraphs C.2., C.3., E.2. and E.3., above, to approve the payment of the Tax Administrator's fees and expenses and to approve the disbursement of QSF tax payments based on the calculations of the Tax Administrator is delegated to the following Division of Enforcement staff: the Division Director, the Deputy Director of the Office of Collections and Distributions, and the Assistant Directors in the Collections and Distributions Unit and the Financial Management Unit; and to the following Office of the Executive Director staff: the Executive Director and the Director of the Office of Collections and Distributions.

G. The Secretary of the Commission shall, upon request by the Division staff during calendar years 2009 and 2010, issue orders that appoint Damasco as the Tax Administrator in administrative proceedings.

By the Commission.

Elizabeth M. Murphy
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. 59507 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13396

In the Matter of **TD Options LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against TD Options LLC ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

4 of 57

III.

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

A. RESPONDENT

1. **TD Options LLC** ("TD Options") is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, since 2002. TD Options is a member of the Chicago Board Options Exchange ("CBOE") and, during the period relevant to this Order, was a member of the Philadelphia Stock Exchange ("PHLX") and the American Stock Exchange ("AMEX," and together with the CBOE and the PHLX, the "Exchanges"). During the period relevant to this Order, TD options acquired certain specialist firms. A significant portion of the conduct that forms the basis of the findings herein took place at those predecessor firms. As used herein, the terms "TD Options" and "Respondent" refer to TD Options, as well as its predecessor firms.

B. FACTS

Summary

2. This matter involves violations by TD Options of its basic obligation as a specialist to serve public customer orders over its own proprietary interests. As a specialist firm on each of the Exchanges,[2] TD Options had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from the firm's own account when those customer orders could be matched with other customer orders. From 1999 through 2005 (the "Relevant Period"), TD Options violated this obligation by filling orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged by approximately $5 million.

3. By effecting proprietary transactions that were not part of a course of dealings reasonably necessary to maintain a fair and orderly market, TD Options violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. TD Options also violated the following Exchange rules in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707.

Overview of Specialists' Obligations

4. On each of the Exchanges, specialist firms are responsible for the quality of the markets in the securities in which individual specialists are registered. A specialist is expected to maintain,

---

[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] On the CBOE, specialist firms like TD Options are known as Designated Primary Market-Makers, or DPMs.

insofar as is reasonably practicable, a "fair" and "orderly" market. A "fair" market is one that, among other things, affords no undue advantage to any participant. An "orderly" market is characterized by regular, reliable operation, with price continuity and depth, in which price movements are accompanied by appropriate volume, and unreasonable price variations between sales are avoided.

5. Specialists have two primary duties: performing their "negative obligation" to execute customer orders at the most advantageous price with minimal dealer intervention, and fulfilling their "affirmative obligation" to offset imbalances in supply and demand.[3] Specialists participate as both broker (or agent), absenting themselves from the market to pair executable customer orders against each other, and as dealer (or principal), trading for the specialists' dealer or proprietary accounts when needed to facilitate price continuity and fill customer orders when there are no available contra parties to those orders.

6. Whether acting as brokers or dealers, specialists are required to hold the public's interest above their own and, as such, are prohibited from trading for their dealers' accounts ahead of pre-existing customer buy or sell orders that could be executed against each other. When matchable customer buy and sell orders are received by the specialists – generally delivered either through one of the Exchange's order processing systems to a specialist's workstation, or, under certain circumstances, by floor brokers gathered in front of specialists' workstations ("the crowd") – specialists are required to act as agent and cross or pair off those orders and to abstain from participating as principal or dealer.

Improper Proprietary Trading by TD Options

7. During the Relevant Period, TD Options breached its duty to refrain from dealing for its own account while in possession of executable buy and sell customer orders. Instead, TD Options effected improper proprietary trades that disadvantaged customer orders.

8. On each of the Exchanges, TD Options specialists possessed or had access to information concerning customer orders on both sides of the market. Where there are matchable orders on both sides of the market, specialists are obligated to "pair off" or cross the buy and sell orders by executing each side of the market for identical prices and in commensurate order quantities. In numerous instances, however, TD Options specialists did not "pair off" or cross these buy and sell orders with each other. Sometimes, TD Options specialists did this by effecting a proprietary trade with an order that arrived electronically through the order processing system. At other times, TD Options specialists effected improper proprietary trades with orders that came in from the crowd. In either case, the disadvantaged order was an order that the TD Options specialist should have paired with the other order, instead of filling that other order through a proprietary trade retained by the specialist. The violative conduct took three basic forms described in paragraphs 9-11 below.

---

[3] A specialist's obligations on the Exchanges also included acting as a market maker, and the Exchanges' rules generally required a specialist to provide continuous quotations for each option for which it acted as a specialist.

9. *Trading Ahead.* In certain instances, TD Options specialists filled one agency order through a proprietary trade for the firm's account while a matchable agency order was present on the opposite side of the market, thereby improperly "trading ahead" of such opposite-side executable agency order. The customer order that was traded ahead of was then disadvantaged when it was subsequently executed at a price that was inferior to the price received by the firm's proprietary account. For example, if a specialist has present on his book, at the same time, a marketable customer order to buy five contracts of an options series and a marketable customer order to sell five contracts of the same options series, the specialist would be obligated to pair off those matchable orders. Trading ahead would occur if the specialist filled the sell order from the firm's proprietary account at $5.00 per share per contract, and then subsequently executed the buy order at the inferior price of $5.05 per share per contract. In this example, the buy order received a price inferior to that to which it was entitled ($5.00) and the customer was disadvantaged by $25.00 (5 contracts x $0.05 per share per contract x 100 shares per contract).

10. *Interpositioning.* In certain instances, after trading ahead, TD Options specialists also traded proprietarily with the matchable opposite-side agency order that had been traded ahead of, thereby "interpositioning" themselves between the two agency orders that should have been paired off in the first instance. By participating on both sides of trades, the specialist captured the spread between the purchase and sale prices, thereby disadvantaging the other parties to the transactions. Interpositioning occurred in a relatively small number of instances.

11. *Trading Ahead of Unexecuted Open or Cancelled Orders.* In certain instances, TD Options specialists traded ahead of opposite-side executable agency orders, as described in paragraph 9 above, but the unexecuted orders were left open until the end of the trading day, or were cancelled by the customer prior to the close of the trading day before receiving an execution. Because these orders were never executed, the calculation of customer harm for this type of misconduct was based on a formula that incorporated certain economic assumptions. A substantial amount of the customer harm discussed in paragraph 12 below relates to these unexecuted or cancelled orders.

12. During the Relevant Period, TD Options engaged in tens of thousands of violative trades of the three types described in paragraphs 9-11, resulting in overall customer disadvantage of approximately $5 million across the Exchanges. Because of limitations in the source data maintained by the Exchanges, the calculation of the amount of customer disadvantage sometimes required the use of certain analytic formulas. The majority of the customer disadvantage relates to violative trading that occurred between 1999 and 2002.

C. APPLICABLE LAW

Section 11(b) of the Exchange Act

13. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 require a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1(b), if the Commission finds, after appropriate

notice and opportunity for hearing, that a specialist has for any account in which he has an interest "effected transactions... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," the Commission may impose sanctions.

14. Where specialists effect trades for their accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. *See In the Matter of LaBranche & Co. LLC,* Exchange Act Release No. 49500, 2004 WL 626573, at *6 (Mar. 30, 2004); *In the Matter of Weiskopf, Silver & Co.,* Exchange Act Release No. 17361, 1980 WL 22091, at *2 (Dec. 10, 1980); *In the Matter of Albert Fried & Co. and Albert Fried, Jr.*, Exchange Act Release No. 15293, 1978 WL 196046, at *6 (Nov. 3, 1978).[4]

15. Here, TD Options violated its negative obligation by engaging in the three types of conduct described in paragraphs 9 through 11 above. Accordingly, TD Options willfully[5] violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

Exchange Rules

16. Several AMEX, CBOE and PHLX rules prohibit the same conduct as is prohibited by Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. These rules effectively prohibit a specialist from trading ahead of, or interpositioning between, eligible customer orders, and require agency orders to be matched whenever possible.

AMEX

17. AMEX Rule 150(a) (Purchases and Sales While Holding Unexecuted Market Order) states that "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for his own account...while such member personally holds...an unexecuted market order to buy...or (2) personally sell or initiate the sale of any such security on the Exchange for any such account, while he personally holds...an unexecuted market order to sell."

---

[4] The obligation to maintain a fair and orderly market "has a broader reach than the prohibition of 'fraud' and, thereby, imposes stricter standards of integrity and performance on specialists." *Albert Fried*, 1978 WL 196046, at *5. A transaction not reasonably necessary to maintain a fair and orderly market has been defined as one "'not reasonably calculated to contribute to the maintenance of price continuity [on the exchange] and to minimize the effects of temporary disparity between supply and demand.'" *Weiskopf*, 1980 WL 22091, at *2 n.5 (quoting Exchange Act Release No. 1117 at 2 (March 30, 1937)).

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

18. AMEX Rule 150(b) (Purchases and Sales While Holding Unexecuted Limit Order) states that: "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for any such account, at or below a price at which he personally holds… an unexecuted limited price order to buy such security…or (2) personally sell or initiate the sale of any security on the Exchange for any such account, at or above the price at which he personally holds… an unexecuted limited price order to sell such security."

19. AMEX Rule 155 (Precedence Accorded to Orders Entrusted to Specialists) requires that a specialist "give precedence to orders entrusted to him as an agent before executing at the same price any purchase or sale in the same stock for an account in which he has an interest."

20. AMEX Rule 170(d) (Registration and Functions of Specialists) imposes upon specialists the obligation to refrain from engaging in transactions for his own account "in the securities in which he is registered" unless that conduct constitutes "a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd lot market." The rule goes on to provide that: "Transactions in such securities not part of such a course of dealings are not to be effected by a specialist for his own account."

21. TD Options violated each of the aforementioned AMEX rules by reason of the activities set forth in paragraphs 9 through 11 above.

CBOE

22. CBOE Rules 8.80 (DPM Defined) and 8.85 (DPM Obligations) require that a CBOE specialist cede priority to customer orders which the specialist represents as agent.

23. TD Options violated each of the aforementioned CBOE rules by reason of the activities set forth in paragraphs 9 through 11 above.

PHLX

24. PHLX Rule 1020(c) (Registration and Functions of Options Specialists) states, in relevant part: "A specialist or his member organization shall not effect... purchases or sales of any option in which such specialist is registered, ... unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."

25. PHLX Rule 1019 (Precedence Accorded to Orders Entrusted to Specialists) provides: "A specialist shall give precedence to orders entrusted to him as an agent in any option in which he is registered before executing at the same price any purchase or sale in the same option for an account in which he has an interest."

26. PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade) provides that specialists "shall not engage in conduct inconsistent with just and equitable principles of trade."

27. TD Options violated each of the aforementioned PHLX rules by reason of the activities set forth in paragraphs 9 through 11 above.

D. CONCLUSION

28. TD Options willfully committed violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder, as described above.

IV.

In view of the foregoing, the Commission finds that it is appropriate and in the public interest to impose the sanctions specified in the Offer submitted by TD Options.

Accordingly it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, TD Options cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder.

B. Pursuant to Section 15(b)(4) of the Exchange Act, TD Options is hereby censured.

C. TD Options shall, within ten days of the entry of the Order, pay disgorgement of $5 million to the 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 TD Options 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281.

D. It is further ordered that TD Options shall, within ten days of the entry of the Order, pay a civil money penalty in the amount of $1 million 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 TD Options 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and

Exchange Commission, 3 World Financial Center, New York, New York, 10281. 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.

By the Commission.

Elizabeth M. Murphy
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. 59506 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13395

In the Matter of **Susquehanna Investment Group,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Susquehanna Investment Group ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

5 of 57

III.

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

A. RESPONDENT

1. **Susquehanna Investment Group** ("SIG") is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, since 1987. SIG is a member of the American Stock Exchange ("AMEX"), the Chicago Board Options Exchange ("CBOE") and the Philadelphia Stock Exchange ("PHLX," and together with the CBOE and the AMEX, the "Exchanges"). During the period relevant to this Order, SIG acquired certain other specialist firms. A certain portion of the conduct that forms the basis of the findings herein took place at those predecessor firms. As used herein, the terms "SIG" and "Respondent" refer to SIG, as well as its predecessor firms.

B. FACTS

Summary

2. This matter involves violations by SIG of its basic obligation as a specialist to serve public customer orders over its own proprietary interests. As a specialist firm on each of the Exchanges,[2] SIG had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from the firm's own account when those customer orders could be matched with other customer orders. From 1999 through 2005 (the "Relevant Period"), SIG violated this obligation by filling orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged by approximately $6.37 million.

3. By effecting proprietary transactions that were not part of a course of dealings reasonably necessary to maintain a fair and orderly market, SIG violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. SIG also violated the following Exchange rules in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707.

Overview of Specialists' Obligations

4. On each of the Exchanges, specialist firms are responsible for the quality of the markets in the securities in which individual specialists are registered. A specialist is expected to maintain, insofar as is reasonably practicable, a "fair" and "orderly" market. A "fair" market is one that,

---

[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] On the CBOE, specialist firms like SIG are known as Designated Primary Market-Makers, or DPMs.

among other things, affords no undue advantage to any participant. An "orderly" market is characterized by regular, reliable operation, with price continuity and depth, in which price movements are accompanied by appropriate volume, and unreasonable price variations between sales are avoided.

5. Specialists have two primary duties: performing their "negative obligation" to execute customer orders at the most advantageous price with minimal dealer intervention, and fulfilling their "affirmative obligation" to offset imbalances in supply and demand.[3] Specialists participate as both broker (or agent), absenting themselves from the market to pair executable customer orders against each other, and as dealer (or principal), trading for the specialists' dealer or proprietary accounts when needed to facilitate price continuity and fill customer orders when there are no available contra parties to those orders.

6. Whether acting as brokers or dealers, specialists are required to hold the public's interest above their own and, as such, are prohibited from trading for their dealers' accounts ahead of pre-existing customer buy or sell orders that could be executed against each other. When matchable customer buy and sell orders are received by the specialists – generally delivered either through one of the Exchange's order processing systems to a specialist's workstation, or, under certain circumstances, by floor brokers gathered in front of specialists' workstations ("the crowd") – specialists are required to act as agent and cross or pair off those orders and to abstain from participating as principal or dealer.

Improper Proprietary Trading by SIG

7. During the Relevant Period, SIG breached its duty to refrain from dealing for its own account while in possession of executable buy and sell customer orders. Instead, SIG effected improper proprietary trades that disadvantaged customer orders.

8. On each of the Exchanges, SIG specialists possessed or had access to information concerning customer orders on both sides of the market. Where there are matchable orders on both sides of the market, specialists are obligated to "pair off" or cross the buy and sell orders by executing each side of the market for identical prices and in commensurate order quantities. In numerous instances, however, SIG specialists did not "pair off" or cross these buy and sell orders with each other. Sometimes, SIG specialists did this by effecting a proprietary trade with an order that arrived electronically through the order processing system. At other times, SIG specialists effected improper proprietary trades with orders that came in from the crowd. In either case, the disadvantaged order was an order that the SIG specialist should have paired with the other order, instead of filling that other order through a proprietary trade retained by the specialist. The violative conduct took three basic forms described in paragraphs 9-11 below.

---

[3] A specialist's obligations on the Exchanges also included acting as a market maker, and the Exchanges' rules generally required a specialist to provide continuous quotations for each option for which it acted as a specialist.

9. *Trading Ahead.* In certain instances, SIG specialists filled one agency order through a proprietary trade for the firm's account while a matchable agency order was present on the opposite side of the market, thereby improperly "trading ahead" of such opposite-side executable agency order. The customer order that was traded ahead of was then disadvantaged when it was subsequently executed at a price that was inferior to the price received by the firm's proprietary account. For example, if a specialist has present on his book, at the same time, a marketable customer order to buy five contracts of an options series and a marketable customer order to sell five contracts of the same options series, the specialist would be obligated to pair off those matchable orders. Trading ahead would occur if the specialist filled the sell order from the firm's proprietary account at $5.00 per share per contract, and then subsequently executed the buy order at the inferior price of $5.05 per share per contract. In this example, the buy order received a price inferior to that to which it was entitled ($5.00) and the customer was disadvantaged by $25.00 (5 contracts x $0.05 per share per contract x 100 shares per contract).

10. *Interpositioning.* In certain instances, after trading ahead, SIG specialists also traded proprietarily with the matchable opposite-side agency order that had been traded ahead of, thereby "interpositioning" themselves between the two agency orders that should have been paired off in the first instance. By participating on both sides of trades, the specialist captured the spread between the purchase and sale prices, thereby disadvantaging the other parties to the transactions. Interpositioning occurred in a relatively small number of instances.

11. *Trading Ahead of Unexecuted Open or Cancelled Orders.* In certain instances, SIG specialists traded ahead of opposite-side executable agency orders, as described in paragraph 9 above, but the unexecuted orders were left open until the end of the trading day, or were cancelled by the customer prior to the close of the trading day before receiving an execution. Because these orders were never executed, the calculation of customer harm for this type of misconduct was based on a formula that incorporated certain economic assumptions. A substantial amount of the customer harm discussed in paragraph 12 below relates to these unexecuted or cancelled orders.

12. During the Relevant Period, SIG engaged in tens of thousands of violative trades of the three types described in paragraphs 9-11, resulting in overall customer disadvantage of approximately $6.37 million across the Exchanges. Because of limitations in the source data maintained by the Exchanges, the calculation of the amount of customer disadvantage sometimes required the use of certain analytic formulas. The majority of the customer disadvantage relates to violative trading that occurred between 1999 and 2002.

C. APPLICABLE LAW

Section 11(b) of the Exchange Act

13. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 require a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1(b), if the Commission finds, after appropriate

notice and opportunity for hearing, that a specialist has for any account in which he has an interest "effected transactions... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," the Commission may impose sanctions.

14. Where specialists effect trades for their accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. *See In the Matter of LaBranche & Co. LLC,* Exchange Act Release No. 49500, 2004 WL 626573, at *6 (Mar. 30, 2004); *In the Matter of Weiskopf, Silver & Co.,* Exchange Act Release No. 17361, 1980 WL 22091, at *2 (Dec. 10, 1980); *In the Matter of Albert Fried & Co. and Albert Fried, Jr.*, Exchange Act Release No. 15293, 1978 WL 196046, at *6 (Nov. 3, 1978).[4]

15. Here, SIG violated its negative obligation by engaging in the three types of conduct described in paragraphs 9 through 11 above. Accordingly, SIG willfully[5] violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

Exchange Rules

16. Several AMEX, CBOE and PHLX rules prohibit the same conduct as is prohibited by Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. These rules effectively prohibit a specialist from trading ahead of, or interpositioning between, eligible customer orders, and require agency orders to be matched whenever possible.

AMEX

17. AMEX Rule 150(a) (Purchases and Sales While Holding Unexecuted Market Order) states that "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for his own account...while such member personally holds...an unexecuted market order to buy...or (2) personally sell or initiate the sale of any such security on the Exchange for any such account, while he personally holds...an unexecuted market order to sell."

---

[4] The obligation to maintain a fair and orderly market "has a broader reach than the prohibition of 'fraud' and, thereby, imposes stricter standards of integrity and performance on specialists." *Albert Fried*, 1978 WL 196046, at *5. A transaction not reasonably necessary to maintain a fair and orderly market has been defined as one "'not reasonably calculated to contribute to the maintenance of price continuity [on the exchange] and to minimize the effects of temporary disparity between supply and demand.'" *Weiskopf*, 1980 WL 22091, at *2 n.5 (quoting Exchange Act Release No. 1117 at 2 (March 30, 1937)).

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

18. AMEX Rule 150(b) (Purchases and Sales While Holding Unexecuted Limit Order) states that: "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for any such account, at or below a price at which he personally holds... an unexecuted limited price order to buy such security...or (2) personally sell or initiate the sale of any security on the Exchange for any such account, at or above the price at which he personally holds... an unexecuted limited price order to sell such security."

19. AMEX Rule 155 (Precedence Accorded to Orders Entrusted to Specialists) requires that a specialist "give precedence to orders entrusted to him as an agent before executing at the same price any purchase or sale in the same stock for an account in which he has an interest."

20. AMEX Rule 170(d) (Registration and Functions of Specialists) imposes upon specialists the obligation to refrain from engaging in transactions for his own account "in the securities in which he is registered" unless that conduct constitutes "a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd lot market." The rule goes on to provide that: "Transactions in such securities not part of such a course of dealings are not to be effected by a specialist for his own account."

21. SIG violated each of the aforementioned AMEX rules by reason of the activities set forth in paragraphs 9 through 11 above.

CBOE

22. CBOE Rules 8.80 (DPM Defined) and 8.85 (DPM Obligations) require that a CBOE specialist cede priority to customer orders which the specialist represents as agent.

23. SIG violated each of the aforementioned CBOE rules by reason of the activities set forth in paragraphs 9 through 11 above.

PHLX

24. PHLX Rule 1020(c) (Registration and Functions of Options Specialists) states, in relevant part: "A specialist or his member organization shall not effect... purchases or sales of any option in which such specialist is registered, ... unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."

25. PHLX Rule 1019 (Precedence Accorded to Orders Entrusted to Specialists) provides: "A specialist shall give precedence to orders entrusted to him as an agent in any option in which he is registered before executing at the same price any purchase or sale in the same option for an account in which he has an interest."

26. PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade) provides that specialists "shall not engage in conduct inconsistent with just and equitable principles of trade."

27. SIG violated each of the aforementioned PHLX rules by reason of the activities set forth in paragraphs 9 through 11 above.

D. CONCLUSION

28. SIG willfully committed violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder, as described above.

IV.

In view of the foregoing, the Commission finds that it is appropriate and in the public interest to impose the sanctions specified in the Offer submitted by SIG.

Accordingly it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, SIG cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder.

B. Pursuant to Section 15(b)(4) of the Exchange Act, SIG is hereby censured.

C. SIG shall, within ten days of the entry of the Order, pay disgorgement of $6.37 million to the 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 SIG 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281.

D. It is further ordered that SIG shall, within ten days of the entry of the Order, pay a civil money penalty in the amount of $1.27 million 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 SIG 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange

Commission, 3 World Financial Center, New York, New York, 10281. 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.

By the Commission.

Elizabeth M. Murphy
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. 59505 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13394

In the Matter of **Goldman Sachs Execution & Clearing, L.P. and SLK-Hull Derivatives LLC,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Goldman Sachs Execution & Clearing, L.P. and SLK-Hull Derivatives LLC (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 Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

6 of 57

III.

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

A. RESPONDENTS

1. **Goldman Sachs Execution & Clearing, L.P.** ("GSEC") is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act. GSEC is an indirect wholly owned subsidiary of The Goldman Sachs Group, Inc. ("GS"), and a member of the American Stock Exchange ("AMEX"), the Chicago Board Options Exchange ("CBOE") and the Philadelphia Stock Exchange ("PHLX," and together with the CBOE and the AMEX, the "Exchanges"). Prior to January 14, 2005, GSEC was known as Spear, Leeds & Kellogg LP ("Spear Leeds"). GS's securities are registered with the Commission pursuant to Section 12(b) of the Exchange Act.

2. **SLK-Hull Derivatives LLC** ("SHD") is a wholly owned subsidiary of GS. During the period relevant to this Order, SHD was a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, and a member of the AMEX, CBOE and PHLX. During the period relevant to this Order, Spear Leeds and SHD each acquired, merged with, or conducted joint venture operations with other specialist firms. A certain portion of the conduct that forms the basis of the findings herein took place at those predecessor firms or joint venture entities. As used herein, the terms "GSEC," "SHD" and Respondents refer to GSEC and SHD, respectively, as well as their predecessor firms and joint venture entities.

B. FACTS

Summary

3. This matter involves violations by GSEC and SHD of their basic obligation as specialists to serve public customer orders over their own proprietary interests. As specialist firms on each of the Exchanges,[2] GSEC and SHD had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from the firms' own accounts when those customer orders could be matched with other customer orders. From 1999 through 2005 (the "Relevant Period"), GSEC and SHD violated this obligation by filling orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged by approximately $6 million.

4. By effecting proprietary transactions that were not part of a course of dealings reasonably necessary to maintain a fair and orderly market, GSEC and SHD violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. Respondents also violated the following Exchange rules

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

[2] On the CBOE, specialist firms like GSEC and SHD are known as Designated Primary Market-Makers, or DPMs.

in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707.

Overview of Specialists' Obligations

5. On each of the Exchanges, specialist firms are responsible for the quality of the markets in the securities in which individual specialists are registered. A specialist is expected to maintain, insofar as is reasonably practicable, a "fair" and "orderly" market. A "fair" market is one that, among other things, affords no undue advantage to any participant. An "orderly" market is characterized by regular, reliable operation, with price continuity and depth, in which price movements are accompanied by appropriate volume, and unreasonable price variations between sales are avoided.

6. Specialists have two primary duties: performing their "negative obligation" to execute customer orders at the most advantageous price with minimal dealer intervention, and fulfilling their "affirmative obligation" to offset imbalances in supply and demand.[3] Specialists participate as both broker (or agent), absenting themselves from the market to pair executable customer orders against each other, and as dealer (or principal), trading for the specialists' dealer or proprietary accounts when needed to facilitate price continuity and fill customer orders when there are no available contra parties to those orders.

7. Whether acting as brokers or dealers, specialists are required to hold the public's interest above their own and, as such, are prohibited from trading for their dealers' accounts ahead of pre-existing customer buy or sell orders that could be executed against each other. When matchable customer buy and sell orders are received by the specialists – generally delivered either through one of the Exchange's order processing systems to a specialist's workstation, or, under certain circumstances, by floor brokers gathered in front of specialists' workstations ("the crowd") – specialists are required to act as agent and cross or pair off those orders and to abstain from participating as principal or dealer.

Improper Proprietary Trading by GSEC and SHD

8. During the Relevant Period, GSEC and SHD breached their duty to refrain from dealing for their own accounts while in possession of executable buy and sell customer orders. Instead, GSEC and SHD effected improper proprietary trades that disadvantaged customer orders.

9. On each of the Exchanges, GSEC and SHD specialists possessed or had access to information concerning customer orders on both sides of the market. Where there are matchable orders on both sides of the market, specialists are obligated to "pair off" or cross the buy and sell orders by executing each side of the market for identical prices and in commensurate order quantities. In numerous instances, however, GSEC and SHD specialists did not "pair off" or cross

[3] A specialist's obligations on the Exchanges also included acting as a market maker, and the Exchanges' rules generally required a specialist to provide continuous quotations for each option for which it acted as a specialist.

these buy and sell orders with each other. Sometimes, GSEC and SHD specialists did this by effecting a proprietary trade with an order that arrived electronically through the order processing system. At other times, GSEC and SHD specialists effected improper proprietary trades with orders that came in from the crowd. In either case, the disadvantaged order was an order that the GSEC and SHD specialists should have paired with the other order, instead of filling that other order through a proprietary trade retained by the specialist. The violative conduct took three basic forms described in paragraphs 10-12 below.

10. *Trading Ahead.* In certain instances, GSEC and SHD specialists filled one agency order through a proprietary trade for their firm's account while a matchable agency order was present on the opposite side of the market, thereby improperly "trading ahead" of such opposite-side executable agency order. The customer order that was traded ahead of was then disadvantaged when it was subsequently executed at a price that was inferior to the price received by the firm's proprietary account. For example, if a specialist has present on his book, at the same time, a marketable customer order to buy five contracts of an options series and a marketable customer order to sell five contracts of the same options series, the specialist would be obligated to pair off those matchable orders. Trading ahead would occur if the specialist filled the sell order from the firm's proprietary account at $5.00 per share per contract, and then subsequently executed the buy order at the inferior price of $5.05 per share per contract. In this example, the buy order received a price inferior to that to which it was entitled ($5.00) and the customer was disadvantaged by $25.00 (5 contracts x $0.05 per share per contract x 100 shares per contract).

11. *Interpositioning.* In certain instances, after trading ahead, GSEC and SHD specialists also traded proprietarily with the matchable opposite-side agency order that had been traded ahead of, thereby "interpositioning" themselves between the two agency orders that should have been paired off in the first instance. By participating on both sides of trades, the specialist captured the spread between the purchase and sale prices, thereby disadvantaging the other parties to the transactions. Interpositioning occurred in a relatively small number of instances.

12. *Trading Ahead of Unexecuted Open or Cancelled Orders.* In certain instances, GSEC and SHD specialists traded ahead of opposite-side executable agency orders, as described in paragraph 10 above, but the unexecuted orders were left open until the end of the trading day, or were cancelled by the customer prior to the close of the trading day before receiving an execution. Because these orders were never executed, the calculation of customer harm for this type of misconduct was based on a formula that incorporated certain economic assumptions. A substantial amount of the customer harm discussed in paragraph 13 below relates to these unexecuted or cancelled orders.

13. During the Relevant Period, GSEC and SHD engaged in tens of thousands of violative trades of the three types described in paragraphs 10-12, resulting in overall customer disadvantage of approximately $6 million across the Exchanges. Because of limitations in the source data maintained by the Exchanges, the calculation of the amount of customer disadvantage sometimes required the use of certain analytic formulas. The majority of the customer disadvantage relates to violative trading that occurred between 1999 and 2002.

C. APPLICABLE LAW

Section 11(b) of the Exchange Act

14. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 require a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1(b), if the Commission finds, after appropriate notice and opportunity for hearing, that a specialist has for any account in which he has an interest "effected transactions... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," the Commission may impose sanctions.

15. Where specialists effect trades for their accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. *See In the Matter of LaBranche & Co. LLC,* Exchange Act Release No. 49500, 2004 WL 626573, at *6 (Mar. 30, 2004); *In the Matter of Weiskopf, Silver & Co.,* Exchange Act Release No. 17361, 1980 WL 22091, at *2 (Dec. 10, 1980); *In the Matter of Albert Fried & Co. and Albert Fried, Jr.*, Exchange Act Release No. 15293, 1978 WL 196046, at *6 (Nov. 3, 1978).[4]

16. Here, GSEC and SHD violated their negative obligation by engaging in the three types of conduct described in paragraphs 9 through 11 above. Accordingly, GSEC and SHD willfully[5] violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

Exchange Rules

17. Several AMEX, CBOE and PHLX rules prohibit the same conduct as is prohibited by Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. These rules effectively prohibit a

---

[4] The obligation to maintain a fair and orderly market "has a broader reach than the prohibition of 'fraud' and, thereby, imposes stricter standards of integrity and performance on specialists." *Albert Fried*, 1978 WL 196046, at *5. A transaction not reasonably necessary to maintain a fair and orderly market has been defined as one "'not reasonably calculated to contribute to the maintenance of price continuity [on the exchange] and to minimize the effects of temporary disparity between supply and demand.'" *Weiskopf*, 1980 WL 22091, at *2 n.5 (quoting Exchange Act Release No. 1117 at 2 (March 30, 1937)).

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

specialist from trading ahead of, or interpositioning between, eligible customer orders, and require agency orders to be matched whenever possible.

AMEX

18. AMEX Rule 150(a) (Purchases and Sales While Holding Unexecuted Market Order) states that "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for his own account…while such member personally holds…an unexecuted market order to buy…or (2) personally sell or initiate the sale of any such security on the Exchange for any such account, while he personally holds…an unexecuted market order to sell."

19. AMEX Rule 150(b) (Purchases and Sales While Holding Unexecuted Limit Order) states that: "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for any such account, at or below a price at which he personally holds… an unexecuted limited price order to buy such security…or (2) personally sell or initiate the sale of any security on the Exchange for any such account, at or above the price at which he personally holds… an unexecuted limited price order to sell such security."

20. AMEX Rule 155 (Precedence Accorded to Orders Entrusted to Specialists) requires that a specialist "give precedence to orders entrusted to him as an agent before executing at the same price any purchase or sale in the same stock for an account in which he has an interest."

21. AMEX Rule 170(d) (Registration and Functions of Specialists) imposes upon specialists the obligation to refrain from engaging in transactions for his own account "in the securities in which he is registered" unless that conduct constitutes "a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd lot market." The rule goes on to provide that: "Transactions in such securities not part of such a course of dealings are not to be effected by a specialist for his own account."

22. GSEC and SHD violated each of the aforementioned AMEX rules by reason of the activities set forth in paragraphs 10 through 12 above.

CBOE

23. CBOE Rules 8.80 (DPM Defined) and 8.85 (DPM Obligations) require that a CBOE specialist cede priority to customer orders which the specialist represents as agent.

24. GSEC and SHD violated each of the aforementioned CBOE rules by reason of the activities set forth in paragraphs 10 through 12 above.

PHLX

25. PHLX Rule 1020(c) (Registration and Functions of Options Specialists) states, in relevant part: "A specialist or his member organization shall not effect... purchases or sales of any option in which such specialist is registered, ... unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."

26. PHLX Rule 1019 (Precedence Accorded to Orders Entrusted to Specialists) provides: "A specialist shall give precedence to orders entrusted to him as an agent in any option in which he is registered before executing at the same price any purchase or sale in the same option for an account in which he has an interest."

27. PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade) provides that specialists "shall not engage in conduct inconsistent with just and equitable principles of trade."

28. GSEC and SHD violated each of the aforementioned PHLX rules by reason of the activities set forth in paragraphs 10 through 12 above.

D. CONCLUSION

29. GSEC and SHD willfully committed violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder, as described above.

IV.

In view of the foregoing, the Commission finds that it is appropriate and in the public interest to impose the sanctions specified in the Offer submitted by GSEC and SHD.

Accordingly it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, GSEC and SHD cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder.

B. Pursuant to Section 15(b)(4) of the Exchange Act, GSEC and SHD are hereby censured.

C. Respondents shall, within ten days of the entry of the Order, jointly pay disgorgement of $6 million to the 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 GSEC and SHD 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 David Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281.

D. It is further ordered that Respondents shall, within ten days of the entry of the Order, jointly pay a civil money penalty in the amount of $1.2 million 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 GSEC and SHD 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 David Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281. 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.

By the Commission.

Elizabeth M. Murphy
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. 59504 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13393

In the Matter of **Knight Financial Products, LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Knight Financial Products, LLC ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

III.

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

A. RESPONDENT

1. **Knight Financial Products, LLC** ("KFP") was a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, from 2000 until March 2005. During the period relevant to this Order, KFP was a member of the American Stock Exchange ("AMEX"), the Chicago Board Options Exchange ("CBOE") and the Philadelphia Stock Exchange ("PHLX," and together with the CBOE and the AMEX, the "Exchanges"). During the period relevant to this Order, KFP acquired, merged with, or conducted joint venture operations with other specialist firms. A certain portion of the conduct that forms the basis of the findings herein took place at those predecessor firms or joint venture entities. As used herein, the terms "KFP" and "Respondent" refer to KFP, as well as its predecessor firms and joint venture entities. KFP sold its specialist operations in December, 2004.

B. FACTS

Summary

2. This matter involves violations by KFP of its basic obligation as a specialist to serve public customer orders over its own proprietary interests. As a specialist firm on each of the Exchanges,[2] KFP had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from the firm's own account when those customer orders could be matched with other customer orders. From 1999 through 2004 (the "Relevant Period"), KFP violated this obligation by filling orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged by approximately $1.7 million.

3. By effecting proprietary transactions that were not part of a course of dealings reasonably necessary to maintain a fair and orderly market, KFP violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. KFP also violated the following Exchange rules in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707.

---

[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] On the CBOE, specialist firms like KFP are known as Designated Primary Market-Makers, or DPMs.

Overview of Specialists' Obligations

4. On each of the Exchanges, specialist firms are responsible for the quality of the markets in the securities in which individual specialists are registered. A specialist is expected to maintain, insofar as is reasonably practicable, a "fair" and "orderly" market. A "fair" market is one that, among other things, affords no undue advantage to any participant. An "orderly" market is characterized by regular, reliable operation, with price continuity and depth, in which price movements are accompanied by appropriate volume, and unreasonable price variations between sales are avoided.

5. Specialists have two primary duties: performing their "negative obligation" to execute customer orders at the most advantageous price with minimal dealer intervention, and fulfilling their "affirmative obligation" to offset imbalances in supply and demand.[3] Specialists participate as both broker (or agent), absenting themselves from the market to pair executable customer orders against each other, and as dealer (or principal), trading for the specialists' dealer or proprietary accounts when needed to facilitate price continuity and fill customer orders when there are no available contra parties to those orders.

6. Whether acting as brokers or dealers, specialists are required to hold the public's interest above their own and, as such, are prohibited from trading for their dealers' accounts ahead of pre-existing customer buy or sell orders that could be executed against each other. When matchable customer buy and sell orders are received by the specialists – generally delivered either through one of the Exchange's order processing systems to a specialist's workstation, or, under certain circumstances, by floor brokers gathered in front of specialists' workstations ("the crowd") – specialists are required to act as agent and cross or pair off those orders and to abstain from participating as principal or dealer.

Improper Proprietary Trading by KFP

7. During the Relevant Period, KFP breached its duty to refrain from dealing for its own account while in possession of executable buy and sell customer orders. Instead, KFP effected improper proprietary trades that disadvantaged customer orders.

8. On each of the Exchanges, KFP specialists possessed or had access to information concerning customer orders on both sides of the market. Where there are matchable orders on both sides of the market, specialists are obligated to "pair off" or cross the buy and sell orders by executing each side of the market for identical prices and in commensurate order quantities. In numerous instances, however, KFP specialists did not "pair off" or cross these buy and sell orders with each other. Sometimes, KFP specialists did this by effecting a proprietary trade with an order that arrived electronically through the order processing system. At other times, KFP specialists effected improper proprietary trades with orders that came in from the crowd. In either case, the

[3] A specialist's obligations on the Exchanges also included acting as a market maker, and the Exchanges' rules generally required a specialist to provide continuous quotations for each option for which it acted as a specialist.

disadvantaged order was an order that the KFP specialist should have paired with the other order, instead of filling that other order through a proprietary trade retained by the specialist. The violative conduct took three basic forms described in paragraphs 9-11 below.

9. *Trading Ahead.* In certain instances, KFP specialists filled one agency order through a proprietary trade for the firm's account while a matchable agency order was present on the opposite side of the market, thereby improperly "trading ahead" of such opposite-side executable agency order. The customer order that was traded ahead of was then disadvantaged when it was subsequently executed at a price that was inferior to the price received by the firm's proprietary account. For example, if a specialist has present on his book, at the same time, a marketable customer order to buy five contracts of an options series and a marketable customer order to sell five contracts of the same options series, the specialist would be obligated to pair off those matchable orders. Trading ahead would occur if the specialist filled the sell order from the firm's proprietary account at $5.00 per share per contract, and then subsequently executed the buy order at the inferior price of $5.05 per share per contract. In this example, the buy order received a price inferior to that to which it was entitled ($5.00) and the customer was disadvantaged by $25.00 (5 contracts x $0.05 per share per contract x 100 shares per contract).

10. *Interpositioning.* In certain instances, after trading ahead, KFP specialists also traded proprietarily with the matchable opposite-side agency order that had been traded ahead of, thereby "interpositioning" themselves between the two agency orders that should have been paired off in the first instance. By participating on both sides of trades, the specialist captured the spread between the purchase and sale prices, thereby disadvantaging the other parties to the transactions. Interpositioning occurred in a relatively small number of instances.

11. *Trading Ahead of Unexecuted Open or Cancelled Orders.* In certain instances, KFP specialists traded ahead of opposite-side executable agency orders, as described in paragraph 9 above, but the unexecuted orders were left open until the end of the trading day, or were cancelled by the customer prior to the close of the trading day before receiving an execution. Because these orders were never executed, the calculation of customer harm for this type of misconduct was based on a formula that incorporated certain economic assumptions. A substantial amount of the customer harm discussed in paragraph 12 below relates to these unexecuted or cancelled orders.

12. During the Relevant Period, KFP engaged in tens of thousands of violative trades of the three types described in paragraphs 9-11, resulting in overall customer disadvantage of approximately $1.7 million across the Exchanges. Because of limitations in the source data maintained by the Exchanges, the calculation of the amount of customer disadvantage sometimes required the use of certain analytic formulas. The majority of the customer disadvantage relates to violative trading that occurred between 1999 and 2002.

C. APPLICABLE LAW

Section 11(b) of the Exchange Act

13. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 require a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1(b), if the Commission finds, after appropriate notice and opportunity for hearing, that a specialist has for any account in which he has an interest "effected transactions... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," the Commission may impose sanctions.

14. Where specialists effect trades for their accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. *See In the Matter of LaBranche & Co. LLC,* Exchange Act Release No. 49500, 2004 WL 626573, at *6 (Mar. 30, 2004); *In the Matter of Weiskopf, Silver & Co.,* Exchange Act Release No. 17361, 1980 WL 22091, at *2 (Dec. 10, 1980); *In the Matter of Albert Fried & Co. and Albert Fried, Jr.*, Exchange Act Release No. 15293, 1978 WL 196046, at *6 (Nov. 3, 1978).[4]

15. Here, KFP violated its negative obligation by engaging in the three types of conduct described in paragraphs 9 through 11 above. Accordingly, KFP willfully[5] violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

Exchange Rules

16. Several AMEX, CBOE and PHLX rules prohibit the same conduct as is prohibited by Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. These rules effectively prohibit a specialist from trading ahead of, or interpositioning between, eligible customer orders, and require agency orders to be matched whenever possible.

---

[4] The obligation to maintain a fair and orderly market "has a broader reach than the prohibition of 'fraud' and, thereby, imposes stricter standards of integrity and performance on specialists." *Albert Fried*, 1978 WL 196046, at *5. A transaction not reasonably necessary to maintain a fair and orderly market has been defined as one "'not reasonably calculated to contribute to the maintenance of price continuity [on the exchange] and to minimize the effects of temporary disparity between supply and demand.'" *Weiskopf*, 1980 WL 22091, at *2 n.5 (quoting Exchange Act Release No. 1117 at 2 (March 30, 1937)).

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

AMEX

17. AMEX Rule 150(a) (Purchases and Sales While Holding Unexecuted Market Order) states that "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for his own account...while such member personally holds...an unexecuted market order to buy...or (2) personally sell or initiate the sale of any such security on the Exchange for any such account, while he personally holds...an unexecuted market order to sell."

18. AMEX Rule 150(b) (Purchases and Sales While Holding Unexecuted Limit Order) states that: "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for any such account, at or below a price at which he personally holds... an unexecuted limited price order to buy such security...or (2) personally sell or initiate the sale of any security on the Exchange for any such account, at or above the price at which he personally holds... an unexecuted limited price order to sell such security."

19. AMEX Rule 155 (Precedence Accorded to Orders Entrusted to Specialists) requires that a specialist "give precedence to orders entrusted to him as an agent before executing at the same price any purchase or sale in the same stock for an account in which he has an interest."

20. AMEX Rule 170(d) (Registration and Functions of Specialists) imposes upon specialists the obligation to refrain from engaging in transactions for his own account "in the securities in which he is registered" unless that conduct constitutes "a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd lot market." The rule goes on to provide that: "Transactions in such securities not part of such a course of dealings are not to be effected by a specialist for his own account."

21. KFP violated each of the aforementioned AMEX rules by reason of the activities set forth in paragraphs 9 through 11 above.

CBOE

22. CBOE Rules 8.80 (DPM Defined) and 8.85 (DPM Obligations) require that a CBOE specialist cede priority to customer orders which the specialist represents as agent.

23. KFP violated each of the aforementioned CBOE rules by reason of the activities set forth in paragraphs 9 through 11 above.

PHLX

24. PHLX Rule 1020(c) (Registration and Functions of Options Specialists) states, in relevant part: "A specialist or his member organization shall not effect... purchases or sales of any option in which such specialist is registered, ... unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."

25. PHLX Rule 1019 (Precedence Accorded to Orders Entrusted to Specialists) provides: "A specialist shall give precedence to orders entrusted to him as an agent in any option in which he is registered before executing at the same price any purchase or sale in the same option for an account in which he has an interest."

26. PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade) provides that specialists "shall not engage in conduct inconsistent with just and equitable principles of trade."

27. KFP violated each of the aforementioned PHLX rules by reason of the activities set forth in paragraphs 9 through 11 above.

D. CONCLUSION

28. KFP willfully committed violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder, as described above.

IV.

In view of the foregoing, the Commission finds that it is appropriate and in the public interest to impose the sanctions specified in the Offer submitted by KFP.

Accordingly it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, KFP cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder.

B. Pursuant to Section 15(b)(4) of the Exchange Act, KFP is hereby censured.

C. KFP shall, within ten days of the entry of the Order, pay disgorgement of $1.7 million to the 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 KFP 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281.

D. It is further ordered that KFP shall, within ten days of the entry of the Order, pay a civil money penalty in the amount of $340,000 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 KFP 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281. 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.

By the Commission.

Elizabeth M. Murphy
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. 59501 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13390

In the Matter of	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934
Botta Capital Management, L.L.C.,	
Respondent.	

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Botta Capital Management, L.L.C. ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

III.

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

A. RESPONDENT

1. Botta Capital Management, L.L.C. ("Botta") is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, since 1998. During the period relevant to this Order, Botta was a member of the American Stock Exchange ("AMEX"), the Chicago Board Options Exchange ("CBOE") and the Philadelphia Stock Exchange ("PHLX," and together with the CBOE and the AMEX, the "Exchanges"). During the period relevant to this Order, Botta acquired, merged with, or conducted joint venture operations with other specialist firms, and a certain portion of the conduct that forms the basis of the findings herein took place at those predecessor or joint venture entities. As used herein, the terms "Botta" and "Respondent" refer to Botta, as well as certain of its predecessor firms and joint venture entities.

B. FACTS

Summary

2. This matter involves violations by Botta of its basic obligation as a specialist to serve public customer orders over its own proprietary interests. As a specialist firm on each of the Exchanges,[2] Botta had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from the firm's own account when those customer orders could be matched with other customer orders. From 1999 through 2005 (the "Relevant Period"), Botta violated this obligation by filling orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged by approximately $2.5 million.

3. By effecting proprietary transactions that were not part of a course of dealings reasonably necessary to maintain a fair and orderly market, Botta violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. Botta also violated the following Exchange rules in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707.

Overview of Specialists' Obligations

4. On each of the Exchanges, specialist firms are responsible for the quality of the markets in the securities in which individual specialists are registered. A specialist is expected to maintain,

---

[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] On the CBOE, specialist firms like Botta are known as Designated Primary Market-Makers, or DPMs.

insofar as is reasonably practicable, a "fair" and "orderly" market. A "fair" market is one that, among other things, affords no undue advantage to any participant. An "orderly" market is characterized by regular, reliable operation, with price continuity and depth, in which price movements are accompanied by appropriate volume, and unreasonable price variations between sales are avoided.

5. Specialists have two primary duties: performing their "negative obligation" to execute customer orders at the most advantageous price with minimal dealer intervention, and fulfilling their "affirmative obligation" to offset imbalances in supply and demand.[3] Specialists participate as both broker (or agent), absenting themselves from the market to pair executable customer orders against each other, and as dealer (or principal), trading for the specialists' dealer or proprietary accounts when needed to facilitate price continuity and fill customer orders when there are no available contra parties to those orders.

6. Whether acting as brokers or dealers, specialists are required to hold the public's interest above their own and, as such, are prohibited from trading for their dealers' accounts ahead of pre-existing customer buy or sell orders that could be executed against each other. When matchable customer buy and sell orders are received by the specialists – generally delivered either through one of the Exchange's order processing systems to a specialist's workstation, or, under certain circumstances, by floor brokers gathered in front of specialists' workstations ("the crowd") – specialists are required to act as agent and cross or pair off those orders and to abstain from participating as principal or dealer.

Improper Proprietary Trading by Botta

7. During the Relevant Period, Botta breached its duty to refrain from dealing for its own account while in possession of executable buy and sell customer orders. Instead, Botta effected improper proprietary trades that disadvantaged customer orders.

8. On each of the Exchanges, Botta specialists possessed or had access to information concerning customer orders on both sides of the market. Where there are matchable orders on both sides of the market, specialists are obligated to "pair off" or cross the buy and sell orders by executing each side of the market for identical prices and in commensurate order quantities. In numerous instances, however, Botta specialists did not "pair off" or cross these buy and sell orders with each other. Sometimes, Botta specialists did this by effecting a proprietary trade with an order that arrived electronically through the order processing system. At other times, Botta specialists effected improper proprietary trades with orders that came in from the crowd. In either case, the disadvantaged order was an order that the Botta specialist should have paired with the other order, instead of filling that other order through a proprietary trade retained by the specialist. The violative conduct took three basic forms described in paragraphs 9-11 below.

---

[3] A specialist's obligations on the Exchanges also included acting as a market maker, and the Exchanges' rules generally required a specialist to provide continuous quotations for each option for which it acted as a specialist.

9. *Trading Ahead.* In certain instances, Botta specialists filled one agency order through a proprietary trade for the firm's account while a matchable agency order was present on the opposite side of the market, thereby improperly "trading ahead" of such opposite-side executable agency order. The customer order that was traded ahead of was then disadvantaged when it was subsequently executed at a price that was inferior to the price received by the firm's proprietary account. For example, if a specialist has present on his book, at the same time, a marketable customer order to buy five contracts of an options series and a marketable customer order to sell five contracts of the same options series, the specialist would be obligated to pair off those matchable orders. Trading ahead would occur if the specialist filled the sell order from the firm's proprietary account at $5.00 per share per contract, and then subsequently executed the buy order at the inferior price of $5.05 per share per contract. In this example, the buy order received a price inferior to that to which it was entitled ($5.00) and the customer was disadvantaged by $25.00 (5 contracts x $0.05 per share per contract x 100 shares per contract).

10. *Interpositioning.* In certain instances, after trading ahead, Botta specialists also traded proprietarily with the matchable opposite-side agency order that had been traded ahead of, thereby "interpositioning" themselves between the two agency orders that should have been paired off in the first instance. By participating on both sides of trades, the specialist captured the spread between the purchase and sale prices, thereby disadvantaging the other parties to the transactions. Interpositioning occurred in a relatively small number of instances.

11. *Trading Ahead of Unexecuted Open or Cancelled Orders.* In certain instances, Botta specialists traded ahead of opposite-side executable agency orders, as described in paragraph 9 above, but the unexecuted orders were left open until the end of the trading day, or were cancelled by the customer prior to the close of the trading day before receiving an execution. Because these orders were never executed, the calculation of customer harm for this type of misconduct was based on a formula that incorporated certain economic assumptions. A substantial amount of the customer harm discussed in paragraph 12 below relates to these unexecuted or cancelled orders.

12. During the Relevant Period, Botta engaged in tens of thousands of violative trades of the three types described in paragraphs 9-11, resulting in overall customer disadvantage of approximately $2.5 million across the Exchanges. Because of limitations in the source data maintained by the Exchanges, the calculation of the amount of customer disadvantage sometimes required the use of certain analytic formulas. The majority of the customer disadvantage relates to violative trading that occurred between 1999 and 2002.

13. Respondent, together with certain affiliated companies, have submitted sworn Statements of Financial Condition dated June 30, 2007, as updated through affidavits dated May 28, 2008 and July 31, 2008, and other evidence and has asserted its inability to pay the full amount of disgorgement and prejudgment interest.

C. APPLICABLE LAW

Section 11(b) of the Exchange Act

14. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 require a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1(b), if the Commission finds, after appropriate notice and opportunity for hearing, that a specialist has for any account in which he has an interest "effected transactions... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," the Commission may impose sanctions.

15. Where specialists effect trades for their accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. *See In the Matter of LaBranche & Co. LLC,* Exchange Act Release No. 49500, 2004 WL 626573, at *6 (Mar. 30, 2004); *In the Matter of Weiskopf, Silver & Co.,* Exchange Act Release No. 17361, 1980 WL 22091, at *2 (Dec. 10, 1980); *In the Matter of Albert Fried & Co. and Albert Fried, Jr.*, Exchange Act Release No. 15293, 1978 WL 196046, at *6 (Nov. 3, 1978).[4]

16. Here, Botta violated its negative obligation by engaging in the three types of conduct described in paragraphs 9 through 11 above. Accordingly, Botta willfully[5] violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

Exchange Rules

17. Several AMEX, CBOE and PHLX rules prohibit the same conduct as is prohibited by Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. These rules effectively prohibit a specialist from trading ahead of, or interpositioning between, eligible customer orders, and require agency orders to be matched whenever possible.

---

[4] The obligation to maintain a fair and orderly market "has a broader reach than the prohibition of 'fraud' and, thereby, imposes stricter standards of integrity and performance on specialists." *Albert Fried*, 1978 WL 196046, at *5. A transaction not reasonably necessary to maintain a fair and orderly market has been defined as one "'not reasonably calculated to contribute to the maintenance of price continuity [on the exchange] and to minimize the effects of temporary disparity between supply and demand.'" *Weiskopf*, 1980 WL 22091, at *2 n.5 (quoting Exchange Act Release No. 1117 at 2 (March 30, 1937)).

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

AMEX

18. AMEX Rule 150(a) (Purchases and Sales While Holding Unexecuted Market Order) states that "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for his own account...while such member personally holds...an unexecuted market order to buy...or (2) personally sell or initiate the sale of any such security on the Exchange for any such account, while he personally holds...an unexecuted market order to sell."

19. AMEX Rule 150(b) (Purchases and Sales While Holding Unexecuted Limit Order) states that: "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for any such account, at or below a price at which he personally holds... an unexecuted limited price order to buy such security...or (2) personally sell or initiate the sale of any security on the Exchange for any such account, at or above the price at which he personally holds... an unexecuted limited price order to sell such security."

20. AMEX Rule 155 (Precedence Accorded to Orders Entrusted to Specialists) requires that a specialist "give precedence to orders entrusted to him as an agent before executing at the same price any purchase or sale in the same stock for an account in which he has an interest."

21. AMEX Rule 170(d) (Registration and Functions of Specialists) imposes upon specialists the obligation to refrain from engaging in transactions for his own account "in the securities in which he is registered" unless that conduct constitutes "a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd lot market." The rule goes on to provide that: "Transactions in such securities not part of such a course of dealings are not to be effected by a specialist for his own account."

22. Botta violated each of the aforementioned AMEX rules by reason of the activities set forth in paragraphs 9 through 11 above.

CBOE

23. CBOE Rules 8.80 (DPM Defined) and 8.85 (DPM Obligations) require that a CBOE specialist cede priority to customer orders which the specialist represents as agent.

24. Botta violated each of the aforementioned CBOE rules by reason of the activities set forth in paragraphs 9 through 11 above.

PHLX

25. PHLX Rule 1020(c) (Registration and Functions of Options Specialists) states, in relevant part: "A specialist or his member organization shall not effect... purchases or sales of any option in which such specialist is registered, ... unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."

26. PHLX Rule 1019 (Precedence Accorded to Orders Entrusted to Specialists) provides: "A specialist shall give precedence to orders entrusted to him as an agent in any option in which he is registered before executing at the same price any purchase or sale in the same option for an account in which he has an interest."

27. PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade) provides that specialists "shall not engage in conduct inconsistent with just and equitable principles of trade."

28. Botta violated each of the aforementioned PHLX rules by reason of the activities set forth in paragraphs 9 through 11 above.

D. CONCLUSION

29. Botta willfully committed violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder, as described above.

IV.

In view of the foregoing, the Commission finds that it is appropriate and in the public interest to impose the sanctions specified in the Offer submitted by Botta.

Accordingly it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Botta cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder.

B. Pursuant to Section 15(b)(4) of the Exchange Act, Botta is hereby censured.

C. Botta shall, within ten days of the entry of the Order, pay disgorgement of $2.5 million to the Commission, but that payment of such amount, except for $825,000, is waived based upon Respondent's sworn representations in its Statement of Financial Condition dated June 30, 2007, as updated through affidavits dated May 28, 2008 and July 31, 2008, and other documents submitted to the 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 Botta 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

D. Based upon Respondent's sworn representations in its Statement of Financial Condition dated June 30, 2007, as updated through affidavits dated May 28, 2008 and July 31, 2008, and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59499 / March 4, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2941 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13388

In the Matter of **KRISPY KREME DOUGHNUTS, INC.,** **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 Krispy Kreme Doughnuts, Inc. ("Krispy Kreme" or "Respondent").

II.

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

III.

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

---

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.

1. Krispy Kreme is a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina. Since approximately 1937, Krispy Kreme has been engaged in the business of making and selling doughnuts, initially through a single store in Winston-Salem and subsequently through multiple stores across the United States owned either by Krispy Kreme or franchisees. Since April 2000, shares of Krispy Kreme's common stock have been registered with the Commission pursuant to Section 12(b) of the Exchange Act and since May 2001 they have been listed on the New York Stock Exchange.

Background

2. Between approximately February 2003 and May 2004, Krispy Kreme fraudulently inflated or otherwise misrepresented its earnings for the fourth quarter of its 2003 fiscal year, which ended on February 2, 2003, and each quarter of its 2004 fiscal year, and its full year results for fiscal 2004, which ended on February 1, 2004. By this misconduct, the Respondent avoided lowering its earnings guidance and improperly reported for each of those quarters what had become a prime benchmark of its historical performance, *i.e.*, reporting quarterly earnings per share of common stock ("EPS") that exceeded its previously announced EPS guidance by one cent.

3. In the 1990s, Krispy Kreme, which initially operated in the southeastern United States, began expanding nationally through a franchise program through which it opened new stores and increased its annual revenue.

4. Although Krispy Kreme calculated and disclosed quarterly various indices of its sales growth and geographical expansion, Krispy Kreme internally placed primary emphasis on only two measures of financial performance, namely, continual quarter over quarter growth of its quarterly EPS and whether that growth resulted in quarterly earnings that exceeded by at least one cent consensus analyst's expectations or, when issued, Krispy Kreme's own quarterly EPS guidance.

5. In the first three years after Krispy Kreme became a public issuer in April 2000, Krispy Kreme's EPS growth increased at an annual rate of 80%, 67%, and 47%, respectively. Additionally, Krispy Kreme reported EPS that tracked closely and—in almost every quarter—exceeded both consensus analyst's expectations and its own EPS guidance by at least $.01.

6. Beginning in fiscal 2002 and in much of fiscal 2003, Krispy Kreme's common stock routinely traded at a multiple of over 50 times annual EPS. In fiscal 2004, Krispy Kreme's stock traded between 30 and 50 times annual EPS.

The Incentive Plan

7. From April 2000 through the end of fiscal year 2004, Krispy Kreme's senior executives were compensated annually with a combination of salary, stock option grants, and cash bonuses, the last of which was paid pursuant to Krispy Kreme's Senior Executive Incentive Compensation Plan ("Incentive Plan"). Under the Incentive Plan, as disclosed in Krispy Kreme's proxy statement, bonuses for all executive officers were contingent upon Krispy Kreme meeting or exceeding goals for two performance measures: (i) the attainment of a certain level

of return on assets, measured by earnings before interest, taxes and depreciation, and amortization, and (ii) a percentage increase in EPS.

8. For fiscal years 2002 and 2003, Krispy Kreme set a quarterly EPS target of earnings that exceeded by at least one cent Wall Street expectations, or when issued, Krispy Kreme's quarterly guidance. The EPS target – meeting EPS guidance plus one cent – had to be achieved to trigger the payment of incentive compensation under the Incentive Plan. In these fiscal years, Krispy Kreme achieved this targeted EPS and paid incentive compensation that consisted of all amounts that Krispy Kreme earned in excess of its EPS target.

9. Krispy Kreme accrued for incentive compensation on a quarterly basis by recording incentive compensation expense in the amount of all earnings in excess of the amount needed to achieve the targeted EPS for that quarter. Thus, during fiscal year 2002 and fiscal year 2003, Krispy Kreme's method of accruing for the Incentive Plan effectively acted as a "ceiling" on its earnings.

10. Beginning in the second quarter of fiscal year 2003, Krispy Kreme experienced delays in new store openings, which adversely affected Krispy Kreme's rate of earnings growth and reduced the amount of incentive compensation expense accrued quarterly. Although Krispy Kreme had sufficient earnings to make an incentive compensation accrual in the second and third quarters of fiscal 2003, the accruals were significantly less than in previous quarters.

11. Furthermore, for fiscal year 2003, the incentive compensation paid at the end of the fiscal year was less than had been previously accrued. The lower level of incentive compensation payment resulted from a reversal of $873,261 of previously accrued incentive compensation expense, which increased earnings by $528,323 and enabled Krispy Kreme to report earnings for the fourth quarter of fiscal year 2003 that met its EPS guidance plus $0.01. In making this disclosure, Krispy Kreme did not also disclose that but for the occurrence of the reversal that it would not have reported that result.

12. As implemented, the Incentive Plan operated as a *de facto* reserve accounting mechanism which, within certain limits, virtually guaranteed that reported quarterly EPS would equal Krispy Kreme's quarterly guidance plus $0.01. Specifically, under Generally Accepted Accounting Principles ("GAAP"), (*see* Accounting Principles Board Opinion No. 28, ¶¶ 12, 15, 16, and 26). Krispy Kreme should have accounted for the plan by periodically comparing a real-time estimate of its projected, pre-incentive compensation expense EPS for the full fiscal year to its full-year EPS target and then reconciling the then-projected payout under the plan with amounts accrued to date for incentive compensation expense. However, despite the fact that Krispy Kreme consistently maintained a real-time estimate of its EPS for the full fiscal year, Krispy Kreme accounted for the plan by booking the difference between Krispy Kreme's actual quarterly EPS results and its quarterly target EPS, *i.e.*, achieving EPS guidance plus one cent. This accounting, in effect, created a "collar" on shareholder earnings, *i.e.*, in good quarters, excess profits were accrued to fund the Incentive Plan and in weak quarters, accruals to the Incentive Plan were reversed to improve earnings, with shareholders consistently being told that Krispy Kreme had exceeded its EPS guidance by $0.01—no more and no less.

13. In the first quarter of fiscal 2004, Krispy Kreme's performance improved from the last quarter of fiscal year 2003, which, combined with a one-time, disclosed partial reversal of previously accrued litigation expense, resulted in Krispy Kreme having sufficient earnings to report EPS of $0.22—or EPS guidance for the first quarter plus $0.02— and accrue $2,050,000

as incentive compensation. However, as of the end of the quarter, management forecasted pre-incentive EPS of $1.05 for the full fiscal year and, therefore, should have accrued an additional $798,000 for a total of $2,848,000 in incentive compensation expense for the quarter. If Krispy Kreme had accrued the full $2,848,000, however, reported EPS—excluding the impact of the reversal of previously accrued litigation expense—would have been $0.20, merely equaling its EPS guidance for the first quarter.

14. Beginning in the second quarter of fiscal 2004, as sales growth continued to slacken, Krispy Kreme reduced the incentive compensation accrual causing it to exceed its EPS guidance. Specifically, at the end of that quarter, Krispy Kreme made a net $949,999 reversal in previously accrued incentive compensation expense, which increased after-tax earnings by $569,999. By effecting the $949,999 reversal, Krispy Kreme increased its earnings for the quarter and reported EPS of $0.21 for the quarter, equaling its previously announced EPS guidance plus $0.01. In making this disclosure, Krispy Kreme did not also disclose that but for the occurrence of the reversal it would not have reported that result.

15. In the third quarter of fiscal 2004, Krispy Kreme made no additional incentive compensation accruals and, instead, reversed the remaining available balance in the account, *i.e.*, $833,332. This increased Krispy Kreme's after-tax earnings by $499,999 and Krispy Kreme reported EPS of $0.23 for the quarter, equaling its previously announced EPS guidance plus $0.01.

16. Each of the incentive compensation accruals or reversals described above was the next to last entry done by Krispy Kreme before its books were closed for the quarter, with the last entry being for the provision for taxes.

Round-Trip Transactions

17. In each of the second, third and fourth quarters of fiscal 2004, Krispy Kreme engaged in a round-trip transaction in connection with the reacquisition of a franchise. Each transaction followed essentially the same pattern, Krispy Kreme paid money to the franchise with the understanding that the franchise would pay the money back to Krispy Kreme in a pre-arranged manner that would allow Krispy Kreme to record additional pre-tax net income in an amount roughly equal to the funds originally paid to the franchise.

First Round Trip Transaction

18. The first of the round-trip transactions occurred in June 2003, the second quarter of fiscal 2004, in connection with the reacquisition of a franchise in Texas. In connection with this reacquisition, Krispy Kreme increased the price it paid for the franchise by $800,000, *i.e.*, from $65,000,000 to $65,800,000, in return for the franchise purchasing from Krispy Kreme certain doughnut making equipment.

19. The purchase of the equipment was made at the request of Krispy Kreme and was arranged after the parties had orally agreed to the $65 million reacquisition price. But for the

$800,000 increase in that price, the franchise would not have agreed to purchase the equipment. On the day of the closing, as Krispy Kreme paid $65.8 million to the franchise, Krispy Kreme debited the franchise's bank account for $744,000, which was the aggregate list price of the equipment. This additional revenue boosted Krispy Kreme's quarterly net income by approximately $365,000 after taxes.

Second Round Trip Transaction

20. The second round-trip transaction occurred at the end of October 2003, four days from the closing of Krispy Kreme's third quarter of fiscal 2004, in connection with the reacquisition of a franchise in Michigan.

21. In this reacquisition transaction, Krispy Kreme agreed to increase the price it paid for the franchise by $535,463, which represented an approximation of the total of two disputed amounts that Krispy Kreme claimed it was owed by the Michigan franchise.

22. As a result, when the reacquisition closed, Krispy Kreme paid an increased purchase price of $535,463, and recorded the transaction on its books and records as if it had been reimbursed for the two disputed amounts. This overstated Krispy Kreme's net income in the third quarter by approximately $310,000 after taxes.

Third Round Trip Transaction

23. The third round-trip transaction occurred in January 2004, in the fourth quarter of fiscal 2004, in connection with Krispy Kreme's reacquisition of the remaining interests in a franchise in California.

24. Krispy Kreme owned a majority interest in the California franchise and, beginning in or about October 2003, initiated negotiations with the remaining interest holders for acquisition of their interests. During those negotiations, the principal manager of the California franchise, who individually owned 25% of the franchise, ceased to manage the California franchise and Krispy Kreme, through its employees, assumed management responsibility.

25. During the course of negotiations, Krispy Kreme demanded payment of a "management fee" in consideration for Krispy Kreme's handling of the management duties since October 2003. A few days before the closing and only about a week before quarter-end, Krispy Kreme engaged a round-trip means that provided the former franchise manager with funds that he could then use to pay a management fee to Krispy Kreme.

26. Specifically, Krispy Kreme proposed that the former franchise manager would receive a distribution from his capital account, which he could then pay back to Krispy Kreme as a management fee. No adjustment was made to the purchase price for his interest in the California franchise to reflect this distribution. As a result, the former franchise manager received the full value for his franchise interest, including his capital account, plus an additional amount provided that he paid back that amount as the management fee. Krispy Kreme, acting through the California franchise, made a distribution to the former franchise manager in the

amount of $597,415, which he immediately transferred back to Krispy Kreme as payment of the management fee. Krispy Kreme booked this fee as income, thereby overstating Krispy Kreme's net income in the fourth quarter by approximately $361,000.

27. In May 2004, Krispy Kreme disclosed disappointing earnings for the first quarter of fiscal 2005 and lowered its future earnings guidance. Subsequently, as a result of the conduct described above, as well as the discovery of other accounting errors, on January 4, 2005, Krispy Kreme announced that it would restate its financial statements for fiscal 2003 and 2004. The restatement reduced net income for fiscal years 2003 and 2004 by $2,420,000 and $8,524,000, respectively. Krispy Kreme also forced the retirement or resignation of a number of senior executives who were identified as bearing some degree of responsibility for events leading to the restatement.

28. Krispy Kreme materially misstated its earnings in its financial statements filed with the Commission between the fourth quarter of fiscal 2003 and the fourth quarter of fiscal 2004. In each of these periods, Krispy Kreme falsely reported that it had achieved earnings equal to its EPS guidance plus one cent in the fourth quarter of fiscal 2003 through the third quarter of fiscal 2004 or, in the case of the fourth quarter of fiscal 2004, earnings that met its EPS guidance.

Krispy Kreme's Violations

29. As a result of the conduct described above, Krispy Kreme violated Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act file with the Commission information, documents, and annual, quarterly, and current reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.

30. Because Krispy Kreme improperly accounted for its Incentive Plan and improperly accounted for three franchise reacquistions, its books, records and accounts did not, in reasonable detail, accurately and fairly reflect its transactions and dispositions of assets.

31. In addition, Krispy Kreme failed to implement internal accounting controls relating to its Incentive Plan and franchise reacquisitions which were sufficient to provide reasonable assurances that its accounts were accurately stated in accordance with generally accepted accounting principles.

32. As a result of the conduct described above, Krispy Kreme violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

33. Lastly, as a result of the conduct described above, Krispy Kreme violated Section 13(b)(2)(B) of the Exchange Act, which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles.

Krispy Kreme's Remedial Efforts

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

Undertakings

35. Respondent shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Respondent has undertaken:

a. To produce, without service of a notice or subpoena, any and all documents and other information requested by the Commission's staff;

b. To use its best efforts to cause its employees to be interviewed by the Commission's staff at such times as the staff reasonably may direct;

c. To use its best efforts to cause its employees to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

d. That in connection with any testimony of Respondent to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, Respondent:

(i) Agrees that any such notice or subpoena for Respondent's appearance and testimony may be served by regular mail on their attorney, Jerome F. Birn, Jr., Esq., at Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050; and

(ii.) Agrees that any such notice or subpoena for Respondent's 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.

36. In determining whether to accept the Offer, the Commission has considered these undertakings.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Krispy Kreme cease and desist from committing or causing violations and future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 promulgated thereunder.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter, not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59500 / March 4, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2942 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13389

In the Matter of **Sherry J. Polonsky** **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 Sherry J. Polonsky ("Polonsky" 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 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.

III.

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

Respondent

1. Polonsky, 47 and a resident of Winston-Salem, North Carolina, was Vice President of Finance and then Senior Vice President of Finance for Krispy Kreme Doughnuts, Inc. ("Krispy Kreme" or the "Company") between January 2002 when she joined the Company and her resignation on June 17, 2005. Krispy Kreme is a public issuer and doughnut retailer and franchisor based in North Carolina. Polonsky's responsibilities at Krispy Kreme included overseeing segments of the Company's accounting, financial reporting, and tax functions.

Overview

2. In the third and fourth quarters of Krispy Kreme's 2004 fiscal year, Polonsky caused Krispy Kreme to record improperly two round-trip transactions in connection with the acquisition of Company franchises located in Michigan and California. In both transactions, Krispy Kreme paid money to the franchisee with the understanding that the franchisee would pay the money back to Krispy Kreme. In each instance, Krispy Kreme recognized additional income in an amount roughly equal to the funds that were paid back to it.

3. As a result, Krispy Kreme filed annual, quarterly, and current reports with the Commission that contained misstated financial results, failed to have books and records that accurately and fairly reflected its transactions and disposition of assets, and failed to devise and maintain internal accounting controls sufficient to provide reasonable assurances that its accounts were accurately stated in accordance with generally accepted accounting principles.

First Round Trip Transaction

4. The first round trip transaction occurred at the end of October 2003, four days before the closing of Krispy Kreme's third quarter of its fiscal year 2004, in connection with the acquisition of a franchise located in Michigan.

5. Specifically, as part of the acquisition transaction, the Company agreed to increase the price it paid for the franchise by $535,463, which represented an approximation of the total of two amounts that Krispy Kreme claimed it was owed by the franchisee, with the understanding that the franchisee would pay the disputed amounts to Krispy Kreme as part of the acquisition's closing. The Michigan franchisee had refused to pay these amounts and only agreed to pay them after Krispy Kreme offered to increase the purchase price in an amount intended to cover the disputed items.

6. Polonsky was told in an e-mail that the purchase price for the franchise would be increased by the approximate total of the two disputed amounts so that those amounts would be paid to Krispy Kreme as part of the acquisition's closing. In addition, a coworker discussed with Polonsky increasing the purchase price to resolve remaining issues. Despite the email and this

---

[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.

conversation with the coworker, Polonsky directed that Krispy Kreme recognize income and reclassify expenses in an amount equal to the total of the two disputed items.

7. As a result, when the acquisition closed, Krispy Kreme paid an increased purchase price of $535,463, and recorded the transaction on its books and records as if it had been paid for the two disputed amounts. This overstated the Company's net income in the third quarter by approximately $310,000 after taxes.

Second Round Trip Transaction

8. The second round-trip transaction occurred in January 2004, in the fourth quarter of Krispy Kreme's 2004 fiscal year, in connection with Krispy Kreme's acquisition of the remaining interests in a franchise located in California, in which Krispy Kreme already owned a majority interest.

9. Specifically, beginning in or about October 2003, Krispy Kreme initiated negotiations with the remaining interest holders for acquisition of their interests. During those negotiations, the franchise manager of the California franchise, who individually owned 25% of the franchise, ceased to manage the California franchise and Krispy Kreme, through its employees, assumed his management responsibility.

10. During the course of negotiations, Krispy Kreme sought from the former franchise manager a "management fee" as compensation to Krispy Kreme for the handling of his previous management duties after October 2003. Krispy Kreme suggested that such a fee be subtracted from any amounts due the former franchise manager at closing for his 25% interest in the franchise.

11. The former franchise manager refused to agree that any amount should be deducted from the proceeds of the sale of his interest to Krispy Kreme.

12. A few days before the scheduled closing of the transaction and only about a week before the end of the fourth quarter of Krispy Kreme's 2004 fiscal year, Polonsky communicated to the former franchise manager a proposal by Krispy Kreme that he accept a distribution from his capital account in the franchise, that he could then pay back to Krispy Kreme as a management fee. The former franchise manager was further told that at closing he would still receive the full amount of the previously negotiated consideration for his 25% interest in the franchise.

13. By offering a non-pro rata distribution from the former franchise manager's capital account while at the same time assuring the former franchise manager that he would receive the full amount of the previously agreed upon consideration for his 25% interest, Krispy Kreme was orchestrating a round-trip transaction that lacked economic substance.

14. Krispy Kreme made a distribution to the former franchise manager from his capital account in the amount of $597,415, which he immediately transferred back to Krispy Kreme as payment of the management fee. Polonsky caused Krispy Kreme to book this fee as income, thereby overstating Krispy Kreme's net income in the fourth quarter by approximately $361,000 after taxes.

Respondent's Violations

15. As a result of the conduct described above, Polonsky caused Krispy Kreme to violate Section 13(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13, thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act file with the Commission information, documents, and annual, quarterly, and current reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.

16. As a result of Polonsky's actions, Krispy Kreme's books, records and accounts did not, in reasonable detail, accurately and fairly reflect its transactions and dispositions of assets.

17. In addition, as a further result of Polonsky's actions, Krispy Kreme failed to devise and maintain a system of internal accounting controls relating to its franchise acquisitions that were sufficient to provide reasonable assurances that its accounts were accurately stated in accordance with generally accepted accounting principles.

18. As a result of the conduct described above, Polonsky caused Krispy Kreme to violate Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

19. Lastly, as a result of the conduct described above, Polonsky caused Krispy Kreme to violate Section 13(b)(2)(B) of the Exchange Act, which requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles.

IV.

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

Accordingly, it is hereby ORDERED that:

Pursuant to Section 21C of the Exchange Act, Respondent Polonsky cease and desist from causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder.

By the Commission.

Elizabeth M. Murphy
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. 59503 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13392

In the Matter of Group One Trading, L.P., Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Group One Trading, L.P. ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

11 of 57

III.

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

A. RESPONDENT

1. **Group One Trading, L.P.** ("Group One," or "Respondent") is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, since 1994. Group One is a member of the American Stock Exchange ("AMEX"), the Chicago Board Options Exchange ("CBOE") and the Philadelphia Stock Exchange ("PHLX," and together with the CBOE and the AMEX, the "Exchanges").

B. FACTS

Summary

2. This matter involves violations by Group One of its basic obligation as a specialist to serve public customer orders over its own proprietary interests. As a specialist firm on each of the Exchanges,[2] Group One had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from the firm's own account when those customer orders could be matched with other customer orders. From 1999 through 2005 (the "Relevant Period"), Group One violated this obligation by filling orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged by approximately $1.5 million.

3. By effecting proprietary transactions that were not part of a course of dealings reasonably necessary to maintain a fair and orderly market, Group One violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. Group One also violated the following Exchange rules in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707.

Overview of Specialists' Obligations

4. On each of the Exchanges, specialist firms are responsible for the quality of the markets in the securities in which individual specialists are registered. A specialist is expected to maintain, insofar as is reasonably practicable, a "fair" and "orderly" market. A "fair" market is one that, among other things, affords no undue advantage to any participant. An "orderly" market is characterized by regular, reliable operation, with price continuity and depth, in which price

---

[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] On the CBOE, specialist firms like Group One are known as Designated Primary Market-Makers, or DPMs.

movements are accompanied by appropriate volume, and unreasonable price variations between sales are avoided.

5. Specialists have two primary duties: performing their "negative obligation" to execute customer orders at the most advantageous price with minimal dealer intervention, and fulfilling their "affirmative obligation" to offset imbalances in supply and demand.[3] Specialists participate as both broker (or agent), absenting themselves from the market to pair executable customer orders against each other, and as dealer (or principal), trading for the specialists' dealer or proprietary accounts when needed to facilitate price continuity and fill customer orders when there are no available contra parties to those orders.

6. Whether acting as brokers or dealers, specialists are required to hold the public's interest above their own and, as such, are prohibited from trading for their dealers' accounts ahead of pre-existing customer buy or sell orders that could be executed against each other. When matchable customer buy and sell orders are received by the specialists – generally delivered either through one of the Exchange's order processing systems to a specialist's workstation, or, under certain circumstances, by floor brokers gathered in front of specialists' workstations ("the crowd") – specialists are required to act as agent and cross or pair off those orders and to abstain from participating as principal or dealer.

Improper Proprietary Trading by Group One

7. During the Relevant Period, Group One breached its duty to refrain from dealing for its own account while in possession of executable buy and sell customer orders. Instead, Group One effected improper proprietary trades that disadvantaged customer orders.

8. On each of the Exchanges, Group One specialists possessed or had access to information concerning customer orders on both sides of the market. Where there are matchable orders on both sides of the market, specialists are obligated to "pair off" or cross the buy and sell orders by executing each side of the market for identical prices and in commensurate order quantities. In numerous instances, however, Group One specialists did not "pair off" or cross these buy and sell orders with each other. Sometimes, Group One specialists did this by effecting a proprietary trade with an order that arrived electronically through the order processing system. At other times, Group One specialists effected improper proprietary trades with orders that came in from the crowd. In either case, the disadvantaged order was an order that the Group One specialist should have paired with the other order, instead of filling that other order through a proprietary trade retained by the specialist. The violative conduct took three basic forms described in paragraphs 9-11 below.

9. *Trading Ahead.* In certain instances, Group One specialists filled one agency order through a proprietary trade for the firm's account while a matchable agency order was present on the opposite side of the market, thereby improperly "trading ahead" of such opposite-side executable

[3] A specialist's obligations on the Exchanges also included acting as a market maker, and the Exchanges' rules generally required a specialist to provide continuous quotations for each option for which it acted as a specialist.

agency order. The customer order that was traded ahead of was then disadvantaged when it was subsequently executed at a price that was inferior to the price received by the firm's proprietary account. For example, if a specialist has present on his book, at the same time, a marketable customer order to buy five contracts of an options series and a marketable customer order to sell five contracts of the same options series, the specialist would be obligated to pair off those matchable orders. Trading ahead would occur if the specialist filled the sell order from the firm's proprietary account at $5.00 per share per contract, and then subsequently executed the buy order at the inferior price of $5.05 per share per contract. In this example, the buy order received a price inferior to that to which it was entitled ($5.00) and the customer was disadvantaged by $25.00 (5 contracts x $0.05 per share per contract x 100 shares per contract).

10. *Interpositioning*. In certain instances, after trading ahead, Group One specialists also traded proprietarily with the matchable opposite-side agency order that had been traded ahead of, thereby "interpositioning" themselves between the two agency orders that should have been paired off in the first instance. By participating on both sides of trades, the specialist captured the spread between the purchase and sale prices, thereby disadvantaging the other parties to the transactions. Interpositioning occurred in a relatively small number of instances.

11. *Trading Ahead of Unexecuted Open or Cancelled Orders*. In certain instances, Group One specialists traded ahead of opposite-side executable agency orders, as described in paragraph 9 above, but the unexecuted orders were left open until the end of the trading day, or were cancelled by the customer prior to the close of the trading day before receiving an execution. Because these orders were never executed, the calculation of customer harm for this type of misconduct was based on a formula that incorporated certain economic assumptions. A substantial amount of the customer harm discussed in paragraph 12 below relates to these unexecuted or cancelled orders.

12. During the Relevant Period, Group One engaged in tens of thousands of violative trades of the three types described in paragraphs 9-11, resulting in overall customer disadvantage of approximately $1.5 million across the Exchanges. Because of limitations in the source data maintained by the Exchanges, the calculation of the amount of customer disadvantage sometimes required the use of certain analytic formulas. The majority of the customer disadvantage relates to violative trading that occurred between 1999 and 2002.

C. APPLICABLE LAW

Section 11(b) of the Exchange Act

13. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 require a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1(b), if the Commission finds, after appropriate notice and opportunity for hearing, that a specialist has for any account in which he has an interest "effected transactions... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," the Commission may impose sanctions.

14. Where specialists effect trades for their accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. *See In the Matter of LaBranche & Co. LLC,* Exchange Act Release No. 49500, 2004 WL 626573, at *6 (Mar. 30, 2004); *In the Matter of Weiskopf, Silver & Co.,* Exchange Act Release No. 17361, 1980 WL 22091, at *2 (Dec. 10, 1980); *In the Matter of Albert Fried & Co. and Albert Fried, Jr.*, Exchange Act Release No. 15293, 1978 WL 196046, at *6 (Nov. 3, 1978).[4]

15. Here, Group One violated its negative obligation by engaging in the three types of conduct described in paragraphs 9 through 11 above. Accordingly, Group One willfully[5] violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

Exchange Rules

16. Several AMEX, CBOE and PHLX rules prohibit the same conduct as is prohibited by Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. These rules effectively prohibit a specialist from trading ahead of, or interpositioning between, eligible customer orders, and require agency orders to be matched whenever possible.

AMEX

17. AMEX Rule 150(a) (Purchases and Sales While Holding Unexecuted Market Order) states that "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for his own account...while such member personally holds...an unexecuted market order to buy...or (2) personally sell or initiate the sale of any such security on the Exchange for any such account, while he personally holds...an unexecuted market order to sell."

18. AMEX Rule 150(b) (Purchases and Sales While Holding Unexecuted Limit Order) states that: "No member shall (1) personally buy or initiate the purchase of any security on the Exchange for any such account, at or below a price at which he personally holds... an unexecuted limited

---

[4] The obligation to maintain a fair and orderly market "has a broader reach than the prohibition of 'fraud' and, thereby, imposes stricter standards of integrity and performance on specialists." *Albert Fried*, 1978 WL 196046, at *5. A transaction not reasonably necessary to maintain a fair and orderly market has been defined as one "'not reasonably calculated to contribute to the maintenance of price continuity [on the exchange] and to minimize the effects of temporary disparity between supply and demand.'" *Weiskopf*, 1980 WL 22091, at *2 n.5 (quoting Exchange Act Release No. 1117 at 2 (March 30, 1937)).

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

price order to buy such security…or (2) personally sell or initiate the sale of any security on the Exchange for any such account, at or above the price at which he personally holds… an unexecuted limited price order to sell such security."

19. AMEX Rule 155 (Precedence Accorded to Orders Entrusted to Specialists) requires that a specialist "give precedence to orders entrusted to him as an agent before executing at the same price any purchase or sale in the same stock for an account in which he has an interest."

20. AMEX Rule 170(d) (Registration and Functions of Specialists) imposes upon specialists the obligation to refrain from engaging in transactions for his own account "in the securities in which he is registered" unless that conduct constitutes "a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated, in either the full lot or the odd lot market." The rule goes on to provide that: "Transactions in such securities not part of such a course of dealings are not to be effected by a specialist for his own account."

21. Group One violated each of the aforementioned AMEX rules by reason of the activities set forth in paragraphs 9 through 11 above.

CBOE

22. CBOE Rules 8.80 (DPM Defined) and 8.85 (DPM Obligations) require that a CBOE specialist cede priority to customer orders which the specialist represents as agent.

23. Group One violated each of the aforementioned CBOE rules by reason of the activities set forth in paragraphs 9 through 11 above.

PHLX

24. PHLX Rule 1020(c) (Registration and Functions of Options Specialists) states, in relevant part: "A specialist or his member organization shall not effect... purchases or sales of any option in which such specialist is registered, ... unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."

25. PHLX Rule 1019 (Precedence Accorded to Orders Entrusted to Specialists) provides: "A specialist shall give precedence to orders entrusted to him as an agent in any option in which he is registered before executing at the same price any purchase or sale in the same option for an account in which he has an interest."

26. PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade) provides that specialists "shall not engage in conduct inconsistent with just and equitable principles of trade."

27. Group One violated each of the aforementioned PHLX rules by reason of the activities set forth in paragraphs 9 through 11 above.

D. CONCLUSION

28. Group One willfully committed violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder, as described above.

IV.

In view of the foregoing, the Commission finds that it is appropriate and in the public interest to impose the sanctions specified in the Offer submitted by Group One.

Accordingly it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Group One cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder.

B. Pursuant to Section 15(b)(4) of the Exchange Act, Group One is hereby censured.

C. Group One shall, within ten days of the entry of the Order, pay disgorgement of \$1.5 million to the 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 Group One 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281.

D. It is further ordered that Group One shall, within ten days of the entry of the Order, pay a civil money penalty in the amount of \$300,000 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 Group One 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange

Commission, 3 World Financial Center, New York, New York, 10281. 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.

By the Commission.

Elizabeth M. Murphy
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. 59502 / March 4, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13391

In the Matter of **Equitec Proprietary Markets, LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Equitec Proprietary Markets, LLC ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order") as set forth below.

III.

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

A. RESPONDENT

1. **Equitec Proprietary Markets, LLC** ("Equitec") is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, since 2000. Equitec is a member of the Chicago Board Options Exchange ("CBOE") and the Philadelphia Stock Exchange ("PHLX," and together with the CBOE, the "Exchanges"). During the period relevant to this Order, Equitec acquired, merged with, or conducted joint venture operations with other specialist firms. A certain portion of the conduct that forms the basis of the findings herein took place at those predecessor firms or joint venture entities. As used herein, the terms "Equitec" and "Respondent" refer to Equitec, as well as its predecessor firms and joint venture entities.

B. FACTS

Summary

2. This matter involves violations by Equitec of its basic obligation as a specialist to serve public customer orders over its own proprietary interests. As a specialist firm on both of the Exchanges,[2] Equitec had a general duty to match executable public customer or "agency" buy and sell orders and not to fill customer orders through trades from the firm's own account when those customer orders could be matched with other customer orders. From 1999 through 2005 (the "Relevant Period"), Equitec violated this obligation by filling orders through proprietary trades rather than through other customer orders, thereby causing customer orders to be disadvantaged by approximately $1.4 million.

3. By effecting proprietary transactions that were not part of a course of dealings reasonably necessary to maintain a fair and orderly market, Equitec violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. Equitec also violated the following Exchange rules in effect during the Relevant Period: CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707.

Overview of Specialists' Obligations

4. On both of the Exchanges, specialist firms are responsible for the quality of the markets in the securities in which individual specialists are registered. A specialist is expected to maintain, insofar as is reasonably practicable, a "fair" and "orderly" market. A "fair" market is one that, among other things, affords no undue advantage to any participant. An "orderly" market is

---

[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] On the CBOE, specialist firms like Equitec are known as Designated Primary Market-Makers, or DPMs.

characterized by regular, reliable operation, with price continuity and depth, in which price movements are accompanied by appropriate volume, and unreasonable price variations between sales are avoided.

5. Specialists have two primary duties: performing their "negative obligation" to execute customer orders at the most advantageous price with minimal dealer intervention, and fulfilling their "affirmative obligation" to offset imbalances in supply and demand.[3] Specialists participate as both broker (or agent), absenting themselves from the market to pair executable customer orders against each other, and as dealer (or principal), trading for the specialists' dealer or proprietary accounts when needed to facilitate price continuity and fill customer orders when there are no available contra parties to those orders.

6. Whether acting as brokers or dealers, specialists are required to hold the public's interest above their own and, as such, are prohibited from trading for their dealers' accounts ahead of pre-existing customer buy or sell orders that could be executed against each other. When matchable customer buy and sell orders are received by the specialists – generally delivered either through one of the Exchange's order processing systems to a specialist's workstation, or, under certain circumstances, by floor brokers gathered in front of specialists' workstations ("the crowd") – specialists are required to act as agent and cross or pair off those orders and to abstain from participating as principal or dealer.

Improper Proprietary Trading by Equitec

7. During the Relevant Period, Equitec breached its duty to refrain from dealing for its own account while in possession of executable buy and sell customer orders. Instead, Equitec effected improper proprietary trades that disadvantaged customer orders.

8. On both of the Exchanges, Equitec specialists possessed or had access to information concerning customer orders on both sides of the market. Where there are matchable orders on both sides of the market, specialists are obligated to "pair off" or cross the buy and sell orders by executing each side of the market for identical prices and in commensurate order quantities. In numerous instances, however, Equitec specialists did not "pair off" or cross these buy and sell orders with each other. Sometimes, Equitec specialists did this by effecting a proprietary trade with an order that arrived electronically through the order processing system. At other times, Equitec specialists effected improper proprietary trades with orders that came in from the crowd. In either case, the disadvantaged order was an order that the Equitec specialist should have paired with the other order, instead of filling that other order through a proprietary trade retained by the specialist. The violative conduct took three basic forms described in paragraphs 9-11 below.

9. *Trading Ahead.* In certain instances, Equitec specialists filled one agency order through a proprietary trade for the firm's account while a matchable agency order was present on the opposite

[3] A specialist's obligations on the Exchanges also included acting as a market maker, and the Exchanges' rules generally required a specialist to provide continuous quotations for each option for which it acted as a specialist.

side of the market, thereby improperly "trading ahead" of such opposite-side executable agency order. The customer order that was traded ahead of was then disadvantaged when it was subsequently executed at a price that was inferior to the price received by the firm's proprietary account. For example, if a specialist has present on his book, at the same time, a marketable customer order to buy five contracts of an options series and a marketable customer order to sell five contracts of the same options series, the specialist would be obligated to pair off those matchable orders. Trading ahead would occur if the specialist filled the sell order from the firm's proprietary account at $5.00 per share per contract, and then subsequently executed the buy order at the inferior price of $5.05 per share per contract. In this example, the buy order received a price inferior to that to which it was entitled ($5.00) and the customer was disadvantaged by $25.00 (5 contracts x $0.05 per share per contract x 100 shares per contract).

10. *Interpositioning*. In certain instances, after trading ahead, Equitec specialists also traded proprietarily with the matchable opposite-side agency order that had been traded ahead of, thereby "interpositioning" themselves between the two agency orders that should have been paired off in the first instance. By participating on both sides of trades, the specialist captured the spread between the purchase and sale prices, thereby disadvantaging the other parties to the transactions. Interpositioning occurred in a relatively small number of instances.

11. *Trading Ahead of Unexecuted Open or Cancelled Orders*. In certain instances, Equitec specialists traded ahead of opposite-side executable agency orders, as described in paragraph 9 above, but the unexecuted orders were left open until the end of the trading day, or were cancelled by the customer prior to the close of the trading day before receiving an execution. Because these orders were never executed, the calculation of customer harm for this type of misconduct was based on a formula that incorporated certain economic assumptions. A substantial amount of the customer harm discussed in paragraph 12 below relates to these unexecuted or cancelled orders.

12. During the Relevant Period, Equitec engaged in tens of thousands of violative trades of the three types described in paragraphs 9-11, resulting in overall customer disadvantage of approximately $1.4 million across the Exchanges. Because of limitations in the source data maintained by the Exchanges, the calculation of the amount of customer disadvantage sometimes required the use of certain analytic formulas. The majority of the customer disadvantage relates to violative trading that occurred between 1999 and 2002.

C. APPLICABLE LAW

Section 11(b) of the Exchange Act

13. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder impose various limitations on the operations of specialists, including limiting a specialist's dealer transactions to those "reasonably necessary to permit him to maintain a fair and orderly market." Section 11(b) and Rule 11b-1 require a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1(b), if the Commission finds, after appropriate notice and opportunity for hearing, that a specialist has for any account in which he has an interest

"effected transactions... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market," the Commission may impose sanctions.

14. Where specialists effect trades for their accounts that are not "reasonably necessary to permit [such specialists] to maintain a fair and orderly market," they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. *See In the Matter of LaBranche & Co. LLC,* Exchange Act Release No. 49500, 2004 WL 626573, at *6 (Mar. 30, 2004); *In the Matter of Weiskopf, Silver & Co.,* Exchange Act Release No. 17361, 1980 WL 22091, at *2 (Dec. 10, 1980); *In the Matter of Albert Fried & Co. and Albert Fried, Jr.*, Exchange Act Release No. 15293, 1978 WL 196046, at *6 (Nov. 3, 1978).[4]

15. Here, Equitec violated its negative obligation by engaging in the three types of conduct described in paragraphs 9 through 11 above. Accordingly, Equitec willfully[5] violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

Exchange Rules

16. Several CBOE and PHLX rules prohibit the same conduct as is prohibited by Section 11(b) of the Exchange Act and Rule 11b-1 thereunder. These rules effectively prohibit a specialist from trading ahead of, or interpositioning between, eligible customer orders, and require agency orders to be matched whenever possible.

CBOE

17. CBOE Rules 8.80 (DPM Defined) and 8.85 (DPM Obligations) require that a CBOE specialist cede priority to customer orders which the specialist represents as agent.

18. Equitec violated each of the aforementioned CBOE rules by reason of the activities set forth in paragraphs 9 through 11 above.

---

[4] The obligation to maintain a fair and orderly market "has a broader reach than the prohibition of 'fraud' and, thereby, imposes stricter standards of integrity and performance on specialists." *Albert Fried*, 1978 WL 196046, at *5. A transaction not reasonably necessary to maintain a fair and orderly market has been defined as one "'not reasonably calculated to contribute to the maintenance of price continuity [on the exchange] and to minimize the effects of temporary disparity between supply and demand.'" *Weiskopf*, 1980 WL 22091, at *2 n.5 (quoting Exchange Act Release No. 1117 at 2 (March 30, 1937)).

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

PHLX

19. PHLX Rule 1020(c) (Registration and Functions of Options Specialists) states, in relevant part: "A specialist or his member organization shall not effect... purchases or sales of any option in which such specialist is registered, ... unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market."

20. PHLX Rule 1019 (Precedence Accorded to Orders Entrusted to Specialists) provides: "A specialist shall give precedence to orders entrusted to him as an agent in any option in which he is registered before executing at the same price any purchase or sale in the same option for an account in which he has an interest."

21. PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade) provides that specialists "shall not engage in conduct inconsistent with just and equitable principles of trade."

22. Equitec violated each of the aforementioned PHLX rules by reason of the activities set forth in paragraphs 9 through 11 above.

D. CONCLUSION

23. Equitec willfully committed violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder, as described above.

IV.

In view of the foregoing, the Commission finds that it is appropriate and in the public interest to impose the sanctions specified in the Offer submitted by Equitec.

Accordingly it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Equitec cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act, and Rule 11b-1 thereunder.

B. Pursuant to Section 15(b)(4) of the Exchange Act, Equitec is hereby censured.

C. Equitec shall, within ten days of the entry of the Order, pay disgorgement of $1.4 million to the 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 Equitec 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281.

D. It is further ordered that Equitec shall, within ten days of the entry of the Order, pay a civil money penalty in the amount of $280,000 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 Equitec 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 Rosenfeld, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, New York, 10281. 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.

By the Commission.

Elizabeth M. Murphy
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. 59513 / March 5, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13397

In the Matter of **VICTOR P. MACHADO,** **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 Victor P. Machado ("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 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. Respondent Machado, 36, is a resident of New Jersey. From 1999 until August 2004, Machado was a fixed income trader at two related entities, Leumi Investment Services Inc. ("LISI"), a registered broker-dealer, and Bank Leumi USA ("BLUSA"), a Federal Deposit Insurance Corporation insured bank and LISI's parent company. While at LISI, Machado held Series 7 and 63 licenses. On August 31, 2004, Machado was terminated by LISI and BLUSA. From July 2006 through June 1, 2008, Machado was employed by a temporary employment agency.

2. On February 27, 2009, a final judgment was entered by consent against Respondent Machado, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and for aiding and abetting LISI's violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, in the civil action entitled, *Securities and Exchange Commission v. Victor P. Machado and Frank Lu*, Civil Action Number 09-cv-01711 (RMB), in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that, from May 2003 through mid-August 2004, Respondent Machado and Frank Lu, a former salesperson at Oppenheimer & Co. Inc. ("OPCO"), a registered broker-dealer and investment adviser, engaged in a scheme to direct LISI's and BLUSA's securities order flow to OPCO in exchange for secret gratuities and entertainment that Lu provided to Machado. The complaint also alleged that as part of the scheme, and in violation of Machado's duties to LISI's and BLUSA's customers, Machado routinely directed a substantial flow of orders to OPCO for execution at prices that were favorable to OPCO and detrimental to LISI's and BLUSA's own customers. The complaint further alleged that as a result of Machado's and Lu's conduct, LISI's and BLUSA's customers were harmed by approximately $1.1 million.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Machado 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.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59514 / March 5, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2850 / March 5, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13398

In the Matter of **FRANK LU,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Frank Lu ("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 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Respondent Lu, 39, is a resident of New Jersey. From January 2003 until his resignation in March 2006, Lu was a registered representative at Oppenheimer & Co. Inc. ("OPCO"), a registered broker-dealer and investment adviser. While at OPCO, Lu held Series 7 and 63 licenses. From July through December 2006, Lu was employed as a registered representative at another broker-dealer. Since that time, Lu has not been associated with any broker-dealer.

2. On February 27, 2009, a final judgment was entered by consent against Respondent Lu, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled, *Securities and Exchange Commission v. Victor P. Machado and Frank Lu*, Civil Action Number 09-cv-01711 (RMB), in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that, from May 2003 through mid-August 2004, Respondent Lu and Victor P. Machado, a former trader at two related entities, Leumi Investment Services Inc. and Bank Leumi USA, (collectively referred to as "Leumi"), engaged in a scheme to direct Leumi's securities order flow to OPCO in exchange for secret gratuities and entertainment that Lu provided to Machado. The complaint also alleged that Lu was a knowing participant in this scheme as he provided Machado with secret gratuities and entertainment to induce Machado to direct Leumi's order flow to OPCO. It was further alleged that Lu benefited from this scheme because he obtained increased compensation as a result of the increased order flow from Machado. The complaint further alleged that as a result of Lu's and Machado's conduct, Leumi's customers were harmed by approximately $1.1 million.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Lu be, and hereby is barred from association with any broker, dealer, or investment adviser.

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

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59527; File No. S7-05-09)

March 6, 2009

ORDER GRANTING TEMPORARY EXEMPTIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934 IN CONNECTION WITH REQUEST ON BEHALF OF ICE US TRUST LLC RELATED TO CENTRAL CLEARING OF CREDIT DEFAULT SWAPS, AND REQUEST FOR COMMENTS

I. Introduction

In response to the recent turmoil in the financial markets, the Securities and Exchange Commission ("Commission") has taken multiple actions to protect investors and ensure the integrity of the nation's securities markets.[1] Today the Commission is taking further action designed to address concerns related to the market in credit default swaps ("CDS"). The over-the-counter ("OTC") market for CDS has been a source of concerns to us and other financial regulators. These concerns include the systemic risk posed by CDS, highlighted by the possible

---

[1] A nonexclusive list of the Commission's actions to stabilize financial markets during this credit crisis include: adopting a package of measures to strengthen investor protections against naked short selling, including rules requiring a hard T+3 close-out, eliminating the options market maker exception of Regulation SHO, and expressly targeting fraud in short selling transactions (See Securities Exchange Act Release No. 58572 (September 17, 2008), 73 FR 54875 (September 23, 2008)); issuing an emergency order to enhance protections against naked short selling in the securities of primary dealers, Federal National Mortgage Association ("Fannie Mae"), and Federal Home Loan Mortgage Corporation ("Freddie Mac") (See Securities Exchange Act Release No. 58166 (July 15, 2008), 73 FR 42379 (July 21, 2008)); taking temporary emergency action to ban short selling in financial securities (See Securities Exchange Act Release No. 58592 (September 18, 2008), 73 FR 55169 (September 24, 2008)); approving emergency rulemaking to ensure disclosure of short positions by hedge funds and other institutional money managers (See Securities Exchange Act Release No. 58591A (September 21, 2008), 73 FR 55557 (September 25, 2008)); proposing rules to strengthen the regulation of credit rating agencies and making the limits and purposes of credit ratings clearer to investors (See Securities Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008); entering into a Memorandum of Understanding with the Board of Governors of the Federal Reserve System ("FRB") to make sure key federal financial regulators share information and coordinate regulatory activities in important areas of common interest (See Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the Board of Governors of the Federal Reserve System Regarding Coordination and Information Sharing in Areas of Common Regulatory and Supervisory Interest (July 7, 2008), http://www.sec.gov/news/press/2008/2008-134_mou.pdf).

inability of parties to meet their obligations as counterparties and the potential resulting adverse effects on other markets and the financial system.[2] Recent credit market events have demonstrated the seriousness of these risks in a CDS market operating without meaningful regulation, transparency,[3] or central counterparties ("CCPs").[4] These events have emphasized the need for CCPs as mechanisms to help control such risks.[5] A CCP for CDS could be an important step in reducing the counterparty risks inherent in the CDS market, and thereby help mitigate potential systemic impacts. In November 2008, the President's Working Group on Financial Markets stated that the implementation of a CCP for CDS was a top priority[6] and, in furtherance of this recommendation, the Commission, the FRB and the Commodity Futures Trading Commission ("CFTC") signed a Memorandum of Understanding[7] that establishes a framework for consultation and information sharing on issues related to CCPs for CDS. Given the continued uncertainty in this market, taking action to help foster the prompt development of

---

2 In addition to the potential systemic risks that CDS pose to financial stability, we are concerned about other potential risks in this market, including operational risks, risks relating to manipulation and fraud, and regulatory arbitrage risks.

3 See Policy Objectives for the OTC Derivatives Market, The President's Working Group on Financial Markets, November 14, 2008, available at http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public.").

4 See The Role of Credit Derivatives in the U.S. Economy Before the H. Agric. Comm., 110th Cong. (2008) (Statement of Erik Sirri, Director of the Division of Trading and Markets, Commission).

5 See id.

6 See Policy Objectives for the OTC Derivatives Market, The President's Working Group on Financial Markets (November 14, 2008), http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf. See also Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets (March 13, 2008), http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf; Progress Update on March Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets (October 2008), http://www.treas.gov/press/releases/reports/q4progress%20update.pdf.

7 See Memorandum of Understanding Between the Board of Governors of the Federal Reserve System, the U.S. Commodity Futures Trading Commission and the U.S. Securities and Exchange Commission Regarding Central Counterparties for Credit Default Swaps (November 14, 2008), http://www.treas.gov/press/releases/reports/finalmou.pdf.

CCPs, including granting conditional exemptions from certain provisions of the federal securities laws, is in the public interest.

A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller under a CDS to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in bonds or in segments of the debt market as represented by an index, or to capitalize on the volatility in credit spreads during times of economic uncertainty. In recent years, CDS market volumes have rapidly increased.[8] This growth has coincided with a significant rise in the types and number of entities participating in the CDS market.[9]

The Commission's authority over this OTC market for CDS is limited. Specifically, Section 3A of the Securities Exchange Act of 1934 ("Exchange Act") limits the Commission's authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.[10] For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission's

---

8 See Semiannual OTC derivatives statistics at end-December 2007, Bank for International Settlements ("BIS"), available at http://www.bis.org/statistics/otcder/dt1920a.pdf.

9 CDS were initially created to meet the demand of banking institutions looking to hedge and diversify the credit risk attendant with their lending activities. However, financial institutions such as insurance companies, pension funds, securities firms, and hedge funds have entered the CDS market.

10 15 U.S.C. 78c-1. Section 3A excludes both a non-security-based and a security-based swap agreement from the definition of "security" under Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10). Section 206A of the Gramm-Leach-Bliley Act defines a "swap agreement" as "any agreement, contract, or transaction between eligible contract participants (as defined in section 1a(12) of the Commodity Exchange Act. . .) . . . the material terms of which (other than price and quantity) are subject to individual negotiation." 15 U.S.C. 78c note.

action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements ("non-excluded CDS"), the Commission's action today provides conditional exemptions from certain requirements of the Exchange Act.

The Commission believes that using well-regulated CCPs to clear transactions in CDS would help promote efficiency and reduce risk in the CDS market and among its participants. These benefits could be particularly significant in times of market stress, as CCPs would mitigate the potential for a market participant's failure to destabilize other market participants, and reduce the effects of misinformation and rumors. CCP-maintained records of CDS transactions would also aid the Commission's efforts to prevent and detect fraud and other abusive market practices.

A well-regulated CCP also would address concerns about counterparty risk by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity of the counterparties to a CDS. In the absence of a CCP, participants in the OTC CDS market must carefully manage their counterparty risks because the default by a counterparty can render worthless, and payment delay can reduce the usefulness of, the credit protection that has been bought by a CDS purchaser. CDS participants currently attempt to manage counterparty risk by carefully selecting and monitoring their counterparties, entering into legal agreements that permit them to net gains and losses across contracts with a defaulting counterparty, and often requiring counterparty exposures to be collateralized.[11] A CCP could allow participants to avoid these risks specific to individual counterparties because a CCP "novates" bilateral trades by entering

---

[11] See generally R. Bliss and C. Papathanassiou, "Derivatives clearing, central counterparties and novation: The economic implications" (March 8, 2006), at 6. See also "New Developments in Clearing and Settlement Arrangements for OTC Derivatives," Committee on Payment and Settlement Systems, BIS, at 25 (March 2007), available at http://www.bis.org/pub/cpss77.pdf; "Reducing Risks and Improving Oversight in the OTC Credit Derivatives Market," Before the Sen. Subcomm. On Secs., Ins. and Investments, 110th Cong. (2008) (Statement of Patrick Parkinson, Deputy Director, Division of Research and Statistics, FRB).

into separate contractual arrangements with both counterparties – becoming buyer to one and seller to the other.[12] Through novation, it is the CCP that assumes counterparty risks.

For this reason, a CCP for CDS would contribute generally to the goal of market stability. As part of its risk management, a CCP may subject novated contracts to initial and variation margin requirements and establish a clearing fund. The CCP also may implement a loss-sharing arrangement among its participants to respond to a participant insolvency or default.

A CCP would also reduce CDS risks through multilateral netting of trades.[13] Trades cleared through a CCP would permit market participants to accept the best bid or offer from a dealer in the OTC market with very brief exposure to the creditworthiness of the dealer. In addition, by allowing netting of positions in similar instruments, and netting of gains and losses across different instruments, a CCP would reduce redundant notional exposures and promote the more efficient use of resources for monitoring and managing CDS positions. Through uniform margining and other risk controls, including controls on market-wide concentrations that cannot be implemented effectively when counterparty risk management is decentralized, a CCP can help prevent a single market participant's failure from destabilizing other market participants and, ultimately, the broader financial system.

In this context, IntercontinentalExchange, Inc. ("ICE") and The Clearing Corporation ("TCC"), on behalf of ICE US Trust LLC ("ICE Trust"), have requested that the Commission

---

12 "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, Recommendations for Central Counterparties (November 2004) at 66.

13 See "New Developments in Clearing and Settlement Arrangements for OTC Derivatives," supra note 11, at 25. Multilateral netting of trades would permit multiple counterparties to offset their open transaction exposure through the CCP, spreading credit risk across all participants in the clearing system and more effectively diffusing the risk of a counterparty's default than could be accomplished by bilateral netting alone.

grant exemptions from certain requirements under the Exchange Act with respect to the proposed activities of ICE Trust in clearing and settling certain CDS, as well as the proposed activities of certain other persons, as described below.[14]

Based on the facts presented and the representations made in the request on behalf of ICE Trust,[15] and for the reasons discussed in this Order, the Commission temporarily is exempting, subject to certain conditions, ICE Trust from the requirement to register as a clearing agency under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS transactions. The Commission also temporarily is exempting eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by ICE Trust. In addition, the Commission temporarily is exempting ICE Trust and certain participants of ICE Trust from the registration requirements of Sections 5 and 6 of the Exchange Act solely in connection with the calculation of mark-to-market prices for non-excluded CDS cleared by ICE Trust. The Commission's exemptions are temporary and will expire on December 7, 2009. To facilitate the operation of one or more CCPs for the CDS market, the Commission has also approved interim final temporary rules providing exemptions under the Securities Act of 1933 and the Exchange Act for non-excluded CDS.[16] Finally, the

---

14 See Letter from Johnathan Short, InterContinental Exchange, Inc. and Kevin McClear, The Clearing Corporation, to Elizabeth Murphy, Secretary, Commission, February 26, 2009.

15 See id. The exemptions we are granting today are based on representations made in the request on behalf of ICE Trust We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS associated with persons subject to those unavailable exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

16 See Securities Act Release No. 33-8999 (January 14, 2009).

Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act for transactions in non-excluded CDS.[17]

II. Discussion

A. Description of ICE Trust's Proposal

The exemptive request on behalf of ICE Trust describes how the proposed arrangements for central clearing of CDS by ICE Trust would operate, and makes representations about the safeguards associated with those arrangements, as described below:

1. ICE Trust Organization

ICE Trust is organized as a New York State chartered limited liability trust company and has received approval of its application to become a member of the Federal Reserve System. ICE Trust is subject to direct supervision and examination by the New York State Banking Department ("NYSBD"), and, in association with the approval of its applicable to become a member of the Federal Reserve System, will be subject to direct supervision and examination by the FRB, specifically the Federal Reserve Bank of New York.

2. ICE Trust Central Counterparty Services for CDS

Initially, ICE Trust's business will be limited to the provision of clearing services for the OTC CDS market. ICE Trust will act as a central counterparty for ICE Trust Participants (as defined below)[18] by assuming, through novation, the obligations of all eligible CDS transactions accepted by it for clearing and collecting margin and other credit support from ICE Trust Participants to collateralize their obligations to ICE Trust. ICE Trust's trade submission process is designed to ensure that it maintains a matched book of offsetting CDS contracts.

---

17 See Securities Exchange Act Release No. 59165 (December 24, 2008).

18 See note 35, infra.

Although CDS are currently bilaterally negotiated and executed, major market participants frequently use the Deriv/SERV service of The Depository Trust & Clearing Corporation ("DTCC") comparison and confirmation service when documenting their CDS transactions. This service creates electronic records of transaction terms and counterparties. As part of this service, market participants separately submit the terms of a CDS transaction to Deriv/SERV in electronic form. Paired submissions are compared to verify that their terms match in all required respects. If a match is confirmed, the parties receive an electronic confirmation of the submitted transaction. All submitted transactions are recorded in the Deriv/SERV Trade Information Warehouse, which serves as the primary registry for submitted transactions.

ICE Trust will leverage the Deriv/SERV infrastructure in operating its CDS clearing service. Initially, all trades submitted by Participants for clearing through ICE Trust will be recorded in the Deriv/SERV Trade Information Warehouse. ICE Trust will, initially on a weekly basis, obtain from DTCC matched trades that have been recorded in the Deriv/SERV Trade Information Warehouse as having been submitted for clearing through ICE Trust. Within two months of launch, ICE Trust intends to obtain matched trades from DTCC on a daily basis.

Participants may use the facilities of an inter-dealer broker to execute CDS transactions, for example, to access liquidity more rapidly or to maintain pre-execution anonymity and submit such transactions for clearance and settlement to ICE Trust. The inter-dealer brokers do not assume market positions in connection with their intermediation of CDS transactions.

Once a matched CDS contract has been forwarded to, or obtained by, ICE Trust, and has been accepted for clearing by it, ICE Trust will clear the CDS contract by becoming the central counterparty to each party to the trade through novation. Deriv/SERV's current infrastructure will help to ensure that ICE Trust maintains a matched book of offsetting CDS contracts. Maintaining a matched offsetting book is essential to managing the credit risk associated with CDS submitted to ICE Trust for clearing.

Under the ICE Trust's current draft rules ("ICE Trust Rules"), each bilateral CDS contract between two ICE Trust Participants that is submitted, and accepted by ICE Trust, for clearing will be "novated." As part of this process, each bilateral CDS contract submitted to ICE Trust will be replaced by two superseding CDS contracts between each of the original parties to the submitted transaction and ICE Trust. Under these new contracts, ICE Trust will act as the counterparty to each of the original parties. As central counterparty to each novated CDS contract, ICE Trust will be able to net offsetting positions on a multilateral basis, even though ICE Trust will have different counterparties with respect to the novated CDS contracts that are being netted.

As part of the novation process, the terms and conditions governing the CDS bilaterally negotiated by the submitting counterparties will be superseded by the relevant provisions of the ICE Trust Rules applicable to the relevant CDS transaction. Multilateral netting will significantly reduce the outstanding notional amount of each ICE Trust Participant's CDS portfolio. When ICE Trust acts as the central counterparty to all cleared CDS of an ICE Trust Participant, that participant's positions will be netted down to a single exposure to ICE Trust.

3. <u>ICE Trust Risk Management</u>

ICE Trust will mitigate counterparty risk through its margin, guaranty fund, and credit support framework, as set forth in the ICE Trust Rules. ICE Trust's risk management infrastructure and related risk metrics will be structured specifically for the CDS products that

ICE Trust clears. Each ICE Trust Participant's credit support obligations will be governed by a uniform credit support framework and applicable ICE Trust Rules.

ICE Trust represents that it will maintain strict, objectively determined, risk-based margin and guaranty fund requirements, which will be subject to extensive and ongoing regulation and oversight by the FRB and the NYSBD. These requirements will also be consistent with clearing industry practice, Basel II capital adequacy standards, and international standards established for central counterparties as articulated in the Bank for International Settlements / International Organization of Securities Commissions ("IOSCO") CCP Recommendations. The amount of margin and guaranty fund required of each ICE Trust Participant will be continuously adjusted to reflect the size and profile of, and risk associated with, the ICE Trust Participant's cleared CDS transactions (and related market factors).

Pursuant to ICE Trust Rules, each ICE Trust Participant's margin requirement will consist of two components: (1) initial margin, reflecting a risk-based calculation of potential loss on outstanding CDS positions in the event of a significant adverse market movement, and (2) mark-to-market margin, based upon an end-of-day mark-to-market of outstanding positions. Acceptable margin will initially include only cash in specified currencies and G-7 government debt for initial margin and only cash for mark-to-market margin. ICE Trust Participants will be required to cover any end-of-day margin deficit with U.S. dollars by the following morning, and ICE Trust will have the discretion to require and collect additional margin, both at the end of the day and intraday, as it deems necessary.[19]

ICE Trust will also maintain a guaranty fund (the "Guaranty Fund") to cover losses arising from an ICE Trust Participant's default on cleared CDS transactions that exceed the

---

[19] An ICE Trust Participant would be permitted to withdraw mark-to-market margin amounts credited to its account to the extent not required to satisfy its initial margin requirement.

amount of margin held by ICE Trust from the defaulting ICE Trust Participant. Each ICE Trust Participant will be required to contribute a minimum of $20 million to the Guaranty Fund initially when it becomes an ICE Trust Participant and on an ongoing basis, additional amounts based on its actual and anticipated CDS position exposures. The adequacy of the Guaranty Fund will be monitored daily and the need for additional contributions will be determined on at least a monthly basis, based on the size of ICE Trust Participant exposures within the ICE Trust clearing system. As a result, the Guaranty Fund will grow in proportion to the position risk associated with the aggregate volume of CDS cleared by ICE Trust.

ICE Trust will also establish rules that "mutualize" the risk of an ICE Trust Participant default across all ICE Trust Participants. In the event of an ICE Trust Participant's default, ICE Trust may look to the margin posted by such participant, such participant's Guaranty Fund contributions and, if applicable, any recovery from a parent guarantor. In addition, at its discretion, ICE Trust will be authorized to use, to the extent needed, other ICE Trust Participants' Guaranty Fund contributions to satisfy any obligations of the defaulting ICE Trust Participant; provided that, any recovery from the defaulting ICE Trust Participant, its parent guarantor, if any, or the sale of the defaulting ICE Trust Participant's positions in ICE Trust will first be used to refund any amounts utilized by ICE Trust from contributions of non-defaulting ICE Trust Participants to the Guaranty Fund.

4. <u>Member Default</u>

Following a default by an ICE Trust Participant, ICE Trust has a number of tools available to it under the ICE Trust Rules to ensure an orderly liquidation and unwinding of the open positions of such defaulting ICE Trust Participant. In the first instance, upon determining that a default has occurred, ICE Trust will have the ability to immediately enter into replacement

CDS transactions with other ICE Trust Participants that are designed to mitigate, to the greatest extent possible, the market risk of the defaulting ICE Trust Participant's open positions. For open positions in which there is no liquid trading market, ICE Trust may enter into covering CDS transactions for which there is a liquid market and that are most closely correlated with such illiquid open positions.

After entering into covering transactions in the open market, if any, ICE Trust will seek to close out any remaining open positions of the defaulting ICE Trust Participant (including any initial covering transactions) by using one or more auctions or other commercially reasonable unwind processes. The ICE Trust Rules will prohibit ICE Trust from entering into any replacement transaction if the price of such transaction would be below the least favorable price that would be reasonable to accept for such replacement transaction. To the extent ICE Trust is not able to enter into the necessary replacement transactions through auctions or open market processes, ICE Trust will be entitled to allocate such replacement transactions to the remaining ICE Trust Participants at the floor price established by ICE Trust.

B. Temporary Conditional Exemptions from Clearing Agency and Exchange Registration Requirements

1. Exemption from Section 17A of the Exchange Act

Section 17A of the Exchange Act sets forth the framework for the regulation and operation of the U.S. clearance and settlement system, including CCPs. Specifically, Section 17A directs the Commission to use its authority to promote enumerated Congressional objectives and to facilitate the development of a national clearance and settlement system for securities transactions. Absent an exemption, a CCP that novates trades of non-excluded CDS that are securities and generates money and settlement obligations for participants is required to register with the Commission as a clearing agency.

Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[20]

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 7, 2009 to ICE Trust from Section 17A of the Exchange Act, solely to perform the functions of a clearing agency for Cleared CDS,[21] subject to the conditions discussed below.

Our action today balances the aim of facilitating the prompt establishment of ICE Trust as a CCP for non-excluded CDS transactions – which should help reduce systemic risks during a period of extreme turmoil in the U.S. and global financial markets – with ensuring that important

---

20 15 U.S.C. 78mm.

21 For purposes of this exemption, and the other exemptions addressed in this Order, "Cleared CDS" means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (i) the reference entity, the issuer of the reference security, or the reference security is one of the following: (A) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (C) a foreign sovereign debt security; (D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (E) an asset-backed security issued or guaranteed by the Fannie Mae, Freddie Mac or the Government National Mortgage Association ("Ginnie Mae"); or (ii) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i). As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. See text at note 10, supra.

elements of Commission oversight are applied to the non-excluded CDS market. In doing so, we are mindful that applying the full scope of the Exchange Act to transactions involving non-excluded CDS could deter the prompt establishment of ICE Trust as a CCP to settle those transactions.

While we are acting so that the prompt establishment of ICE Trust as a CCP for non-excluded CDS will not be delayed by the need to apply the full scope of Exchange Act Section 17A's requirements that govern clearing agencies, the relief we are providing is temporary and conditional. The limited duration of the exemptions will permit the Commission to gain more direct experience with the non-excluded CDS market after ICE Trust becomes operational, giving the Commission the ability to oversee the development of the centrally cleared non-excluded CDS market as it evolves. During the exemptive period, the Commission will closely monitor the impact of the CCPs on the CDS market. In particular, the Commission will seek to assure itself that the CCPs do not act in anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, the dissemination of market data and the access to clearing services by independent CDS exchanges or CDS trading platforms. The Commission will take that experience into account in future actions.

Moreover, this temporary exemption in part is based on ICE Trust's representation that it meets the standards set forth in the Committee on Payment and Settlement Systems ("CPSS") and IOSCO report entitled: Recommendation for Central Counterparties ("RCCP").[22] The RCCP establishes a framework that requires a CCP to have: (i) the ability to facilitate the prompt

---

[22] The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the FRB, and the CFTC.

and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

In addition, this Order is designed to assure that – as represented in the request on behalf of ICE Trust – information will be available to market participants about the terms of the CDS cleared by ICE Trust, the creditworthiness of ICE Trust or any guarantor, and the clearing and settlement process for the CDS. Moreover, to be within the definition of Cleared CDS for purposes of this exemption (as well as the other exemptions granted through this Order), a CDS may only involve a reference entity, a reference security, an issuer of a reference security, or a reference index that satisfies certain conditions relating to the availability of information about such persons or securities. For non-excluded CDS that are index-based, the definition provides that at least 80 percent of the weighting of the index must be comprised of reference entities, issuers of a reference security, or reference securities that satisfy the information conditions. The definition does not prescribe the type of financial information that must be available nor the location of the particular information, recognizing that eligible contract participants have access to information about reference entities and reference securities through multiple sources. The Commission believes, however, that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to appropriately evaluate the risks relating to a particular investment and make more informed investment decisions.[23] Such information availability also will assist ICE Trust

---

23 The Commission notes the recommendations of the President's Working Group on Financial Markets regarding the informational needs and due diligence responsibilities of investors. See Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets,

and the buyers and sellers in valuing their Cleared CDS and their counterparty exposures. As a result of the Commission's actions today, the Commission believes that information should be available for market participants to be able to make informed investment decisions, and value and evaluate their Cleared CDS and their counterparty exposures.

This temporary exemption is subject to a number of conditions that are designed to enable Commission staff to monitor ICE Trust's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that ICE Trust: (i) make available on its Web site its annual audited financial statements; (ii) preserve records related to the conduct of its Cleared CDS clearance and settlement services for at least five years (in an easily accessible place for the first two years); (iii) provide information relating to its Cleared CDS clearance and settlement services to the Commission and provide access to the Commission to conduct on-site inspections of facilities, records and personnel related to its Cleared CDS clearance and settlement services; (iv) notify the Commission about material disciplinary actions taken against any of its members utilizing its Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity that is utilizing ICE Trust's Cleared CDS clearance and settlement services; (v) provide the Commission with changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements[24] and its annual audited financial

---

March 13, 2008, available at:
http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.

[24] See Automated Systems of Self-Regulatory Organization, Exchange Act Release No. 27445 (November 16, 1989), File No. S7-29-89, and Automated Systems of Self-Regulatory Organization (II), Exchange Act Release No. 29185 (May 9, 1991), File No. S7-12-19.

statements prepared by independent audit personnel; and (vii) report all significant systems outages to the Commission.

In addition, this relief is conditioned on ICE Trust, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Trust may establish to calculate mark-to-market margin requirements for ICE Trust Participants; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Trust. The Commission believes this is an appropriate condition for ICE Trust's exemption from registration as a clearing agency. In Section 11A of the Exchange Act, Congress found that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."[25] The President's Working Group on Financial Markets has stated that increased transparency is a policy objective for the over-the-counter derivatives market,[26] which includes the market for CDS. The condition is designed to further this policy objective of both Congress and the President's Working Group by requiring ICE Trust to make useful pricing data available to the public on terms that are fair and reasonable and not unreasonably discriminatory. Congress adopted these standards for the distribution of data in Section 11A. The Commission long has

---

[25] 15 U.S.C. 78k-1(a)(1)(C)(iii). See also 15 U.S.C. 78k-1(a)(1)(D).

[26] See President's Working Group on Financial Markets, Policy Objectives for the OTC Derivatives Market (November 14, 2008), available at http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public.").

applied the standards in the specific context of securities market data,[27] and it anticipates that ICE Trust will distribute its data on terms that generally are consistent with the application of these standards to securities market data. For example, data distributors generally are required to treat subscribers equally and not grant special access, fees, or other privileges to favored customers of the distributor. Similarly, distributors must make their data feeds reasonably available to data vendors for those subscribers who wish to receive their data indirectly through a vendor rather than directly from the distributor. In addition, a distributor's attempt to tie data products that must be made available to the public with other products or services of the distributor would be inconsistent with the statutory requirements.[28] The Commission carefully evaluates any type of discrimination with respect to subscribers and vendors to assess whether there is a reasonable basis for the discrimination given, among other things, the Exchange Act objective of promoting price transparency.[29] Moreover, preventing unreasonable discrimination is a practical means to promote fair and reasonable terms for data distribution because distributors are more likely to act appropriately when the terms applicable to the broader public also must apply to any favored classes of customers.[30]

---

27 See Exchange Act Release No. 42209 (December 9, 1999), 64 FR 70613, 70621-70623 (December 17, 1999) ("Market Information Concept Release") (discussion of legal standards applicable to market data distribution since Section 11A was adopted in 1975).

28 See Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74793 (December 9, 2008) ("NYSE ArcaBook Order") ("[S]ection 6 and Exchange Act Rule 603(a) require NYSE Arca to distribute the ArcaBook data on terms that are not tied to other products in a way that is unfairly discriminatory or anticompetitive.").

29 See Market Information Concept Release, 64 FR at 70630 ("The most important objectives for the Commission to consider in evaluating fees are to assure (1) the wide availability of market information, (2) the neutrality of fees among markets, vendors, broker-dealers, and users, (3) the quality of market information – its integrity, reliability, and accuracy, and (4) fair competition and equal regulation among markets and broker-dealers.").

30 See NYSE ArcaBook Order, 73 FR at 74794 ("[T]he proposed fees for ArcaBook data will apply equally to all professional subscribers and all non-professional subscribers . . . The fees therefore do not

As a CCP, ICE Trust will collect and process information about CDS transactions, prices, and positions from all of its participants. With this information, a CCP will, among other things, calculate and disseminate current values for open positions for the purpose of setting appropriate margin levels. The availability of such information can improve fairness, efficiency, and competitiveness of the market – all of which enhance investor protection and facilitate capital formation. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indexes. This may improve the efficiency and effectiveness of the securities markets by allowing investors to better understand credit conditions generally.

2. Exemption from Sections 5 and 6 of the Exchange Act

ICE Trust represents that, in connection with its clearing and risk management process, it will calculate an end-of-day settlement price for each Cleared CDS in which an ICE Trust Participant has a cleared position, based on prices submitted by ICE Trust Participants. As part of this mark-to-market process, ICE Trust will periodically require ICE Trust Participants to execute certain CDS trades at the applicable end-of-day settlement price. Requiring ICE Trust Participants to trade CDS periodically in this manner is designed to help ensure that such submitted prices reflect each ICE Trust Participant's best assessment of the value of each of its open positions in Cleared CDS on a daily basis, thereby reducing risk by allowing ICE Trust to impose appropriate margin requirements.

Section 5 of the Exchange Act states that "[i]t shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of

---

unreasonably discriminate among types of subscribers , such as by favoring participants in the NYSE Arca market or penalizing participants in other markets.").

interstate commerce for the purpose of using any facility of an exchange . . . to effect any transaction in a security, or to report any such transactions, unless such exchange (1) is registered as a national securities exchange under section 6 of [the Exchange Act], or (2) is exempted from such registration . . . by reason of the limited volume of transactions effected on such exchange...."[31] Section 6 of the Exchange Act sets forth a procedure whereby an exchange[32] may register as a national securities exchange.[33] To facilitate the establishment of ICE Trust's end-of-day settlement price process, including the periodically required trading described above, the Commission is exercising its authority under Section 36 of the Exchange Act to temporarily exempt ICE Trust and ICE Trust Participants from Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with ICE Trust's calculation of mark-to-market prices for open positions in Cleared CDS. This temporary exemption is subject to the following conditions:

First, ICE Trust must report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

- The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and

---

31 15 U.S.C. 78e.

32 Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1), defines "exchange." Rule 3b-16 under the Exchange Act, 17 CFR 240.3b-16, defines certain terms used in the statutory definition of exchange. See Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (adopting Rule 3b-16 in addition to Regulation ATS).

33 15 U.S.C. 78f. Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

- The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index.

Reporting of this information will assist the Commission in carrying out its responsibility to supervise and regulate the securities markets.

Second, ICE Trust must establish adequate safeguards and procedures to protect participants' confidential trading information. Such safeguards and procedures shall include: (a) limiting access to the confidential trading information of participants to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (b) implementing standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed. This condition is designed to prevent any misuse of ICE Trust Participant trading information that may be available to ICE Trust in connection with the daily marking-to-market process of open positions in Cleared CDS. This should strengthen confidence in ICE Trust as a CCP for CDS, promoting participation.

Third, ICE Trust must comply with the conditions to the temporary exemption from registration as a clearing agency granted in this Order. As set forth above, this Order is designed to facilitate the prompt establishment of ICE Trust as a CCP for non-excluded CDS. ICE Trust has represented that, to enhance the reliability of end-of-day settlement prices submitted as part of the daily mark-to-market process, it must require periodic trading of Cleared CDS positions by ICE Participants whose submitted end-of-day prices lock or cross. The Commission's temporary exemption from Sections 5 and 6 of the Exchange Act is based on ICE Trust's representation that the end-of-day settlement pricing process, including the periodically required trading is integral to its risk management. Accordingly, as a condition to ICE Trust's temporary exemption from Sections 5 and 6 of the Exchange Act, ICE trust must comply with the conditions to the temporary exemption from Section 17A of the Exchange Act in this Order.

The Commission is also exempting each ICE Trust Participant from the prohibition in Section 5 of the Exchange Act to the extent that such ICE Trust Participant uses any facility of ICE Trust to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Trust's calculation of mark-to-market prices for open positions in Cleared CDS. Absent an exemption, Section 5 would prohibit any ICE Trust Participant that is a broker or dealer from effecting transactions in Cleared CDS on ICE Trust, which will rely on this order for an exemption from exchange registration. The Commission believes that exempting ICE Trust Participants from the restriction in Section 5 is necessary and appropriate in the public interest and is consistent with the protection of investors because it will facilitate their use of ICE Trust's CCP for Cleared CDS, which for the reasons noted in this Order the Commission believes to be beneficial. Without also exempting ICE Trust Participants from this Section 5 requirement, the Commission's temporary exemption of ICE Trust from Sections 5 and 6 of the Exchange Act would be ineffective, because ICE Trust Participants that are brokers or dealers would not be permitted to effect transactions on ICE Trust in connection with the end-of-day settlement price process.

C. Temporary General Exemption for ICE Trust, Certain ICE Trust Participants, and Certain Eligible Contract Participants

Applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. At the same time, it is important that the antifraud provisions of the Exchange Act apply to transactions in non-excluded CDS; indeed, OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to these antifraud provisions.[34]

We thus believe that it is appropriate in the public interest and consistent with the protection of investors temporarily to apply substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Applying substantially the same set of requirements to participants in transactions in non-excluded CDS as apply to participants in OTC CDS transactions will avoid deterring market participants from promptly using CCPs, which would detract from the potential benefits of central clearing.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 7, 2009 from certain requirements under the Exchange Act. This temporary exemption applies to ICE Trust, any ICE Trust

---

[34] While Section 3A of the Exchange Act excludes "swap agreements" from the definition of "security," certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. See (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u-1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations.

"Security-based swap agreement" is defined in Section 206B of the Gramm-Leach-Bliley Act as a swap agreement in which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

Participant[35] which is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof), and any eligible contract participants[36] other than: eligible contract participants that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons;[37] eligible contract participants that are self-regulatory organizations; or eligible contract participants that are registered brokers or dealers.[38]

Under this temporary exemption, and solely with respect to Cleared CDS, these persons generally are exempt from provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Those persons thus would still be subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements.[39] In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such

---

[35] For purposes of this Order, an "ICE Trust Participant" means any participant in ICE Trust that submits Cleared CDS to ICE Trust for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the participant in ICE Trust. In general, this exemption does not apply to any ICE Trust Participant that is registered with the Commission as a broker-dealer. A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. See Part II.D., infra.

[36] This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

[37] For these purposes, and for the purpose of the definition of "Cleared CDS," the terms "purchasing" and "selling" mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms "purchase" or "sale" under the Exchange Act in the context of security-based swap agreements. See Exchange Act Section 3A(b)(4).

[38] A separate temporary exemption addresses the Cleared CDS activities of registered broker-dealers. See Part II.D., infra. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

[39] See note 34, supra.

provisions would remain applicable.[40] In this way, the temporary exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

This temporary exemption, however, does not extend to Sections 5 and 6 of the Exchange Act.[41] The Commission separately issued a conditional exemption from these provisions to all broker-dealers and exchanges.[42] This temporary exemption also does not extend to Section 17A of the Exchange Act; instead, ICE Trust is exempt from registration as a clearing agency under the conditions discussed above. In addition, this exemption does not apply to Exchange Act Sections 12, 13, 14, 15(d), and 16;[43] eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission. Finally, this temporary exemption does not extend to the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6),[44] or to certain provisions related to government securities.[45]

---

40 Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the federal courts and administrative proceedings, and to seek the full panoply of remedies available in such cases.

41 This Order includes a separate temporary exemption regarding the mark-to-market process of ICE Trust, discussed above.

42 See note 17, supra. A national securities exchange that effects transactions in Cleared CDS would continue to be required to comply with all requirements under the Exchange Act applicable to such transactions. A national securities exchange could form subsidiaries or affiliates that operate exchanges exempt under that order. Any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link, the exempt CDS exchange with the registered exchange including the premises or property of such exchange for effecting or reporting a transaction without being considered a "facility of the exchange." See Section 3(a)(2), 15 U.S.C.78c(a)(2).

43 15 U.S.C. 78*l*, 78m, 78n, 78o(d), 78p.

44 Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while this exemption generally extends to persons that act as inter-dealer brokers in the market for Cleared CDS and do not hold funds or securities for others, such inter-dealer brokers may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act.

In addition, such inter-dealer brokers may be subject to actions under Exchange Act Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. As noted above, Section 15(c)(1) explicitly applies to security-based swap agreements. Sections

D. Temporary General Exemption for Certain Registered Broker-Dealers

The temporary exemptions addressed above – with regard to ICE Trust, certain ICE Trust Participants, and certain eligible contract participants – are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Section 15(b)(11)).[46] The Exchange Act and its underlying rules and regulations require broker-dealers to comply with a number of obligations that are important to protecting investors and promoting market integrity. We are mindful of the need to avoid creating disincentives to the prompt use of CCPs, and we recognize that the factors discussed above suggest that the full panoply of Exchange Act requirements should not immediately be applied to registered broker-dealers that engage in transactions involving Cleared CDS. At the same time, we also are sensitive to the critical importance of certain broker-dealer requirements to promoting market integrity and protecting customers (including those broker-dealer customers that are not involved with CDS transactions).

This calls for balancing the facilitation of the development and prompt implementation of CCPs with the preservation of certain key investor protections. Pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 7, 2009 from certain Exchange Act requirements. Consistent with

---

15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

[45] This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o-5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. See Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

[46] Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

the temporary exemptions discussed above, and solely with respect to Cleared CDS, we are exempting registered broker-dealers in general from provisions of the Exchange Act and its underlying rules and regulations that do not apply to security-based swap agreements. As above, we are not excluding registered broker-dealers from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.[47] As above, and for similar reasons, we are not exempting registered broker-dealers from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.[48]

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (1) Section 7(c),[49] which addresses the unlawful extension of credit by broker-dealers; (2) Section 15(c)(3),[50] which addresses the use of unlawful or manipulative devices by broker-dealers; (3) Section 17(a),[51] regarding broker-dealer obligations to make, keep and furnish information; (4) Section 17(b),[52] regarding broker-dealer records subject to examination; (5) Regulation T,[53] a Federal Reserve Board regulation regarding

---

47 See notes 34 and 40, supra. As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (e.g., requirements under Rule 17h-1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

48 We also are not exempting those members from provisions related to government securities, as discussed above.

49 15 U.S.C. 78g(c).

50 15 U.S.C. 78o(c)(3).

51 15 U.S.C. 78q(a).

52 15 U.S.C. 78q(b).

53 12 CFR 220.1 et seq.

extension of credit by broker-dealers; (6) Exchange Act Rule 15c3-1, regarding broker-dealer net capital; (7) Exchange Act Rule 15c3-3, regarding broker-dealer reserves and custody of securities; (8) Exchange Act Rules 17a-3 through 17a-5, regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; and (9) Exchange Act Rule 17a-13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.[54] Registered broker-dealers should comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices and safeguard against fraud and abuse.[55]

E. Solicitation of Comments

The Commission intends to monitor closely the development of the CDS market and intends to determine to what extent, if any, additional regulatory action may be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated. Moreover, because these exemptions are temporary, the Commission will in the future consider whether they should be extended or allowed to expire. The Commission believes it would be prudent to solicit public comment on its action today, and on what action it should take with respect to the CDS market in the future. The Commission is soliciting public comment on all aspects of these exemptions, including:

---

54 Solely for purposes of this exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections.

55 Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules regarding custody, the use of customer securities and the use of customers' deposits or credit balances, and regarding establishment of minimum financial requirements.

1. Whether the length of this temporary exemption (until December 7, 2009) is appropriate. If not, what should the appropriate duration be?

2. Whether the conditions to these exemptions are appropriate. Why or why not? Should other conditions apply? Are any of the present conditions to the exemptions provided in this Order unnecessary? If so, please specify and explain why such conditions are not needed.

3. Whether ICE Trust ultimately should be required to register as a clearing agency under the Exchange Act. Why or why not?

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-05-09 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 S7-05-09. 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. We will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 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.

III. Conclusion

IT IS HEREBY ORDERED, pursuant to Section 36(a) of the Exchange Act, that, until December 7, 2009:

(a) Exemption from Section 17A of the Exchange Act.

ICE US Trust LLC ("ICE Trust") shall be exempt from Section 17A of the Exchange Act solely to perform the functions of a clearing agency for Cleared CDS (as defined in paragraph (e)(1) of this Order), subject to the following conditions:

(1) ICE Trust shall make available on its Web site its annual audited financial statements.

(2) ICE Trust shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it relating to its Cleared CDS clearance and settlement services. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) ICE Trust shall supply information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission, and shall provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), records, and personnel related to ICE Trust's Cleared CDS clearance and settlement services.

(4) ICE Trust shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any of its members utilizing its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. ICE Trust shall notify the Commission promptly when ICE Trust involuntarily terminates the membership of an entity that is utilizing ICE Trust's Cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to the ICE Trust's disciplinary action.

(5) ICE Trust notify the Commission of all changes to rules, procedures, and any other material events affecting its Cleared CDS clearance and settlement services, including its fee schedule and changes to risk management practices, the day before effectiveness or implementation of such rule changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. All such rule changes will be posted on ICE Trust's Web site. Such notifications will not be deemed rule filings that require Commission approval.

(6) ICE Trust shall provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. ICE Trust shall provide the Commission with (beginning in its first year of operation) its annual audited financial statements prepared by independent audit personnel.

(7) ICE Trust shall report all significant systems outages to the Commission. If it appears that the outage may extend for 30 minutes or longer, ICE Trust shall report the systems outage immediately. If it appears that the outage will be resolved in less than 30

minutes, ICE Trust shall report the systems outage within a reasonable time after the outage has been resolved.

(8) ICE Trust, directly or indirectly, shall make available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that ICE Trust may establish to calculate mark-to-market margin requirements for ICE Trust Participants; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by ICE Trust.

(b) Exemption from Sections 5 and 6 of the Exchange Act

(1) ICE Trust shall be exempt from the requirements of Sections 5 and 6 of the Exchange Act and the rules and regulations thereunder in connection with its calculation of mark-to-market prices for open positions in Cleared CDS, subject to the following conditions:

(i) ICE Trust shall report the following information with respect to the calculation of mark-to-market prices for Cleared CDS to the Commission within 30 days of the end of each quarter, and preserve such reports during the life of the enterprise and of any successor enterprise:

(A) The total dollar volume of transactions executed during the quarter, broken down by reference entity, security, or index; and

(B) The total unit volume and/or notional amount executed during the quarter, broken down by reference entity, security, or index;

(ii) ICE Trust shall establish adequate safeguards and procedures to protect participants' confidential trading information. Such safeguards and procedures shall include: (A) limiting access to the confidential trading information of participants to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) implementing standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed; and

(iii) ICE Trust shall satisfy the conditions of the temporary exemption from Section 17A of the Exchange Act set forth in paragraphs (a)(1) – (8) of this Order.

(2) Any ICE Trust Participant shall be exempt from the requirements of Section 5 of the Exchange Act to the extent such ICE Trust Participant uses any facility of ICE Trust to effect any transaction in Cleared CDS, or to report any such transaction, in connection with ICE Trust's clearance and risk management process for Cleared CDS.

(c) Exemption for ICE Trust, certain ICE Trust Participants, and certain eligible contract participants.

(1) Persons eligible. The exemption in paragraph (c)(2) is available to:

(i) ICE Trust;

(ii) Any ICE Trust Participant (as defined in paragraph (e)(2) of this Order), which is not a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof); and

(iii) Any eligible contract participant (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), other than: (A) an eligible contract participant that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons; (B) an eligible contract participant that is a self-regulatory organization, as that term is defined in Section 3(a)(26) of the Exchange Act; or (C) a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof).

(2) Scope of exemption.

(i) In general. Such persons generally shall, solely with respect to Cleared CDS, be exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply in connection with security-based swap agreements. Accordingly, under this exemption, those persons would remain subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements (i.e., paragraphs (2) through (5) of Section 9(a), Section 10(b), Section 15(c)(1), paragraphs (a) and (b) of Section 16, Section 20(d) and Section 21A(a)(1) and the rules thereunder that explicitly are applicable to security-based swap agreements). All provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

(ii) Exclusions from exemption. The exemption in paragraph (c)(2)(i), however, does not extend to the following provisions under the Exchange Act:

(A) Paragraphs (42), (43), (44), and (45) of Section 3(a);

(B) Section 5;

(C) Section 6;

(D) Section 12 and the rules and regulations thereunder;

(E) Section 13 and the rules and regulations thereunder;

(F) Section 14 and the rules and regulations thereunder;

(G) Paragraphs (4) and (6) of Section 15(b);

(H) Section 15(d) and the rules and regulations thereunder;

(I) Section 15C and the rules and regulations thereunder;

(J) Section 16 and the rules and regulations thereunder; and

(K) Section 17A (other than as provided in paragraph (a)).

(d) Exemption for certain registered broker-dealers.

A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (c)(2), solely with respect to Cleared CDS, except:

(1) Section 7(c);

(2) Section 15(c)(3);

(3) Section 17(a);

(4) Section 17(b);

(5) Regulation T, 12 CFR 200.1 et seq.;

(6) Rule 15c3-1;

(7) Rule 15c3-3;

(8) Rule 17a-3;

(9) Rule 17a-4;

(10) Rule 17a-5; and

(11) Rule 17a-13.

(e) Definitions.

For purposes of this Order:

(1) "Cleared CDS" shall mean a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which:

(i) the reference entity, the issuer of the reference security, or the reference security is one of the following:

(A) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available;

(B) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States;

(C) a foreign sovereign debt security;

(D) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or

(E) an asset-backed security issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae; or

(ii) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (i).

(2) "ICE Trust Participant" shall mean any participant in ICE Trust that submits Cleared CDS to ICE Trust for clearance and settlement exclusively (i) for its own account or (ii) for the account of an affiliate that controls, is controlled by, or is under common control with the participant in ICE Trust.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59533 / March 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13403

In the Matter of **Grant Bettingen, Inc.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AS TO GRANT BETTINGEN, INC.**

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 Grant Bettingen, Inc. ("GBI" or "Respondent").

II.

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

III.

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

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

Summary

These proceedings arise out of GBI's failure reasonably to supervise Christopher Johndrow in connection with purported private placement offerings of the securities of Credit First, LLC and Credit First Income Plus, LLC (collectively, "Credit First") from January 2004 to December 2005.[2] During this time, Johndrow was associated with GBI,[3] a registered broker-dealer. Johndrow violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by misrepresenting to investors and instructing the sales agents he supervised to misrepresent to investors that they would receive at least 1% monthly returns of profits from Credit First's allegedly lucrative distressed debt business. Johndrow also violated Sections 5(a) and 5(c) of the Securities Act by offering and selling Credit First securities, and instructing the sales agents he supervised to offer and sell Credit First securities through general solicitations.

GBI failed reasonably to supervise Johndrow because it did not have a supervisory policy in place regarding the sale of securities in private placement offerings until November 2004, almost a year after Johndrow began selling Credit First securities. As a result, GBI failed reasonably to supervise Johndrow within the meaning of Section (15)(b)(4)(E) of the Exchange Act.

Respondent

1. **Grant Bettingen, Inc. ("GBI")** is a registered broker-dealer (File No. 8-34790) based in Newport Beach, California since 1985. At the time of the misconduct, it had five branch offices, four in California and one in New York, as well as an unregistered office location in Florida. Additionally, it had an unregistered office location in Orange County, California until December 2005. GBI was owned by the Grant Bettingen Trust, of which M. Grant Bettingen was the sole trustee. During the relevant period, GBI had 37 registered representatives and approximate annual revenues of $4 million. GBI conducts a general securities business which includes equities, fixed income securities, mutual funds, and insurance products. On June 2, 2008, GBI was acquired by Rubicon Financial Incorporated, a publicly held company.

---

[2] In December 2005, the Commission filed an action against Credit First and its principal, David Lund, for, among other things, making false representations to investors (the "Lund Action"). SEC v. Credit First Fund, LP, et al., CV05-8741-DSF (C.D. Cal. Dec. 15, 2005), Litigation Release No. 19497 (Dec. 16, 2005). In November 2006, Lund settled with the Commission, consenting to a permanent injunction, disgorgement, prejudgment interest, a civil penalty, and a five-year broker-dealer bar. Litigation Release No. 19497 (Dec. 20, 2006). On March 6, 2009, the Commission instituted a settled administrative proceeding against Johndrow in which Johndrow consented to a cease-and-desist order, disgorgement, prejudgment interest, a civil penalty, a three-year broker-dealer bar, and a five-year supervisory bar. Christopher J. Johndrow, Exchange Act Release No. 33-9012 (March 6, 2009).

[3] On March 6, 2009, the Commission instituted a settled administrative proceeding against GBI's former principal and president, M. Grant Bettingen. M. Grant Bettingen, Exchange Act Release No.34-59532 (March 6, 2009).

Other Relevant Entities and Persons

2. **M. Grant Bettingen ("Bettingen")**, age 67, resides in Newport Beach, California. Bettingen was the president, compliance manager, and indirect owner of GBI. Bettingen directly supervised Johndrow from January 2004 to January 2008. Bettingen currently holds Series 1, 3, 7, 24, 27, 55, and 63 licenses. Subsequent to the acquisition of GBI by Rubicon Financial Incorporated, Bettingen has been replaced as president and compliance manager and is now a minority owner of shares of GBI's parent company.

3. **The Credit First Entities** are comprised of Credit First Fund, L.P., Credit First, LLC, and Credit First Income Plus, LLC (collectively, the "Credit First Entities") which were formed in February 2001, April 2003 and July 2004, respectively. These companies raised at least $10.7 million from 2002 to December 2005 in private placement offerings purportedly exempt from registration under Section 4(2) of the Securities Act and Rule 506 of Regulation D. GBI sold approximately $3.1 million of these securities beginning in January 2004.

4. **Christopher J. Johndrow ("Johndrow")**, age 44, resides in Hallandale Beach, Florida. He holds Series 7, 24, and 63 licenses, and from 1991 through the present, has been associated with thirteen different broker-dealers. One of the prior firms terminated Johndrow for "selling away" violations and failing to supervise adequately his registered representatives. From January 2004 to January 2008, Johndrow was associated with GBI.

Background

5. Credit First was in the business of purchasing distressed debt and purportedly generating profits by selling or collecting on the debt. Johndrow had been selling securities of the Credit First Entities since December 2002 through two other broker-dealers. He was therefore very familiar with Credit First and its principal, Lund. Johndrow and Lund had a close business relationship and had shared offices since February 2002. The Credit First Entities raised approximately $10.7 million from 186 investors nationwide from February 2001 to December 2005. As of December 2005, however, there was little to no money left to return to investors.[4]

GBI's Santa Ana Office and Johndrow's Sale of Credit First Securities

6. GBI accounted for $3.1 million of the sales of Credit First securities. In January 2004, GBI and Bettingen hired Johndrow to open and supervise an office location in Santa Ana, California (the "Santa Ana Office") to primarily sell Credit First securities. During 2004 – 2005, the Santa Ana Office had one registered and about four unregistered salespersons, all supervised by Johndrow.

[4] The Credit First entities raised approximately $10.7 million from investors and paid about $11.9 million to acquire the defaulted debt portfolios. Lund also distributed $6.1 million to investors. Approximately $960,000 remained in the Credit First entities' bank accounts when the Commission brought the Lund Action in December 2005.

7. Johndrow used pre-purchased lead lists to cold-call potential investors. Johndrow also distributed the pre-purchased lead lists to the other salespersons at the Santa Ana Office, which they used to cold-call potential investors.

8. Johndrow trained the Credit First salespersons by having them listen in on his sales calls. In particular, Johndrow instructed the salespersons to emphasize to investors that Credit First was an income-based investment. The salespersons sent prospective investors copies of Credit First's private placement memorandum and the subscription agreement after making an initial telephone contact, and then telephoned them a second time approximately one week later to confirm that they received the written materials and answer any questions. They then referred interested investors to Johndrow or Lund, who helped them complete the necessary paperwork and close the deal.

9. GBI received a 10% sales commission on the sales of Credit First securities. GBI retained 25% of the commission and paid the remaining to the pertinent licensed salespersons. Johndrow also received a 5% override on all commissions earned by the licensed salespersons in the Santa Ana Office. During the relevant period, Johndrow earned $270,720 in commissions, and GBI earned $88,675 in commissions.

10. Pursuant to a contractual arrangement with GBI, Johndrow paid all of the Santa Ana Office's operating expenses including the administrative assistant's salary, and rent, utilities, and postage. The Santa Ana Office and Credit First, both, operated from the same business location. Accordingly, Johndrow paid Lund for the rent and other overhead.

Johndrow's Misrepresentations to Investors

11. Johndrow orally represented to prospective investors that Credit First would provide them a monthly income and they could expect to receive at least 1% per month in profits. Johndrow also told the salespersons he supervised to make similar representations to investors during sales calls.

12. Johndrow knew or was reckless in not knowing that Credit First did not make any monthly returns of income to its investors. The financial statements of the Credit Fund Entities for the years 2002 to 2004 showed that they operated at a net loss and were only returning principal to investors. Lund made these financial statements available to Johndrow for his review during the entire time Johndrow was selling these securities, i.e., since December 2002. Johndrow failed to review the financial statements, or perform an equivalent form of due diligence to ensure that he and his sales agents were making accurate representations about the returns to investors when they recommended securities of Credit First.

GBI's Failure to Supervise Johndrow

13. GBI failed reasonably to supervise Johndrow. GBI adopted a Written Supervisory Procedures Manual (the "January Manual") when it began selling Credit First securities in early 2004. However, written supervisory procedures for private placement offerings were added only in the November 2004 Manual (the "November Manual"). Nevertheless, GBI, under Bettingen,

sold Credit First shares for eleven months starting in January 2004 without the written supervisory procedures necessary to prevent and detect Johndrow's misrepresentations to Credit First investors and unlawful cold-calling activity.

Legal Analysis

14. As a result of the conduct described above, Johndrow violated Sections 5(a), 5(c), and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

15. Section 15(b)(4)(E) of the Exchange Act requires broker-dealers reasonably to supervise persons subject to their supervision, with a view toward preventing violations of the federal securities laws. See, e.g., Dean Witter Reynolds, Inc., Exchange Act Rel. No. 46578 (October 1, 2002). The Commission has emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." Id. 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."

16. As a result of the conduct described above, GBI failed reasonably to supervise Johndrow within the meaning of Section 15(b) of the Exchange Act when it failed to supervise Johndrow with a view to preventing and detecting violations of the federal securities laws.

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 15(b) of the Exchange Act, it is hereby ORDERED that:

A. Respondent GBI is censured.

B. IT IS FURTHER ORDERED that Respondent GBI shall, within 30 days of the entry of this Order, pay disgorgement of $88,675.00 and prejudgment interest of $8,460.51, for a total payment of $97,135.51 to Thomas F. Lennon, Inc., the court-appointed receiver for Credit First pursuant to Rule 1102 of the Commission's Rules on Fair Fund and Disgorgement Plans [17 C.F.R. 201.1102]. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. 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 Thomas F. Lennon, Inc.; (C) hand-delivered or mailed to Thomas F. Lennon, Inc., 7777 Alvarado Rd., Suite 712, La Mesa, CA 91941-3688; and (D) submitted under cover letter that identifies GBI 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 Michele Wein Layne, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., Suite 1100, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59532 / March 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13402

In the Matter of

M. Grant Bettingen,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AS TO M. GRANT BETTINGEN

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 M. Grant Bettingen ("Bettingen" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative 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[1] that:

Summary

These proceedings arise out of Bettingen's failure to supervise Christopher Johndrow in connection with purported private placement offerings of the securities of Credit First, LLC and Credit First Income Plus, LLC (collectively, "Credit First") from January 2004 to December 2005.[2] During this time, Johndrow was associated with Grant Bettingen, Inc. ("GBI"),[3] a registered broker-dealer owned and managed by Bettingen. Johndrow violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by misrepresenting to investors and instructing the sales agents he supervised to misrepresent to investors that they would receive at least 1% monthly returns of profits from Credit First's allegedly lucrative distressed debt business. Johndrow also violated Sections 5(a) and 5(c) of the Securities Act by offering and selling Credit First securities, and instructing the sales agents he supervised to offer and sell Credit First securities through general solicitations.

Bettingen failed reasonably to supervise Johndrow because he and GBI did not have a supervisory policy in place regarding the sale of securities in private placement offerings until November 2004, almost a year after Johndrow began selling Credit First securities. Even after Bettingen established a supervisory policy for private placement offerings, Bettingen failed to follow the firm's own procedures with respect to the Credit First offerings. Additionally, during the two years that Johndrow violated the securities laws, Bettingen failed to follow existing supervisory procedures with respect to conducting periodic inspections of Johndrow's office, which could have led to the prevention and detection of Johndrow's violations. Bettingen also knew of Johndrow's discharge by a former broker-dealer for "selling away" violations and failing to adequately supervise his branch, but Bettingen nevertheless failed to follow GBI's own policy requiring heightened supervision in such a case. As a result, Bettingen failed reasonably to supervise Johndrow within the meaning of Section (15)(b)(6)(A) of the Exchange Act.

---

[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] In December 2005, the Commission filed an action against Credit First and its principal, David Lund, for, among other things, making false representations to investors (the "Lund Action"). SEC v. Credit First Fund, LP, et al., CV05-8741-DSF (C.D. Cal. Dec. 15, 2005), Litigation Release No. 19497 (Dec. 16, 2005). In November 2006, Lund settled with the Commission, consenting to a permanent injunction, disgorgement, prejudgment interest, a civil penalty, and a five-year broker-dealer bar. Litigation Release No. 19497 (Dec. 20, 2006). On March 6, 2009, the Commission instituted a settled administrative proceeding against Johndrow in which Johndrow consented to a cease-and-desist order, disgorgement, prejudgment interest, a civil penalty, a three-year broker-dealer bar, and a five-year supervisory bar. Christopher J. Johndrow, Exchange Act Release No. 33-9012 (March 6, 2009).

[3] On March 6, 2009, the Commission instituted a settled administrative proceeding against GBI. Grant Bettingen, Inc., Exchange Act Release No. 34-59533 (March 6, 2009).

Respondent

1. **M. Grant Bettingen ("Bettingen")**, age 67, resides in Newport Beach, California. Bettingen was the president, compliance manager, and indirect owner of GBI until April 2008. Bettingen directly supervised Johndrow from January 2004 to January 2008. Bettingen currently holds Series 1, 3, 7, 24, 27, 55, and 63 licenses. Subsequent to the acquisition of GBI by Rubicon Financial Incorporated, Bettingen has been replaced as president and compliance manager and is now a minority owner of shares of GBI's parent company.

Other Relevant Entities and Persons

2. **Grant Bettingen, Inc. ("GBI")** is a registered broker-dealer (File No. 8-34790) based in Newport Beach, California since 1985. At the time of the misconduct, GBI had five branch offices, four in California and one in New York, as well as an unregistered office location in Florida. Additionally, it had an unregistered office location in Orange County, California until December 2005. GBI was owned by the Grant Bettingen Trust, of which M. Grant Bettingen was the sole trustee. During the relevant period, GBI had 37 registered representatives and approximate annual revenues of $4 million. GBI conducts a general securities business which includes equities, fixed income securities, mutual funds, and insurance products. On June 2, 2008, GBI was acquired by Rubicon Financial Incorporated, a publicly held company.

3. **The Credit First Entities** are comprised of Credit First Fund, L.P., Credit First, LLC, and Credit First Income Plus, LLC (collectively, the "Credit First Entities") which were formed in February 2001, April 2003 and July 2004, respectively. These companies raised at least $10.7 million from 2002 to December 2005 in private placement offerings purportedly exempt from registration under Section 4(2) of the Securities Act and Rule 506 of Regulation D. GBI sold approximately $3.1 million of these securities beginning in January 2004.

4. **Christopher J. Johndrow ("Johndrow")**, age 44, resides in Hallandale Beach, Florida. He holds Series 7, 24, and 63 licenses, and from 1991 through the present, has been associated with thirteen different broker-dealers. One of the prior firms terminated Johndrow for "selling away" violations and failing to supervise adequately his registered representatives. From January 2004 to January 2008, Johndrow was associated with GBI.

Background

5. Credit First was in the business of purchasing distressed debt and purportedly generating profits by selling or collecting on the debt. Johndrow had been selling securities of the Credit First Entities since December 2002 through two other broker-dealers. He was therefore very familiar with Credit First and its principal, Lund. Johndrow and Lund had a close business relationship and had shared offices since February 2002. The Credit First Entities raised approximately $10.7 million from 186 investors nationwide from February 2001 to December 2005. As of December 2005, however, there was little money left to return to investors.[4]

[4] The Credit First entities raised approximately $10.7 million from investors and paid about $11.9 million to acquire the defaulted debt portfolios. Lund also distributed approximately $6.1 million to investors.

GBI's Santa Ana Office and Johndrow's Sale of Credit First Securities

6. GBI accounted for $3.1 million of the sales of Credit First securities. In January 2004, Bettingen hired Johndrow to open and supervise an office location in Santa Ana, California (the "Santa Ana Office") to primarily sell Credit First securities. During 2004 – 2005, the Santa Ana Office had one registered and about four unregistered salespersons, all supervised by Johndrow.

7. Johndrow used pre-purchased lead lists to cold-call potential investors. Johndrow also distributed the pre-purchased lead lists to other salespersons at the Santa Ana Office, which they used to cold-call potential investors.

8. Johndrow trained the Credit First salespersons by having them listen in on his sales calls. In particular, Johndrow instructed the salespersons to emphasize to investors that Credit First was an income-based investment. The salespersons sent prospective investors copies of Credit First's private placement memorandum and the subscription agreement after making an initial telephone contact, and then telephoned them a second time approximately one week later to confirm that they received the written materials and answer any questions. They then referred interested investors to Johndrow or Lund, who helped them complete the necessary paperwork and close the deal.

9. GBI received a 10% sales commission on the sales of Credit First securities. GBI retained 25% of the commission and paid the remaining to the pertinent licensed salespersons. Johndrow also received a 5% override on all commissions earned by the licensed salespersons in the Santa Ana Office. During the relevant period, Johndrow earned $270,720 in commissions, and GBI earned $88,675 in commissions.

10. Pursuant to a contractual arrangement with GBI, Johndrow paid all of the Santa Ana Office's operating expenses including the administrative assistant's salary, and rent, utilities, and postage. The Santa Ana Office and Credit First, both, operated from the same business location. Accordingly, Johndrow paid Lund for the rent and other overhead.

Johndrow's Misrepresentations to Investors

11. Johndrow orally represented to prospective investors that Credit First would provide them a monthly income and they could expect to receive at least 1% per month in profits. Johndrow also told the salespersons he supervised to make similar representations to investors during sales calls.

12. Johndrow knew or was reckless in not knowing that Credit First did not make any monthly returns of income to its investors. The financial statements of the Credit Fund Entities for the years 2002 to 2004 showed that they operated at a net loss and were only returning principal to investors. Lund made these financial statements available to Johndrow for his review during the entire time Johndrow was selling these securities, i.e., since December 2002. Johndrow failed to

---

Approximately $960,000 remained in the Credit First entities' bank accounts when the Commission brought the Lund Action in December 2005.

review the financial statements, or perform an equivalent form of due diligence to ensure that he and his sales agents were making accurate representations about the returns to investors when they recommended securities of Credit First.

Bettingen's Failure to Supervise Johndrow

13. Bettingen failed reasonably to supervise Johndrow. Bettingen directly supervised Johndrow and had the powers traditionally associated with a supervisor – he hired Johndrow and had the authority to fire him. Bettingen was also responsible for ensuring that GBI established adequate written supervisory procedures and a system for applying those procedures.

No Written Supervisory Procedures for Private Placement Offerings

14. Bettingen and GBI adopted a Written Supervisory Procedures Manual (the "January Manual") when GBI began selling Credit First securities in early 2004. However, written supervisory procedures for private placement offerings were added only in the November 2004 Manual (the "November Manual"). Nevertheless, GBI sold Credit First shares for eleven months starting in January 2004 without the written supervisory procedures necessary to prevent and detect Johndrow's violations of the securities laws in connection with the private placement offerings of Credit First securities to customers.

15. Even after adopting the November Manual, Bettingen failed to follow its procedures. The November Manual required Bettingen to perform due diligence on an ongoing basis for GBI's private placement offerings. The procedure required Bettingen to review all of the offering materials and execute an agreement with the issuer. It also required Bettingen to document his efforts by maintaining a file comprised of, among other things, the issuer agreement, an issuer representation letter, and the offering materials. Finally, it required Bettingen to review the issuer's financial statements for the past twelve months.

16. Bettingen failed to follow any of these due diligence procedures with respect to the Credit First securities recommended and sold by Johndrow to customers. Bettingen merely leafed through Credit First's private placement memoranda and held one or two meetings with Johndrow to discuss the offering. In one such meeting, Johndrow represented to Bettingen that Credit First returned 1%-3% monthly distributions of profits to investors. Bettingen did nothing, however, to verify Johndrow's representations, including reviewing Credit First's financial statements for the past twelve months, which would have revealed that Credit First was returning capital to its investors. Bettingen's failure to follow these due diligence procedures for the Credit First securities is particularly egregious in light of other supervisory failures by Bettingen.

17. Moreover, Bettingen failed to follow the November Manual's procedure regarding cold-calling and private placement offerings. The November Manual states in pertinent part: "A key element of private placement exemptions . . . is that there may be no general solicitation of the issue. This includes . . . [n]o cold calling of potential offerees." Not surprisingly, Johndrow's cold-calling of potential investors in Credit First continued unabated for almost two years.

Bettingen Failed to Follow Another Supervisory Procedure

18. Another more general written supervisory procedure was specified in the January Manual and the November Manual (collectively, the "Manuals"). Most significantly, the January Manual contained a written policy requiring Bettingen to make quarterly compliance visits to non-branch business locations, like the Santa Ana Office. The January Manual further required Bettingen to documents those visits.

19. Despite these clear written directives, Bettingen never made a quarterly compliance-related visit to the Santa Ana Office. The only compliance-related visit to the Santa Ana Office was made by another GBI executive in July 2005, who did detect the cold-calling at the Santa Ana Office and informed Bettingen about it. However, this occurred well after the bulk of Credit First securities were sold. Furthermore, Bettingen did not do anything to stop the cold-calling. Bettingen may have visited the Santa Ana Office one or two times, but those visits were made for sales purposes and to discuss general business issues with Johndrow. Indeed, Bettingen delegated the majority of his day-to-day "on-site" supervisory responsibilities to Johndrow, except for the quarterly visits. This was unreasonable because it left Johndrow to supervise himself. Had Bettingen followed the supervisory procedures, or followed up on the report of cold-calling from the July 2005 visit, it would have given him the opportunity to detect and prevent the securities antifraud and registration violations by Johndrow.

Bettingen Did Not Respond Adequately to Indications of Irregularity

20. When Johndrow joined GBI in 2004, Bettingen did identify him as a broker in need of heightened supervision; however, he failed to implement the applicable procedure set forth in the Manuals. The procedure applied when a registered representative met one or more of the criteria enumerated in the Manuals, including employment with three or more broker-dealers in the past five years and being discharged or permitted to resign from a former employer where the termination appeared to involve a significant sales practice. Here, Johndrow was associated with five different broker-dealers in the three years prior to his association with GBI, and he was discharged by one of these firms for "selling away" violations and failing to supervise his registered representatives. GBI's heightened supervision procedure required, among other things, a special supervision memorandum, extra training or continuing education in areas subject to special supervision, and assignment of the registered representative to a "mentor." Bettingen failed to establish such a heightened supervisory program for Johndrow even though he knew that GBI had represented to FINRA (then the NASD) that such a program was established for Johndrow. A FINRA representative had identified Johndrow as a registered representative in need of special supervision as part of its tracking and compliance program. If Bettingen had established heightened supervision over Johndrow, he would have likely prevented and detected Johndrow's securities law violations.

Legal Analysis

21. As a result of the conduct described above, Johndrow violated Sections 5(a), 5(c), and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

22. Section 15(b)(4)(E) of the Exchange Act requires broker-dealers reasonably to supervise persons subject to their supervision, with a view toward preventing violations of the federal securities laws. See, e.g., Dean Witter Reynolds, Inc., Exchange Act Rel. No. 46578 (October 1, 2002). The Commission has emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." Id. 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) parallels Section 15(b)(4)(E) and provides for the imposition of sanctions against persons associated with a broker-dealer.

23. As a result of the conduct described above, Bettingen failed reasonably to supervise Johndrow within the meaning of Section 15(b) of the Exchange Act when he failed to supervise Johndrow with a view to preventing and detecting his violations of the federal securities laws.

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 15(b) of the Exchange Act, it is hereby ORDERED that:

A. Respondent Bettingen be, and hereby is, barred from association in a supervisory capacity with any broker or dealer for a period of three (3) years with the right to reapply for association in a supervisory capacity after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

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

C. IT IS FURTHER ORDERED that Respondent shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $35,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. 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 Bettingen 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 Michele Wein Layne, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., Suite 1100, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
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. 59530 / March 6, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2944 / March 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13400

In the Matter of **STEPHAN HUSI** **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 (the "Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Stephan Husi (the "Respondent" or "Husi") 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.2. below, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Rule

---

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.

102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions (the "Order"), as set forth below.

III.

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

1. Husi, age 48, has held a certificate as a "Swiss Certified Expert for Accounting and Controlling" since 1996. From April 2002 through October 2003, he was the Head of Corporate Planning & Controlling of Centerpulse Ltd., a Swiss public company that manufactured and marketed various medical devices. From January 2001 through October 2003, Centerpulse's American Depositary Shares were registered in the United States pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and were traded on the New York Stock Exchange under the symbol "CEP."

2. On January 23, 2009, a final judgment was entered against Husi, permanently enjoining him from future violations of Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder, and from aiding and abetting future violations of Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 10b-5, 12b-20, 13a-1 and 13a-16 thereunder, in the civil action entitled United States Securities and Exchange Commission v. Urs Kamber et al., Civil Action Number 1:07-cv-01867 (JDB), in the United States District Court for the District of Columbia. Husi was also ordered to pay $14,216 in disgorgement of ill-gotten gains, $5,868 in prejudgment interest, and a $30,000 civil money penalty.

3. The Commission's complaint alleged that Husi and others engaged in a fraudulent scheme to inflate Centerpulse's reported earnings during the second half of 2002 by manipulating reserves and refusing to recognize expenses and liabilities. The complaint also alleged that, as a result of the scheme, Centerpulse issued and furnished to the Commission false and misleading earnings releases for the third and fourth quarters of 2002, and issued and filed with the Commission a false and misleading annual report for fiscal 2002, which materially overstated Centerpulse's third quarter 2002 reported pretax income by approximately $32 million, and its fourth quarter 2002 and fiscal year 2002 reported pretax income by at least $26.4 million.

IV.

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

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

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

B. After 5 years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

March 6, 2009

IN THE MATTER OF INTERNATIONAL BUSINESS VENTURES GROUP, 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 International Business Ventures Group, Inc. ("IBVG") because of questions regarding the accuracy of assertions by IBVG, and by others, of publicly disseminated information concerning, among other things, IBVG's products and business prospects.

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 in the above listed company is suspended for the period from 9:30 a.m. EST, March 6, 2009 through 11:59 p.m. EDT, on March 19, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9011A/March 6, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59528A/March 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13099

In the Matter of NEWBRIDGE SECURITIES CORP., GUY S. AMICO, SCOTT H. GOLDSTEIN, ERIC M. VALLEJO, and DANIEL M. KANTROWITZ, Respondents.	CORRECTED ORDER MAKING FINDINGS AND IMPOSING A CEASE-AND-DESIST ORDER AND REMEDIAL SANCTIONS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO NEWBRIDGE SECURITIES CORP.

I.

Newbridge Securities Corp. ("Newbridge" or "Respondent"), pursuant to Rule 240(a) of the Rules of Practice of the Securities and Exchange Commission ("Commission") [17 C.F.R.§ 201.240(a)] submitted an Offer of Settlement ("Offer") in the above-captioned proceeding instituted against Respondent on July 25, 2008 by the Commission, pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"). The Commission deems it appropriate and in the public interest to accept the Offer.

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or to which the Commission is a party, and without admitting or denying the findings herein, except for the Commission's jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing A Cease-and-Desist Order and Remedial Sanctions Pursuant to

Section 8A of the Securities Act and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

FINDINGS

A. RESPONDENT

1. Newbridge, a Fort Lauderdale, Florida broker-dealer, has been registered with the Commission since 2000 and is a member of the Financial Industry Regulatory Authority ("FINRA"). Over the course of the past five years, FINRA has brought numerous actions against Newbridge alleging the firm failed to comply with various broker-dealer regulations.

B. BACKGROUND

2. Guy S. Amico ("Amico"), 45, resides in Wellington, Florida. Amico is an owner of Newbridge.

3. Scott H. Goldstein ("Goldstein"), 43, resides in Delray Beach, Florida. Goldstein is an owner of Newbridge.

4. Eric M. Vallejo ("Vallejo"), 44, resides in Hollywood, Florida. Vallejo is Newbridge's head trader.

5. Daniel M. Kantrowitz ("Kantrowitz"), 45, resides in Boca Raton, Florida. Kantrowitz was a registered representative at Newbridge. In 1996, FINRA censured and fined Kantrowitz $10,000, suspended Kantrowitz from associating with any member for 120 days in any capacity and required him to pay $3,625 in restitution to NAIB Trading Corporation because he arranged a fictitious, profitable trade on behalf of a customer as a reward for the customer's business in violation of the FINRA Rules of Fair Practice. (FINRA Case Number CMS950084 filed July 24, 1995.) During the relevant time period, Kantrowitz participated in offerings of Concorde America, Inc. and Roanoke Technology Corp. stock, which were penny stocks.

6. Concorde America, Inc. ("Concorde") is a Nevada corporation with its principal place of business in Boca Raton, Florida. Concorde's securities, which are quoted on the Pink Sheets, are not registered with the Commission. On February 14, 2005, the Commission filed a civil injunctive action against Concorde and others based on their violations of the antifraud provisions of the federal securities laws for their participation in a fraudulent manipulation of Concorde shares. SEC v. Concorde America, Inc., Absolute Health and Fitness, Inc., et al., Case

[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.

No. 05-80128-CIV-ZLOCH (S.D. Fla.). Concorde consented to all non-monetary relief sought in the complaint and the court entered a final judgment of permanent injunction on February 9, 2007.

7. Donald Oehmke ("Oehmke"), 58, resides in Kalamazoo, Michigan. Oehmke, a former registered representative, was permanently barred from association with any FINRA member in 1991. Oehmke controlled a shell company, which later became Concorde, and executed numerous fraudulent securities transactions in Concorde through Newbridge and another broker-dealer registered with the Commission ("other broker-dealer"). The Commission named Oehmke as a defendant in the Concorde action based on his violation of the antifraud provisions of the federal securities laws, for his participation in the fraudulent manipulation of Concorde shares. On November 28, 2006, the court entered a final judgment against Oehmke enjoining him from future violations of the antifraud provisions of the federal securities laws and imposing a penny stock bar, an unregistered offering bar, disgorgement in the amount of $1,095,177, prejudgment interest of $109,307, and a civil penalty of $250,000.

8. Roanoke Technology Corp. ("Roanoke") is a Florida corporation headquartered in Rocky Mount, North Carolina. Roanoke's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. On January 15, 2008, the Commission revoked Roanoke's registration for its repeated failure to file required periodic reports. The stock was quoted on the Over-The-Counter Bulletin Board, then quoted on the Pink Sheets. Prior to the Commission revoking Roanoke's registration, the Commission filed a civil injunctive action on December 21, 2005 against Roanoke and others for their participation in a fraudulent S-8 scheme, and charged Roanoke with antifraud, registration, and reporting violations of the federal securities laws. SEC v. Roanoke Technology Corp. et al., Case No. 6:05-CV-1880-ORL-3-KRS (M.D. Fla.). Roanoke consented to all non-monetary relief sought in the complaint and the court entered a final judgment of permanent injunction on September 27, 2006.

9. Thomas L. Bojadzijev ("Bojadzijev"), 29, resides in Orlando, Florida, and is purportedly a self-employed consultant. Bojadzijev participated in a sham S-8 scheme with Roanoke, and executed numerous fraudulent securities transactions in Roanoke through Newbridge. The Commission named Bojadzijev as a defendant in the Roanoke civil injunctive action based on his violations of the antifraud, registration, and reporting provisions of the federal securities laws for participating in the fraudulent S-8 scheme. On January 3, 2007, the court entered a judgment against Bojadzijev enjoining him from future violations of the antifraud, registration, and reporting provisions of the federal securities laws, and imposing a penny stock bar. On August 31, 2007, the court entered a final judgment against Bojadzijev ordering him to pay disgorgement in the amount of $2,681,866, prejudgment interest of $291,565 and a civil penalty in the amount of $120,000.

10. In 2003 and 2004, Kantrowitz engaged in the manipulation of Concorde and Roanoke shares on behalf of Oehmke and Bojadzijev, respectively. Kantrowitz used Newbridge's market making capacity to manipulate the securities.

11. In October 2002 and December 2003, Newbridge was advised by the Commission's examination staff of supervisory failures at Newbridge's trading desk and the

possibility that Kantrowitz's business was facilitating unregistered offerings and engaging in other manipulative conduct. Despite these warnings, Newbridge did not develop and implement policies, procedures, and systems reasonably designed to prevent and detect Kantrowitz's manipulation of Concorde securities and his manipulation and unregistered distribution of Roanoke securities.

12. At all relevant times, Amico and Goldstein were Newbridge's president and chief executive officer, respectively, and they had ultimate authority and responsibility for developing reasonable firm supervisory procedures. Amico and Goldstein claim they delegated the day-to-day supervision of Kantrowitz to subordinates.

13. Vallejo, the firm's head trader, directly supervised Kantrowitz.

14. Newbridge, through the actions of certain of its registered representatives, also violated the federal securities laws in connection with two initial public offerings when the registered representatives sent detailed emails concerning the offerings to customers during the "waiting period," the period after a registration statement is filed with the Commission but before the Commission declares it effective.

C. MANIPULATION OF CONCORDE

15. From June through October 2004, Kantrowitz engaged in a manipulation scheme involving the securities of Concorde that enabled Oehmke to reap more than $5.8 million in sales proceeds by liquidating more than 1.5 million Concorde shares.

16. In June 2004, Oehmke obtained ten million shares of Concorde, which constituted almost all of Concorde's publicly tradable shares. Oehmke subsequently distributed the shares to a number of offshore nominee entities that maintained brokerage accounts at Newbridge and the other broker-dealer, who also made a market in Concorde.

17. Beginning on June 30, 2004, Oehmke directed Kantrowitz and the other broker-dealer's market making activities to increase Concorde's share price. At Oehmke's direction, Kantrowitz and the other broker-dealer placed increasing bids on Concorde stock, even though no Concorde shares were traded and no news items were disseminated. From June 30 to July 27, 2004, Kantrowitz manipulated Concorde's share price upward from $0.01 to $3.00.

18. Despite raising the bid price for Concorde shares on an almost daily basis, Kantrowitz was aware that Oehmke had no interest in buying Concorde shares. Oehmke had communicated to Kantrowitz that Oehmke intended to liquidate the large number of Concorde shares he deposited with the firm through an account he maintained at Newbridge as well as, in a representative capacity, through an account maintained by one of the offshore nominee entities.

19. After raising the price of Concorde shares under Oehmke's direction through increasing fictitious bids, Kantrowitz took part in a scheme to dispose of the shares without drawing attention to Oehmke's control over the supply of Concorde shares. Beginning in

July 2004, Oehmke directed Kantrowitz and the other broker-dealer to sell his Concorde shares, which he had deposited at each firm.

20. Kantrowitz followed another Oehmke tactic designed to artificially stimulate market activity in Concorde shares. To further create the appearance of an active and competitive market, Oehmke directed wash trades between accounts he controlled and directed Kantrowitz and the other broker-dealer to post quotes to buy the stock. Kantrowitz followed Oehmke's instructions.

21. Additionally, Kantrowitz complied with Oehmke's instruction to stay "close" to and shadow the bids posted by the other broker-dealer in Concorde stock, by either posting the same or incrementally higher quotes, despite an August 11, 2004 Concorde disclaimer press release that caused the stock price to drop more than 80%.

22. In August 2004, Oehmke started another campaign to raise Concorde's share price. Oehmke directed Kantrowitz and the other broker-dealer to make a series of incrementally higher bid quotes. By utilizing two market makers, Oehmke was able to cause Kantrowitz and the other broker-dealer to create the appearance of buyers at each firm engaging in a bidding war for the stock. Kantrowitz complied with Oehmke's instruction to incrementally increase Newbridge's bids in accordance to bids posted by the other broker-dealer. As a result, Kantrowitz and the other broker-dealer rapidly manipulated Concorde's share price upward on August 13, 2004 from $1.75 to $5.45 over a period of an hour and twenty minutes, creating another rise in Concorde's share price that enabled Oehmke to liquidate additional Concorde shares at a substantial profit.

23. Kantrowitz knew that Oehmke had no bona fide interest in buying Concorde shares. Through a series of instant-messages, Oehmke conveyed to Kantrowitz his manipulative intent. One example is Oehmke directing Kantrowitz to stay "close" to and shadow the bids posted by the other broker-dealer in Kantrowitz's quoting activities.

24. Based upon the foregoing, Kantrowitz knew or was reckless in not knowing that he was fraudulently manipulating the market in Concorde shares, in furtherance of Oehmke's manipulative scheme. Kantrowitz knew Oehmke wanted to liquidate a large number of Concorde shares and that Oehmke had no interest in buying any Concorde stock. Further, Kantrowitz knew that Oehmke was liquidating Concorde shares through the other broker-dealer, and was manipulating the market by having Kantrowitz shadow the other broker-dealer's bids and enter into trades with the other broker-dealer.

D. UNREGISTERED DISTRIBUTION OF ROANOKE

25. From November through December 2003, Bojadzijev received 300 million shares of Roanoke, totaling nearly half of Roanoke's outstanding shares. Bojadzijev posed as a consultant to the company and obtained these shares through a sham S-8 scheme. Bojadzijev deposited his Roanoke holdings with Newbridge for liquidation, in blocks of 50 million shares.

26. Newbridge maintained an internal stock certificate deposit form that registered representatives were required to complete prior to liquidating any stock that a customer deposited in his account. A registered representative was required to complete a form for each deposit of securities. According to Newbridge's policies and procedures, no trades could be effected and no sales proceeds distributed until the form was completed.

27. Kantrowitz failed to inquire adequately as to the source of Bojadzijev's Roanoke shares. Kantrowitz asked Bojadzijev for the minimal information necessary to complete Newbridge's internal stock certificate deposit forms while ignoring Bojadzijev's suspect and contradictory information regarding the source of his Roanoke shares.

28. When Kantrowitz belatedly completed Newbridge's internal stock certificate form for the blocks of Roanoke shares Bojadzijev initially deposited with the firm, Kantrowitz falsely represented on the internal stock certificate form that Bojadzijev received such shares through a private transaction. In contrast, Roanoke's public filing showed that Roanoke had issued Bojadzijev shares through a Form S-8.

29. After Kantrowitz had already begun liquidating Bojadzijev's Roanoke shares, Kantrowitz asked Bojadzijev to obtain a letter from Roanoke confirming that his shares would not be cancelled. On November 28, 2003, Bojadzijev faxed Kantrowitz a letter written by Roanoke's former president to Bojadzijev which noted: "As we discussed, the 300 million shares registered on 11-21-2003 will not be cancelled under any circumstances. They will be issued to you in lots of 50 million, which keeps you under the 10% rule." Kantrowitz never questioned Roanoke's confirming letter outlining the highly suspect manner in which the company was issuing the shares to Bojadzijev.

30. Kantrowitz repeatedly liquidated Bojadzijev's shares and wired the sales proceeds despite the following: (1) Bojadzijev repeatedly pressured Kantrowitz to process his wire requests faster; (2) Bojadzijev informed Kantrowitz that his ability to deposit additional blocks of Roanoke shares depended on how quickly Newbridge wired out the proceeds of his sales; (3) Bojadzijev informed Kantrowitz that he forwarded his Roanoke sales proceeds to a third party, a practice inconsistent with his claims that the shares were compensation for consulting services; and (4) Kantrowitz failed to complete the forms for each block of Bojadzijev's Roanoke shares until after he liquidated each block.

E. MANIPULATION OF ROANOKE

31. In order to liquidate his S-8 shares into the market, Bojadzijev instructed Kantrowitz to post increasing bids for Roanoke to artificially buoy the stock price. Kantrowitz complied and regularly quoted bids that were greater than or equal to the highest prevailing bids posted by other market makers.

32. Kantrowitz knew that Bojadzijev had no interest in buying Roanoke shares. Bojadzijev had communicated to Kantrowitz that Bojadzijev intended to liquidate the large number of Roanoke shares he owned.

33. As a means of determining the highest price at which he could start liquidating his Roanoke shares, Bojadzijev instructed Kantrowitz to "test" the market and post an ask quote in Roanoke. Kantrowitz complied before Bojadzijev had yet to deposit any shares of Roanoke with Newbridge to sell.

34. Kantrowitz proceeded with other Bojadzijev tactics designed to artificially stimulate market activity in Roanoke shares. At one point, Bojadzijev's efforts to manipulate Roanoke's bid price upward was temporarily impeded when Kantrowitz's bid price came close to equaling the inside ask price being posted by another market maker. Bojadzijev instructed Kantrowitz to purchase the shares offered by the market maker on the inside ask, effectively removing those shares from the inside ask. Kantrowitz knew that Bojadzijev was attempting to increase the inside ask so that he could continue directing Kantrowitz to increase Roanoke's bid price.

35. Kantrowitz also knew that Bojadzijev was privy to information regarding when Roanoke planned to issue press releases. Bojadzijev repeatedly told Kantrowitz when the company expected to issue news and even confirmed when the company actually issued press releases. Kantrowitz followed Bojadzijev's instructions to post increasing bids in Roanoke stock, which enabled Bojadzijev to time his sales of Roanoke shares with the issuance of Roanoke press releases.

36. Through a series of instant-messages, Bojadzijev conveyed to Kantrowitz his manipulative intent. For example, Bojadzijev told Kantrowitz, "I want to make 150k profit next batch trying to move this up." Nonetheless, Kantrowitz repeatedly complied with Bojadzijev's instructions.

37. From November through December 2003, Kantrowitz enabled Bojadzijev to raise over $1.1 million in sales proceeds through the manipulation of Roanoke shares.

38. Based upon the foregoing, Kantrowitz knew or was reckless in not knowing that he was fraudulently manipulating the market in Roanoke shares in furtherance of Bojadzijev's manipulative scheme. Kantrowitz knew Bojadzijev wanted to liquidate a large number of Roanoke

shares and that Bojadzijev had no interest in buying any Roanoke stock. Further, Kantrowitz knew that Bojadzijev was providing him with instructions to manipulate Roanoke's share price rather than for the purpose of effecting legitimate trades.

F. NEWBRIDGE FAILED REASONABLY TO SUPERVISE KANTROWITZ

39. Newbridge did not reasonably supervise Kantrowitz with a view to preventing his violations of the federal securities laws.

40. Newbridge did not reasonably supervise Kantrowitz because it did not develop reasonable systems to implement its policies and procedures to prevent and detect Kantrowitz's stock manipulations. While Newbridge's compliance manual contained an explicit description of manipulative activities and policies prohibiting such practices, the firm did not have adequate systems to implement its policies and procedures to prevent and detect Kantrowitz's manipulative conduct. The firm claims to have delegated to Vallejo supervisory responsibility over the trading desk, tasking him with the responsibility for monitoring for manipulative activity. Newbridge, however, did not provide Vallejo with any systems or guidance as to how he was expected to prevent and detect such conduct.

41. Newbridge also did not develop reasonable policies and procedures to prevent and detect Kantrowitz's unregistered offerings. Newbridge created the internal stock certificate deposit form in an effort, in part, to address unregistered stock distributions. The process for completing the form was ineffective because it allowed registered representatives to obtain the requisite information by simply asking their customers, who could and did make self-serving statements. Other than confirm with transfer agents that the relevant stocks were clear to sell, Newbridge did not take sufficient steps to verify the accuracy of the information provided on the form. Newbridge's former chief compliance officer claimed that documentation, such as consulting agreements and stock loan agreements, was "normally" required to be submitted with the internal stock certificate deposit form to evidence the source of a customer's shares. However, neither the compliance manual nor the deposit form memorialized this requirement, and it was not consistently adhered to in practice.

42. Furthermore, Newbridge did not develop reasonable systems to implement the firm's policies and procedures with respect to the review of customer correspondence with a view to preventing and detecting Kantrowitz's misconduct. As noted above, instant messages played a central role in the Roanoke manipulation and unregistered distribution. Although FINRA reminded all broker-dealers in July 2003 of the requirement to review instant messages, Newbridge did not implement a policy to review instant messages until July 2004.[2] While Newbridge's compliance manual expressly required supervisors to review other forms of correspondence (such as letters and faxes), there is no evidence that anyone at the firm consistently performed that task at the trading desk. This is significant because a large part of the trading desk's activities consisted of

---

[2] NASD Notice to Members, 03-33 (July 2003), requires members to establish an adequate supervisory program if they allow instant messaging and to ensure that their use of instant messaging complies with FINRA and SEC recordkeeping requirements.

servicing retail customers. At the least, Newbridge may have prevented and detected Kantrowitz's unregistered distribution of Roanoke shares if it had developed reasonable systems to implement its policies and procedures concerning correspondence review. As noted above, on November 28, 2003, Bojadzijev faxed Kantrowitz a suspect letter noting that he would be receiving his Roanoke shares in certain blocks to avoid the reporting requirements. There is no evidence that anyone at Newbridge ever reviewed that letter.

G. VIOLATIVE EMAILS SENT IN CONNECTION WITH INITIAL PUBLIC OFFERINGS

43. From June through July 2004, Newbridge violated the federal securities laws when its registered representatives sent communications to customers concerning two anticipated IPOs.

44. On April 30, 2004, Newbridge learned that Lumera Corp. ("Lumera") was planning an IPO, and took steps to attempt to participate as an underwriter. Lumera filed a registration statement with the Commission on May 19, 2004. During the waiting period, registered representatives are permitted to solicit indications of interest from customers for the offering, but are restricted in what information they can release to the public.

45. On June 28, 2004, approximately a month after Lumera filed its registration statement and during the waiting period, Newbridge held a due diligence meeting where the lead underwriter for Lumera's IPO distributed a sales memorandum marked "For Internal Use Only." Newbridge briefed its sales force and informed them that they were permitted to contact customers solely to solicit indications of interest.

46. On the following day, a registered representative in Newbridge's Fort Lauderdale, Florida branch sent an email to a prospective customer regarding the Lumera offering. The email provided a link to the preliminary prospectus, but also included prohibited details about the offering. For example, the registered representative inserted content from the internal sales memorandum and other information not contained in the preliminary prospectus. The email described Lumera as a nanotechnology company "addressing three primary multi-billion dollar markets." The email also noted that Lumera "will have revenue in 2004" and contained projections of revenue of "$12-18 million and profitability of 0.10 – 0.16 per share for 2005."

47. During the next two weeks, the registered representative on over twenty separate occasions sent various versions of the email to over sixty individuals, many of whom did not maintain accounts at Newbridge. The registered representative continued his practice of providing a hyperlink to Lumera's preliminary prospectus, but only to some of the email recipients. Other registered representatives at Newbridge also sent prospective investors in Lumera's IPO emails containing prohibited details about the offering. These emails concerning the Lumera IPO were prohibited written offers during the waiting period.

48. Around the same time period, Newbridge registered representatives also improperly solicited investors for SandHill IT Security Acquisition Corp.'s ("SandHill") IPO by

sending emails that included information not contained in the preliminary prospectus during the waiting period. The emails sometimes contained a hyperlink to SandHill's preliminary prospectus, but often improperly included projections and other information not included in the preliminary prospectus.

H. VIOLATIONS

49. As a result of the conduct described above, Newbridge willfully[3] violated Sections 5(a) and 5(c) of the Securities Act by directly or indirectly, offering to sell and selling Roanoke shares through the use of any means or instrumentality of transportation, communication in interstate commerce, or of the mails when the Roanoke shares were not the subject of an effective registration statement.

50. As a result of the conduct described above, Newbridge did not reasonably supervise Kantrowitz, within the meaning of Section 15(b)(4)(E) with a view to detecting and preventing Kantrowitz's violations of Sections 5 and 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

51. As a result of the conduct described above, Newbridge willfully violated Section 5(b) of the Securities Act, which requires that a prospectus used after the filing of a registration statement meet the requirements of Section 10 of the Securities Act. Section 2(a)(10) of the Securities Act broadly defines "prospectus" to include any written communication that offers any security for sale. Emails are a form of written communication. As discussed above, Newbridge, through the actions of certain of its registered representatives, willfully violated Section 5(b) of the Securities Act by sending emails to customers during the waiting periods for two IPOs that did not meet the requirements of Section 10 of the Securities Act.

IV.

UNDERTAKING

Respondent undertakes:

a. to retain, within 30 days of the date of entry of the Order, at its own expense, the services of an Independent Consultant not unacceptable to the Division of Enforcement of the Commission, to (i) review Newbridge's written supervisory policies and procedures; and (ii) review Newbridge's system for implementing its supervisory polices and procedures.

b. to require the Independent Consultant, at the conclusion of the review, which in no event shall be more than 120 days after the entry of the Order, to submit a

---

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

Report to Newbridge and the Division. The report shall address the supervisory issues described above and shall include a description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes or improvements to the policies, procedures, and practices of Newbridge and a procedure for implementing the recommended changes or improvements to such policies, procedures, and practices.

c. to adopt, implement, and maintain all policies, procedures, and practices recommended in the Report of the Independent Consultant. As to any of the Independent Consultant's recommendations about which Newbridge and the Independent Consultant do not agree, such parties shall attempt in good faith to reach agreement within 180 days of the date of the entry of the Order. In the event that Newbridge and the Independent Consultant are unable to agree on an alternative proposal, Newbridge will abide by the determinations of the Independent Consultant and adopt those recommendations deemed appropriate by the Independent Consultant.

d. to cooperate fully with the Independent Consultant in its review, including making such information and documents available as the Independent Consultant may reasonably request, and by permitting and requiring Newbridge's employees and agents to supply such information and documents as the Independent Consultant may reasonably request.

e. that, in order to ensure the independence of the Independent Consultant, Newbridge (i) shall not have the authority to terminate the Independent Consultant without the prior written approval of the Division; (ii) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to the Order at their reasonable and customary rates.

f. to require the Independent Consultant to enter into an agreement that provides that, for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing, or other professional relationship, directly or indirectly, with Newbridge, or any of its present or former affiliates, directors, officers or employees. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Division of Enforcement in Miami, Florida, enter into any employment, consultant, attorney-client, auditing or other professional relationship, directly or indirectly, with Newbridge, or any of their present or former affiliates, directors, officers or employees for the period of the engagement and for a period of two years after the engagement.

V.

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

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

A. Newbridge shall cease and desist from committing or causing violations of and any future violations of Sections 5(a), 5(b), and 5(c) of the Securities Act;

B. Newbridge shall be, and hereby is censured;

C. Newbridge shall pay disgorgement in the amount of $206,711, plus prejudgment interest in the amount of $1,722, and a civil money penalty in the amount of $80,000 to the United States Treasury within ten (10) days after entry of this Order. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check, bank money order or funds directly from an escrow agent; (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 Newbridge as a Respondent in these proceedings and sets forth the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to C. Ian Anderson, Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Ave., Suite 1800, Miami, Florida 33131

D. Newbridge shall comply with its undertaking as enumerated in Section IV.

By the Commission.

Elizabeth M. Murphy
Secretary

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

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59529A/March 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13099

In the Matter of NEWBRIDGE SECURITIES CORP., GUY S. AMICO, SCOTT H. GOLDSTEIN, ERIC M. VALLEJO, and DANIEL M. KANTROWITZ, Respondents.	CORRECTED ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AS TO ERIC M. VALLEJO

I.

Eric M. Vallejo ("Vallejo" or "Respondent"), pursuant to Rule 240(a) of the Rules of Practice of the Securities and Exchange Commission ("Commission") [17 C.F.R.§ 201.240(a)] submitted an Offer of Settlement ("Offer") in the above-captioned proceeding instituted against him on July 25, 2008 by the Commission, 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"). The Commission deems it appropriate and in the public interest to accept the Offer.

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or to which the Commission is a party, and without admitting or denying the findings herein, except for 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 ("Order"), as set forth below.

III.

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

FINDINGS

A. RESPONDENT

1. Vallejo, 44, resides in Hollywood, Florida. Vallejo is Newbridge's head trader. Vallejo was previously disciplined by the Financial Industry Regulatory Authority ("FINRA") for a supervisory failure at Newbridge regarding excessive markups and markdowns.

B. BACKGROUND

2. Newbridge, a Fort Lauderdale, Florida broker-dealer, has been registered with the Commission since 2000 and is a member of FINRA. Over the course of the past five years, FINRA has brought numerous actions against Newbridge alleging the firm failed to comply with various broker-dealer regulations.

3. Daniel M. Kantrowitz ("Kantrowitz"), 45, resides in Boca Raton, Florida. Kantrowitz was a registered representative at Newbridge from 2001 until June 2008, when he resigned from the firm. In 1996, FINRA censured and fined Kantrowitz $10,000, suspended Kantrowitz from associating with any member for 120 days in any capacity and required him to pay $3,625 in restitution to NAIB Trading Corporation because he arranged a fictitious, profitable trade on behalf of a customer as a reward for the customer's business in violation of the FINRA Rules of Fair Practice. (FINRA Case Number CMS950084 filed July 24, 1995.) Kantrowitz participated in offerings of Concorde America, Inc. and Roanoke Technology Corp. stock, which were penny stocks.

4. Concorde America, Inc. ("Concorde") is a Nevada corporation with its principal place of business in Boca Raton, Florida. Concorde's securities, which are quoted on the Pink Sheets, are not registered with the Commission. On February 14, 2005, the Commission filed a civil injunctive action against Concorde and others based on their violations of the antifraud provisions of the federal securities laws for their participation in a fraudulent manipulation of Concorde shares. SEC v. Concorde America, Inc., Absolute Health and Fitness, Inc., et al., Case No. 05-80128-CIV-ZLOCH (S.D. Fla.). Concorde consented to all non-monetary relief sought in the complaint and the court entered a final judgment of permanent injunction on February 9, 2007.

5. Donald Oehmke ("Oehmke"), 58, resides in Kalamazoo, Michigan. Oehmke, a former registered representative, was permanently barred from association with any

[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.

FINRA member in 1991. Oehmke controlled a shell company, which later became Concorde, and executed numerous fraudulent securities transactions in Concorde through Newbridge and another broker-dealer registered with the Commission ("other broker-dealer"). The Commission named Oehmke as a defendant in the Concorde action based on his violation of the antifraud provisions of the federal securities laws, for his participation in the fraudulent manipulation of Concorde shares. On November 28, 2006, the court entered a final judgment against Oehmke enjoining him from future violations of the antifraud provisions of the federal securities laws and imposing a penny stock bar, an unregistered offering bar, disgorgement in the amount of $1,095,177, prejudgment interest of $109,307, and a civil penalty of $250,000.

6. Roanoke Technology Corp. ("Roanoke") is a Florida corporation headquartered in Rocky Mount, North Carolina. Roanoke's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act. On January 15, 2008, the Commission revoked Roanoke's registration for its repeated failure to file required periodic reports. The stock was quoted on the Over-The-Counter Bulletin Board, then quoted on the Pink Sheets. Prior to the Commission revoking Roanoke's registration, the Commission filed a civil injunctive action on December 21, 2005 against Roanoke and others for their participation in a fraudulent S-8 scheme, and charged Roanoke with antifraud, registration, and reporting violations of the federal securities laws. SEC v. Roanoke Technology Corp. et al., Case No. 6:05-CV-1880-ORL-3-KRS (M.D. Fla.). Roanoke consented to all non-monetary relief sought in the complaint and the court entered a final judgment of permanent injunction on September 27, 2006.

7. Thomas L. Bojadzijev ("Bojadzijev"), 29, resides in Orlando, Florida, and is purportedly a self-employed consultant. Bojadzijev participated in a sham S-8 scheme with Roanoke, and executed numerous fraudulent securities transactions in Roanoke through Newbridge. The Commission named Bojadzijev as a defendant in the Roanoke civil injunctive action based on his violations of the antifraud, registration, and reporting provisions of the federal securities laws for participating in the fraudulent S-8 scheme. On January 3, 2007, the court entered a judgment against Bojadzijev enjoining him from future violations of the antifraud, registration, and reporting provisions of the federal securities laws, and imposing a penny stock bar. On August 31, 2007, the court entered a final judgment against Bojadzijev ordering him to pay disgorgement in the amount of $2,681,866, prejudgment interest of $291,565 and a civil penalty in the amount of $120,000.

8. In 2003 and 2004, Kantrowitz engaged in the manipulation of Concorde and Roanoke shares on behalf of Oehmke and Bojadzijev, respectively. Kantrowitz used Newbridge's market making capacity to manipulate the securities.

9. Vallejo, the firm's head trader, directly supervised Kantrowitz. Vallejo, however, failed reasonably to supervise Kantrowitz.

C. MANIPULATION OF CONCORDE

10. From June through October 2004, Kantrowitz engaged in a manipulation scheme involving the securities of Concorde that enabled Oehmke to reap more than $5.8 million in sales proceeds by liquidating more than 1.5 million Concorde shares.

11. In June 2004, Oehmke obtained ten million shares of Concorde, which constituted almost all of Concorde's publicly tradable shares. Oehmke subsequently distributed the shares to a number of offshore nominee entities that maintained brokerage accounts at Newbridge and the other broker-dealer, who also made a market in Concorde.

12. Beginning on June 30, 2004, Oehmke directed Kantrowitz and the other broker-dealer's market making activities to increase Concorde's share price. At Oehmke's direction, Kantrowitz and the other broker-dealer placed increasing bids on Concorde stock, even though no Concorde shares were traded and no news items were disseminated. From June 30 to July 27, 2004, Kantrowitz manipulated Concorde's share price upward from $0.01 to $3.00.

13. Despite raising the bid price for Concorde shares on an almost daily basis, Kantrowitz was aware that Oehmke had no interest in buying Concorde shares. Oehmke had communicated to Kantrowitz that Oehmke intended to liquidate the large number of Concorde shares he deposited with the firm through an account he maintained at Newbridge as well as, in a representative capacity, through an account maintained by one of the offshore nominee entities.

14. After raising the price of Concorde shares under Oehmke's direction through increasing fictitious bids, Kantrowitz took part in a scheme to dispose of the shares without drawing attention to Oehmke's control over the supply of Concorde shares. Beginning in July 2004, Oehmke directed Kantrowitz and the other broker-dealer to sell his Concorde shares, which he had deposited at each firm.

15. Kantrowitz followed another Oehmke tactic designed to artificially stimulate market activity in Concorde shares. To further create the appearance of an active and competitive market, Oehmke directed wash trades between accounts he controlled and directed Kantrowitz and the other broker-dealer to post quotes to buy the stock. Kantrowitz followed Oehmke's instructions.

16. Additionally, Kantrowitz complied with Oehmke's instruction to stay "close" to and shadow the bids posted by the other broker-dealer in Concorde stock, by either posting the same or incrementally higher quotes, despite an August 11, 2004 Concorde disclaimer press release that caused the stock price to drop more than 80%.

17. In August 2004, Oehmke started another campaign to raise Concorde's share price. Oehmke directed Kantrowitz and the other broker-dealer to make a series of incrementally higher bid quotes. By utilizing two market makers, Oehmke was able to cause

Kantrowitz and the other broker-dealer to create the appearance of buyers at each firm engaging in a bidding war for the stock. Kantrowitz complied with Oehmke's instruction to incrementally increase Newbridge's bids in accordance to bids posted by the other broker-dealer. As a result, Kantrowitz and the other broker-dealer rapidly manipulated Concorde's share price upward on August 13, 2004 from $1.75 to $5.45 over a period of an hour and twenty minutes, creating another rise in Concorde's share price that enabled Oehmke to liquidate additional Concorde shares at a substantial profit.

18. Kantrowitz knew that Oehmke had no bona fide interest in buying Concorde shares. Through a series of instant-messages, Oehmke conveyed to Kantrowitz his manipulative intent. One example is Oehmke directing Kantrowitz to stay "close" to and shadow the bids posted by the other broker-dealer in Kantrowitz's quoting activities.

19. Based upon the foregoing, Kantrowitz knew or was reckless in not knowing that he was fraudulently manipulating the market in Concorde shares, in furtherance of Oehmke's manipulative scheme. Kantrowitz knew Oehmke wanted to liquidate a large number of Concorde shares and that Oehmke had no interest in buying any Concorde stock. Further, Kantrowitz knew that Oehmke was liquidating Concorde shares through the other broker-dealer, and was manipulating the market by having Kantrowitz shadow the other broker-dealer's bids and enter into trades with the other broker-dealer.

D. MANIPULATION OF ROANOKE

20. From November through December 2003, Bojadzijev received 300 million shares of Roanoke, totaling nearly half of Roanoke's outstanding shares. Bojadzijev posed as a consultant to the company and obtained these shares through a sham S-8 scheme. Bojadzijev deposited his Roanoke holdings with Newbridge for liquidation, in blocks of 50 million shares.

21. In order to liquidate his S-8 shares into the market, Bojadzijev instructed Kantrowitz to post increasing bids for Roanoke to artificially buoy the stock price. Kantrowitz complied and regularly quoted bids that were greater than or equal to the highest prevailing bids posted by other market makers.

22. Kantrowitz knew that Bojadzijev had no interest in buying Roanoke shares. Bojadzijev had communicated to Kantrowitz that Bojadzijev intended to liquidate the large number of Roanoke shares he owned.

23. As a means of determining the highest price at which he could start liquidating his Roanoke shares, Bojadzijev instructed Kantrowitz to "test" the market and post an ask quote in Roanoke. Kantrowitz complied before Bojadzijev had yet to deposit any shares of Roanoke with Newbridge to sell.

24. Kantrowitz proceeded with other Bojadzijev tactics designed to artificially stimulate market activity in Roanoke shares. At one point, Bojadzijev's efforts to manipulate Roanoke's bid price upward was temporarily impeded when Kantrowitz's bid price came close to

equaling the inside ask price being posted by another market maker. Bojadzijev instructed Kantrowitz to purchase the shares offered by the market maker on the inside ask, effectively removing those shares from the inside ask. Kantrowitz knew that Bojadzijev was attempting to increase the inside ask so that he could continue directing Kantrowitz to increase Roanoke's bid price.

25. Kantrowitz also knew that Bojadzijev was privy to information regarding when Roanoke planned to issue press releases. Bojadzijev repeatedly told Kantrowitz when the company expected to issue news and even confirmed when the company actually issued press releases. Kantrowitz followed Bojadzijev's instructions to post increasing bids in Roanoke stock, which enabled Bojadzijev to time his sales of Roanoke shares with the issuance of Roanoke press releases.

26. Through a series of instant-messages, Bojadzijev conveyed to Kantrowitz his manipulative intent. For example, Bojadzijev told Kantrowitz, "I want to make 150k profit next batch trying to move this up." Nonetheless, Kantrowitz repeatedly complied with Bojadzijev's instructions.

27. From November through December 2003, Kantrowitz enabled Bojadzijev to raise over $1.1 million in sales proceeds through the manipulation of Roanoke shares.

28. Based upon the foregoing, Kantrowitz knew or was reckless in not knowing that he was fraudulently manipulating the market in Roanoke shares in furtherance of Bojadzijev's manipulative scheme. Kantrowitz knew Bojadzijev wanted to liquidate a large number of Roanoke shares and that Bojadzijev had no interest in buying any Roanoke stock. Further, Kantrowitz knew that Bojadzijev was providing him with instructions to manipulate Roanoke's share price rather than for the purpose of effecting legitimate trades.

E. VALLEJO FAILED REASONABLY TO SUPERVISE KANTROWITZ

29. Vallejo failed reasonably to supervise Kantrowitz with a view to preventing his violations of the federal securities laws.

30. While Newbridge's compliance manual contained an explicit description of manipulative activities and policies prohibiting such practices, the firm had no systems to implement its policies and procedures to prevent and detect Kantrowitz's manipulative conduct. The firm delegated to Vallejo supervisory responsibility over the trading desk, tasking him with the responsibility for monitoring for manipulative activity. Vallejo, however, failed to monitor the trading desk for manipulation.

31. Vallejo failed reasonably to supervise Kantrowitz with a view to preventing Kantrowitz's violation of the antifraud provisions of the federal securities laws. When Kantrowitz traded Concorde and Roanoke shares, Vallejo was Newbridge's head trader and was delegated supervisory responsibility over Kantrowitz. Vallejo failed reasonably to supervise Kantrowitz by failing to follow up on several red flags of suspicious conduct. For example, Vallejo was aware of or should have been aware of unusual activities relating to Kantrowitz trading Concorde and

Roanoke shares. Vallejo noticed a steep price increase in Concorde stock and had access to information showing Kantrowitz placing numerous successively higher bids in both Concorde and Roanoke, which was inconsistent with Vallejo's understanding of Kantrowitz's business – namely, primarily a sell side practice of liquidating penny stocks. For both stocks, Kantrowitz's bids were higher or equal to the highest prevailing bids posted by other market makers the majority of the time. Vallejo failed to follow up on any of these red flags.

32. Vallejo received an override on the commissions generated by Kantrowitz's trading in the Concorde and Roanoke stocks.

F. VIOLATIONS

33. As a result of the conduct described above, Vallejo failed reasonably to supervise Kantrowitz with a view to detecting and preventing Kantrowitz's violations of 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

IV.

UNDERTAKINGS

1. Respondent Vallejo shall provide the Commission within 10 days after the end of the nine-month supervisory suspension that is described below in Section V., an affidavit that he has complied fully with this sanction.

2. In connection with this public administrative proceeding and any related judicial or administrative proceedings or investigation commenced by the Commission or to which the Commission is a party, Respondent Vallejo: (i) agrees to appear and be interviewed by Commission staff at such times and places as the staff requests upon reasonable notice; (ii) will accept service by mail or facsimile transmission of notices or subpoenas issued by the Commission for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff; (iii) with respect to such notices and subpoenas, waive the territorial limits on service contained in Rule 45 of the Federal Rules of Civil Procedure and any applicable local rules, provided that the party requesting the testimony reimburses Respondent's travel, lodging, and subsistence expenses at the then-prevailing U.S. Government per diem rates; and (iv) consent to personal jurisdiction over him in any United States District Court or administrative court for purposes of enforcing any such subpoena.

In determining whether to accept Respondent Vallejo's Offer, the Commission has considered Vallejo's undertaking to cooperate as enumerated in Section IV.2 above.

V.

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

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

A. Vallejo be, and hereby is, suspended from acting in a supervisory capacity with any broker or dealer for a period of nine (9) months.

B. Vallejo shall pay disgorgement in the amount of $12,919, plus prejudgment interest in the amount of $172.79, and a civil money penalty in the amount of $20,000 to the United States Treasury within ten (10) days after entry of this Order. Such payment shall be: (a) made by United States postal money order, certified check, bank cashier's check, bank money order or funds directly from an escrow agent; (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 Vallejo as a Respondent in these proceedings and sets forth the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to C. Ian Anderson, Securities and Exchange Commission, Southeast Regional Office, 801 Brickell Ave., Suite 1800, Miami, Florida 33131

Vallejo shall comply with his undertaking as enumerated in Section IV.1

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9012 / March 6, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 59531 / March 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13401

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

I.

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

II.

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

III.

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

Summary

These proceedings arise out of Johndrow's misrepresentations to investors in connection with purported private placement offerings of the securities of Credit First, LLC and Credit First Income Plus, LLC (collectively, "Credit First") from January 2004 to December 2005.[2] During this time, Johndrow was associated with Grant Bettingen, Inc. ("GBI"), a registered broker-dealer owned and managed by M. Grant Bettingen ("Bettingen").[3] Johndrow violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by misrepresenting to investors and instructing the sales agents he supervised to misrepresent to investors that they would receive at least 1% monthly returns of profits from Credit First's allegedly lucrative distressed debt business. Johndrow also violated Sections 5(a) and 5(c) of the Securities Act by offering and selling Credit First securities, and instructing the sales agents he supervised to offer and sell Credit First securities through general solicitations.

Respondent

1. **Christopher J. Johndrow ("Johndrow")**, age 44, resides in Hallandale Beach, Florida. He holds Series 7, 24, and 63 licenses, and from 1991 through the present, has been associated with thirteen different broker-dealers. One of the prior firms terminated Johndrow for "selling away" violations and failing to supervise adequately registered representatives subject to his supervision. From January 2004 to January 2008, Johndrow was associated with GBI.

Other Relevant Entities

2. **Grant Bettingen, Inc. ("GBI")** is a registered broker-dealer (File No. 8-34790) based in Newport Beach, California since 1985. At the time of the misconduct, it had five branch offices, four in California and one in New York, as well as an unregistered office location in Florida. Additionally, it had an unregistered office location in Orange County, California until December 2005. GBI was owned by the Grant Bettingen Trust, of which M. Grant Bettingen was the sole trustee. During the relevant period, GBI had 37 registered representatives and

---

[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] In December 2005, the Commission filed an action against Credit First and its principal, David Lund ("Lund"), for, among other things, making false representations to investors (the "Lund Action"). SEC v. Credit First Fund, LP, et al., CV05-8741-DSF (C.D. Cal. Dec. 15, 2005), Litigation Release No. 19497 (Dec. 16, 2005). In November 2006, Lund settled with the Commission, consenting to a permanent injunction, disgorgement, prejudgment interest, a civil penalty, and a five-year broker-dealer bar. Litigation Release No. 19497 (Dec. 20, 2006).

[3] On March 6, 2009, the Commission instituted settled administrative proceedings against GBI and Bettingen. Grant Bettingen, Inc., Exchange Act Release No. 34-59533 (March 6, 2009); M. Grant Bettingen, Exchange Act Release No. 34-59532 (March 6, 2009).

approximate annual revenues of $4 million. GBI conducts a general securities business which includes equities, fixed income securities, mutual funds, and insurance products. On June 2, 2008, GBI was acquired by Rubicon Financial Incorporated, a publicly held company

3. **The Credit First Entities** are comprised of Credit First Fund, L.P., Credit First, LLC, and Credit First Income Plus, LLC (collectively, the "Credit First Entities") which were formed in February 2001, April 2003 and July 2004, respectively. These companies raised at least $10.7 million from 2002 to December 2005 in private placement offerings purportedly exempt from registration under Section 4(2) of the Securities Act and Rule 506 of Regulation D. GBI sold approximately $3.1 million of these securities beginning in January 2004.

Background

4. Credit First was in the business of purchasing distressed debt and purportedly generating profits by selling or collecting on the debt. Johndrow had been selling securities of the Credit First Entities since December 2002 through two other broker-dealers. He was therefore very familiar with Credit First and its principal, Lund. Johndrow and Lund had a close business relationship and had shared offices since February 2002. The Credit First Entities raised approximately $10.7 million from 186 investors nationwide from February 2001 to December 2005. As of December 2005, however, there was little to no money left to return to investors.[4]

Johndrow's Sale of Credit First Securities

5. In January 2004, GBI hired Johndrow to open and supervise an office location in Santa Ana, California (the "Santa Ana Office") to primarily sell Credit First securities. During 2004 – 2005, the Santa Ana Office had one registered and about four unregistered salespersons, all supervised by Johndrow. GBI accounted for $3.1 million of the sales of Credit First securities.

6. Johndrow distributed pre-purchased lead lists to the salespersons at the Santa Ana Office, which they used to cold-call potential investors. Johndrow monitored the salespersons to ensure that they were constantly cold-calling investors, and indeed, the salespersons testified that they made as many as 400 telephone calls per day to prospective investors.

7. Johndrow trained the Credit First salespersons by having them listen in on his sales calls. Johndrow then listened in on the salespersons' calls periodically and gave them feedback. In particular, Johndrow instructed the salespersons to emphasize to investors that Credit First was an income-based investment. The salespersons Johndrow supervised also represented to investors that they would receive monthly returns of profits of at least 1%. The salespersons sent prospective investors copies of Credit First's private placement memorandum and the subscription agreement after making an initial telephone contact, and then telephoned them a second time approximately one week later to confirm that they received the written materials and answer any questions. They

[4] The Credit First entities raised approximately $10.7 million from investors and paid about $11.9 million to acquire the defaulted debt portfolios. Lund also distributed approximately $6.1 million to investors. Approximately $960,000 remained in the Credit First entities' bank accounts when the Commission brought the Lund Action in December 2005.

then referred interested investors to Johndrow or Lund, who helped them complete the necessary paperwork and close the deal.

8. GBI received a 10% sales commission on the sales of Credit First securities. GBI retained 25% of the commission and paid the remaining to the pertinent licensed salespersons. Johndrow also received a 5% override on all commissions earned by the licensed salespersons in the Santa Ana Office. During the relevant period, Johndrow earned $270,720 in commissions.

9. Pursuant to a contractual arrangement with GBI, Johndrow paid all of the Santa Ana Office's operating expenses including the administrative assistant's salary, and rent, utilities, and postage. The Santa Ana Office and Credit First, both, operated from the same business location. Accordingly, Johndrow paid Lund for the rent and other overhead.

Johndrow's Misrepresentations to Investors

10. Johndrow orally represented to prospective investors that Credit First would provide them a monthly income and they could expect to receive at least 1% per month in profits Johndrow also told the salespersons he supervised to make similar representations to investors during sales calls.

11. Johndrow knew or was reckless in not knowing that Credit First did not make any monthly returns of income to its investors. The financial statements of the Credit Fund Entities for the years 2002 to 2004 showed that they operated at a net loss and were only returning principal to investors. Lund made these financial statements available to Johndrow for his review during the entire time Johndrow was selling these securities, i.e., since December 2002. Johndrow failed to review the financial statements, or perform an equivalent form of due diligence to ensure that he and his sales agents were making accurate representations about the returns to investors when they recommended securities of Credit First.

Legal Analysis

12. As a result of the conduct described above, Respondent willfully violated Section 17(a) of the Securities Act in that he, by the use of the means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, in the offer or sale of securities, employed devices, schemes or artifices to defraud; obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers or prospective purchasers of such securities.

13. As a result of the conduct described above, Respondent willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that he, in connection with the purchase or sale of securities, directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, employed devices, schemes or artifices to defraud; made untrue statements of material fact or omitted to state material facts necessary in order to make the

statements made, in the light of the circumstances under which they were made, not misleading; or engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchasers of the securities, as described above.

14. Also as a result of the conduct described above, Respondent willfully violated Sections 5(a) and 5(c) of the Securities Act in that he, by the use of means or instruments of transportation or communication in interstate commerce or of the mails, offered or sold a security without a registration statement being in effect as to such security and without any exemption from registration being available.

Disgorgement and Civil Penalties

15. Respondent has submitted a sworn Statement of Financial Condition dated March 7, 2008 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest and a civil penalty.

IV.

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

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

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

B. Respondent Johndrow be, and hereby is barred from association with any broker or dealer, with the right to reapply for association after three (3) years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

D. IT IS FURTHER ORDERED that Respondent Johndrow shall pay disgorgement of $270,720 and prejudgment interest of $25,814.55, but that payment of such amount is waived based upon Johndrow's sworn representations in his Statement of Financial Condition dated March 7, 2008 and other documents submitted to the Commission. Additionally, based upon the sworn representations in his Statement of Financial Condition dated March 7, 2008 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent Johndrow.

E. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent Johndrow provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest. No other issue shall be considered in connection with this petition other than whether the financial information provided by Johndrow was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 239, 249, 269 and 274

[Release Nos. 33-9013, 34-59536, 39-2463, IC-28642]

ATTACHING AUTHENTICATING DOCUMENTS TO ONLINE FORM ID APPLICATIONS

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting rule and form amendments that allow applicants for EDGAR access codes using Form ID to submit their authenticating documents by attaching them to their online Form ID applications in Portable Document Format (PDF) as an alternative to submitting the documents by fax.

EFFECTIVE DATE: March 16, 2009.

FOR FURTHER INFORMATION CONTACT: Corey Jennings, Special Counsel, at (202) 551-3258, for information on legal issues, or Cecile Peters, Chief, Information Technology Office, (202) 551-3600, for information on technical issues, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20459-3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments that will revise Rules 10[1] and 101[2] under Regulation S-T[3] and Form ID.[4]

---

1 17 CFR 232.10.

2 17 CFR 232.101.

3 17 CFR 232.10 et seq.

4 17 CFR 239.63, 249.446, 269.7 and 274.402.

I. BACKGROUND

Form ID is used to apply for access codes to file information electronically through the Commission's Electronic Data Gathering, Analysis and Retrieval or "EDGAR" system. EDGAR access codes include a CIK (Central Index Key) number, which serves as a permanent, public filer identification number, as well as confidential security codes.

Applicants submitting Form ID applications must submit them online. They also must fax to the Commission a notarized document containing the same information as contained in the Form ID application. The additional document is called an "authenticating document." Commission staff matches applicants' online submissions with their faxed authenticating documents before approving the Form ID application and allowing applicants to generate their EDGAR access codes.[5]

Today, we adopt amendments that allow Form ID applicants to submit their authenticating documents as PDF attachments to their online Form ID applications. This provides an alternative method to submitting the authenticating documents by fax. The use of a PDF attachment may provide a simpler and easier method for some applicants to submit their authenticating documents. Filers can use a fillable PDF version of Form ID available on the Commission's website to create and print the document. For Form ID applications with the authenticating documents attached, Commission staff will no longer have to match faxed authenticating documents manually with online submissions. This alternative method should enhance the processing efficiency of these Form ID

---

[5] We approved this process in Release No. 33-8410 (Apr. 21, 2004) [69 FR 22704 (Apr. 26, 2004)], available at http://www.sec.gov/rules/final/33-8410.htm.

applications. The amendments do not impose any new burdens or requirements on Form ID applicants or others.

The effective date of the new rules, March 16, 2009, coincides with the effective date of our new rules requiring that Form D filings be made online, through the Internet, using the EDGAR system.[6] At the time we adopted the new Form D rules, we estimated they would result in an increase of approximately 20,000, or 40%, in the number of Form ID applications that we receive annually.[7] Although many Form ID applicants will be applying for EDGAR access codes to make filings other than Form D filings, the increased efficiency in use of Commission staff resources will benefit all applicants. We expect adoption of the Form ID amendments should assist the staff in better managing the expected increase in Form ID applications resulting from the Form D amendments.

At the time we adopted the Form D amendments, we acknowledged concern over the burdens of the Form ID authentication process, particularly in the context of mandating Form D online filing.[8] We stated that we planned to consider ways to simplify the Form ID authentication process before Form D online filing became mandatory on March 16, 2009.[9] The Form ID amendments we adopt today address concerns over the burdens of the Form ID authentication process. They make the process simpler and easier for some applicants. We are hopeful that the increased Commission staff

[6] We adopted the rules requiring online filing of Form D information in Release No. 33-8891 (Feb. 6, 2008) [73 FR 10592 (Feb. 27, 2008)], available at http://www.sec.gov/rules/final/2008/33-8891.pdf.

[7] See id. at 70 [73 FR 10610]. We expect an increase because Form D filings previously were made only in paper format, and no Form ID filings were required because filers do not need EDGAR access codes to make paper filings.

[8] Id. at 58 [73 FR 10607].

[9] Id. at 59-60 [73 FR 10607-10608].

efficiency in processing Form ID applications with attached authenticating documents will allow Form ID applicants to get their EDGAR access codes more quickly. However, we continue to study ways to further streamline the process.

II. DISCUSSION OF THE AMENDMENTS

A. Optional Attachment of Authenticating Document to Online Form ID Application

We are adopting minor revisions to Regulation S-T[10] to allow applicants for EDGAR access codes using Form ID to attach their required authenticating document electronically as a PDF document to their online Form ID application.[11] The authenticating document is a paper version of the online Form ID submission that has been notarized. It contains the same information, but is manually signed and witnessed by a notary public. Rule 10 of Regulation S-T currently requires that an applicant fax its authenticating document to the Commission within two days before or after submitting its online Form ID application.[12] The amendments revise subparagraph (b) of Rule 10 by

[10] Regulation S-T is the general regulation governing electronic filing of information with the Commission. In addition to complying with Regulation S-T, filers must submit electronic filings in accordance with the instructions in the Commission's EDGAR Filer Manual. We also are amending the EDGAR Filer Manual to reflect a Form ID filer's ability to attach a PDF copy of its authenticating document to its online Form ID application.

[11] Filers that previously have been assigned a CIK number are not eligible to use Form ID. This category includes filers that previously have made paper filings with the Commission, such as Form D filings since 1986 that have been assigned CIK numbers by the Commission staff. These filers need to obtain confidential security codes to file using the EDGAR system, even though they already have a CIK number. Prior paper filers that have a CIK number but need security access codes may obtain the codes by using the "Convert Paper Only Filer to Electronic Filer" function on the EDGAR Filer Management website at https://www.filermanagement.edgarfiling.sec.gov and submit their authenticating documents by fax. For details, see EDGAR Filer Manual—Volume I, available at http://www.sec.gov/info/edgar/edmanuals.htm.

[12] To assist Form ID applicants in preparing their authenticating documents, the Commission maintains a fillable PDF version of Form ID for them to use on its website at http://www.sec.gov/about/forms/formid.pdf. Using this or another version of Form ID that they may have available, applicants can choose to prepare the authenticating document, including having it notarized, before they go online to make their online Form ID submission. Upon the effectiveness of today's amendments, applicants will be able to choose to continue faxing their authenticating document or electronically attach a PDF version of the document at the time of the actual submission. If they do not

supplementing the faxing requirement with the option of electronically attaching a PDF version of the authenticating document to an applicant's online Form ID application.[13] The amendments also revise subparagraph (a)(1)(ix) of Rule 101 of Regulation S-T[14] to reflect that the authenticating document required by Rule 10(b) of Regulation S-T may be filed either by fax or electronically as an uploaded PDF attachment to an applicant's online Form ID application.[15]

B. Form ID

We are adopting minor revisions to the General Instructions to Form ID to clarify that applicants may also fulfill the authenticating document requirement of Rule 10 of Regulation S-T by electronically attaching a PDF version of the document to their online Form ID application. Currently, the instructions to Form ID follow Rule 10 of Regulation S-T, which provides that an applicant may only fax its authenticating document to the Commission within two days before or after submitting its electronic

---

have the authenticating document prepared before they make their online Form ID submission, they may print out the information they submit on the EDGAR website, have the printout notarized, and fax the notarized document as their authenticating document. This latter alternative avoids the necessity of entering the information twice, once on the pre-prepared authenticating document and again during the online submission itself. As noted above, however, faxing the document increases staff processing steps and likely will result in less timely assignment of EDGAR access codes.

[13] When we adopted the current rules, we stated that we did not believe that electronically attaching a PDF copy of the authenticating document would provide a level of assurance materially greater than having no authenticating document and that it would not provide a level of assurance as high as the fax requirement coupled with our planned human intervention and verification procedures. We also stated that it was not possible to upload a PDF attachment to an online Form ID application in our online system at that time. Release No. 33-8410, at n.31 (Apr. 21, 2004) [69 FR 22704, 27706 n.31 (Apr. 26, 2004)]. Improvements to the EDGAR system and advancements in PDF technology now make it possible to upload a PDF attachment to an online Form ID application. We have used PDF technology internally to upload and disseminate comment letters onto the EDGAR system. The procedures we will use to process authenticating documents attached as PDF files will be identical to our existing human intervention verification procedures. These factors have led us to conclude that attaching a PDF copy of the authenticating document provides assurance comparable to that provided by a faxed document.

[14] 17 CFR 232.101(a)(1).

Form ID application. We are also adopting revisions to the General Instructions to Form ID to update the Commission contact information on the current form.

III. PAPERWORK REDUCTION ACT

The amendments do not impose any new "collection of information" within the meaning of the Paperwork Reduction Act of 1995, nor do they create any new filing, reporting, recordkeeping, or disclosure reporting requirements for Form ID filers. Compliance with the adopted amendments will be optional. The Commission previously obtained a control number from the Office of Management and Budget ("OMB") for this collection of information.[16]

IV. COST-BENEFIT ANALYSIS

We expect that the adopted amendments will neither significantly benefit Form ID applicants, nor will they impose additional costs on them, since electronically attaching a PDF copy of their notarized authenticating document to their electronic Form ID application will be optional only. We expect that there will be some benefit to investors, applicants and the Commission because the optional method of transmitting the authenticating document required of Form ID applicants may be easier for some applicants. To the extent filers attach the authenticating document as a PDF file rather than sending a faxed document, the Commission staff will be able to avoid sorting through faxes and matching them to online Form ID applications. If many filers choose this option, we can improve the speed and accuracy of the process that leads to receipt of EDGAR access codes.

---

[15] Rule 101(a)(1)(ix) currently provides that the authenticating document required by Rule 10(b) of Regulation S-T must be submitted by fax transmission. 17 CFR 232.101(a)(1)(ix).

[16] OMB Control No. 3235-0328

Form ID applicants that choose to transmit their authenticating documents as PDF attachments will need access to the technology that allows them to scan their notarized document and electronically attach it to their online Form ID application. Since this method is optional and a scanning feature is now quite widely available on many computer printers, and because the existing process requires access to fax transmission facilities, we do not feel applicants that choose the optional PDF attachment method will incur greater costs. Indeed, we assume filers will choose the option that is least costly.

V. EFFECT ON EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 23(a)(2) of the Securities Exchange Act[17] 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. The amendments we adopt today merely provide an optional method that allows an applicant to electronically attach a PDF copy of a notarized Form ID authenticating document to its online Form ID application. The method will be voluntary and not required. We believe the amendments will not impose a burden on competition.

Section 2(b) of the Securities Act[18] and Section 3(f) of the Exchange Act[19] 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

[17] 15 U.S.C. 78w(a)(2).

[18] 15 U.S.C. 77b(b).

[19] 15 U.S.C. 78c(f).

protection of investors, whether the action will promote efficiency, competition, and capital formation. We believe the amendments will have a negligible impact on efficiency, competition or capital formation.

VI. CERTAIN FINDINGS

Under the Administrative Procedure Act ("APA"), notice of proposed rulemaking is not required when an agency, for good cause, finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[20] The changes we are adopting today do not impose new burdens and merely provide an optional method for applicants to fulfill the authentication requirements of the Form ID submission process. They do not change the basic content of the form. In making these changes, we also have updated certain contact information for Commission staff in the instructions to Form ID. We therefore believe that publication for public comment is unnecessary. Accordingly, we find that publishing a proposed rulemaking notice of these amendments is likewise unnecessary.[21]

The APA generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.[22] This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[23] The Commission finds good cause to make the changes to the Form ID application process

---

[20] See 5 U.S.C. 553(b)(3)(B).

[21] For similar reasons, the amendments do not require analysis under the Regulatory Flexibility Act or a report to Congress under the Small Business Regulatory Fairness Act. See 5 U.S.C. 601(2) (for purposes of a Regulatory Flexibility Act analysis, the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking) and 5 U.S.C. 804(3)(C) (for purposes of Congressional review of agency rulemaking, the term "rule" does not include any rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties).

[22] 5 U.S.C. 553(d).

effective on March 16, 2009. The changes to the Form ID application process are optional and therefore do not impose any new burdens on applicants. They are related to changes being made to our EDGAR system in expectation of March 16, 2009, when mandatory electronic filing of Form D information becomes effective and when we expect to begin experiencing a substantial increase in the number of new Form ID applications per year. We see no reason to delay the effectiveness of the amendments for 30 days after these rule changes are published in the Federal Register. We believe Form ID applicants, investors and the Commission should be able to enjoy the limited benefits of these changes as soon as practicable and find there is good cause for the amendments to take effect on March 16, 2009.

VII. STATUTORY BASIS AND TEXT OF RULE AMENDMENTS

We are adopting the amendments to Regulation S-T and Form ID under the authority in Section 19(a)[24] of the Securities Act, Sections 3(b),[25] 13(a),[26] 23(a)[27] and 35A[28] of the Exchange Act, Section 319[29] of the Trust Indenture Act of 1939 and Sections 30[30] and 38[31] of the Investment Company Act of 1940.

TEXT OF RULE AMENDMENTS

---

[23] Id.

[24] 15 U.S.C. 77s(a).

[25] 15 U.S.C. 78c(b).

[26] 15 U.S.C. 78m(a).

[27] 15 U.S.C. 78w(a).

[28] 15 U.S.C. 78ll.

[29] 15 U.S.C. 77sss.

[30] 15 U.S.C. 80a-29.

[31] 15 U.S.C. 80a-37.

List of Subjects

17 CFR Parts 232, 239, 249, 269 and 274

Reporting and recordkeeping requirements, Securities.

TEXT OF THE RULES AND AMENDMENTS

For the reasons set forth above, we amend title 17, chapter II of the Code of Federal Regulations 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), 80a–6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

2. Amend § 232.10 by revising paragraph (b) to read as follows:

§ 232.10 Application of part 232.

* * * * *

(b) Each registrant, third party filer, or agent to whom the Commission previously has not assigned a Central Index Key (CIK) code, must, before filing on EDGAR:

(1) File electronically the information required by Form ID (§§ 239.63, 249.446, 269.7 and 274.402 of this chapter), the uniform application form for access codes to file on EDGAR, and

(2) File, by uploading as a Portable Document Format (PDF) attachment to the Form ID filing or by faxing to (202) 504-2474 or (703) 914-4240 within two business days before or after the electronic Form ID filing, a notarized document, manually signed by the applicant over the applicant's typed signature, that includes the information required to be included in the Form ID filing, confirms the authenticity of the Form ID filing and, if filed by fax after the electronic Form D filing, includes the accession number assigned to the electronic Form ID filing.

* * * * *

3. Amend § 232.101 by revising paragraph (a)(1)(ix) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * * * *

(ix) Form ID (§§ 239.63, 249.446, 269.7 and 274.402 of this chapter), except that the authenticating document required by Rule 10(b) of Regulation S-T (§ 232.10(b)) may be filed either in electronic format as an uploaded Portable Document Format (PDF) attachment to the Form ID filing or by fax as provided in that rule, and other related correspondence and supplemental information submitted after the Form ID filing shall not be submitted in electronic format.

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

PART 269 – FORMS PRESCRIBED UNDER THE TRUST INDENTURE ACT OF 1939

PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

17. Revise the two paragraphs appearing immediately after the bullets in the General Instructions of Form ID (referenced in § 239.63, § 249.446, § 269.7 and § 274.402) to read as three paragraphs as follows:

Note: The text of Form ID does not and this amendment will not appear in the Code of Federal Regulations.

Form ID

UNIFORM APPLICATION FOR ACCESS CODES TO FILE ON EDGAR

* * * * *

General Instructions

* * * * *

An applicant must file the information required by this form in electronic format via the Commission's EDGAR Filer Management website. Please see Regulation S-T (17 CFR Part 232) and the EDGAR Filer Manual for instructions on how to file electronically, including how to use the access codes.

The applicant must complete the Form ID electronic filing by also submitting to the Commission a copy of a notarized paper "authenticating" document. The authenticating document must include the information required to be included in the Form ID filing, be manually signed by the applicant over the applicant's typed signature, and confirm the authenticity of the Form ID filing. Applicants may fulfill the authenticating document requirement by making a copy of the applicant's electronic Form ID filing, adding the necessary confirming language, signing it, and having the signature notarized.

If the applicant has prepared the authenticating document before making its electronic Form ID filing, it may submit the document as an uploaded Portable Document

Format (PDF) attachment to the electronic filing. An applicant also may submit the authenticating document by faxing it to the Commission at (202) 504-2474 or (703) 914-4240 within two business days before or after its electronic Form ID filing. If submitted by fax after the electronic Form ID filing, the authenticating document must contain the accession number assigned to the electronic Form ID filing. If the fax is not received timely, the Form ID filing and application for access codes will not be processed, and the applicant will receive an e-mail message at the contact e-mail address included in the Form ID filing informing the applicant of the failure to process and providing further guidance. The message will state why the application was not processed.

For assistance with technical questions about electronic filing, call Filer Support at (202) 551-8900. For assistance with questions about the EDGAR rules, Division of Corporation Finance filers may call the Office of Information Technology at (202) 551-3600; and Division of Investment Management filers may call the IM EDGAR Inquiry Line at (202) 551-6989.

* * * * *

Florence E. Harmon

By the Commission.

Florence E. Harmon
Deputy Secretary

March 9, 2009

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59541 / March 9, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2945 / March 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13399

In the Matter of **LISA W. ZAPPALA (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 Lisa W. Zappala (CPA) ("Respondent" or "Zappala") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

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

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

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

III.

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

1. Zappala, age 49, served as Senior Vice President and Chief Financial Officer ("CFO") at Aspen Technology, Inc. from at least September 1998 until she resigned as CFO in approximately July 2003. Thereafter, she took on an advisory role at Aspen until she resigned in approximately December 2004. Zappala was previously a certified public accountant ("CPA") licensed to practice in the State of Massachusetts; her CPA license lapsed in or about 1994.

2. Aspen was, at all relevant times, a Delaware corporation with its principal place of business in Cambridge, Massachusetts. During the relevant period, Aspen was engaged in the business of selling computer software and related services to industries such as petroleum, chemicals, and pharmaceuticals. At all relevant times, Aspen's common stock was registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ National Market system.

3. On January 8, 2007, the Commission filed a complaint against Zappala in SEC v. Evans, et al. (Civil Action No. 1:07-cv-10027-JLT). On February 26, 2009, the court entered an order permanently enjoining Zappala, by consent, from future violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Zappala was also ordered to pay $49,653 in disgorgement of ill-gotten gains from her sales of stock during the period of the alleged fraud, together with prejudgment interest thereon in the amount of $20,347 and a $75,000 civil money penalty, and was barred from serving as an officer and director of a public company for two years.

4. The Commission's complaint alleged, among other things, that between at least 1999 and 2002, Zappala and two other former senior executives at Aspen engaged in a fraudulent scheme which resulted in Aspen improperly recognizing revenue on at least six different transactions involving at least five different customers worldwide and the filing of materially false and misleading statements in various Form 10-K annual reports, Form 10-Q quarterly reports, and Form 8-K current reports during periods including fiscal years 2000

through 2004. The Complaint further alleged that Zappala engaged in a number of improper accounting practices that materially overstated Aspen's net income and revenue in fiscal years 2000 and 2001 and that materially understated Aspen's net income and revenue in fiscal years 2002, 2003, and 2004, in a departure from generally accepted accounting principles. According to the complaint, these practices included, among other things, prematurely and improperly recognizing revenue on contracts that had not been signed within the appropriate fiscal period or for earnings that had not been completed due to side letters or other contingency arrangements which changed the terms of the customers' contractual payment obligations. In addition, the complaint alleged that Zappala provided numerous false management representation letters to Aspen's outside auditors between August 1999 and April 2002. The complaint also alleged that Zappala obtained proceeds from exercising stock options and selling artificially inflated Aspen stock into the marketplace.

IV.

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

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

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

B. After two years from the date of this order, Respondent may request that the Commission consider her reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in her practice before the Commission will be reviewed either by the independent audit committee of the public company for which she works or in some other acceptable manner, as long as she practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9014 / March 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13404

In the Matter of

HS3 TECHNOLOGIES, INC.,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against HS3 Technologies, Inc. ("HS3" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, 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. Respondent is a Nevada corporation headquartered in Denver, Colorado. HS3 resells satellite-based, broadband Internet access and has a web-hosting business. It also installs and services surveillance systems and sells certain security products. HS3 plans to offer surveillance systems making use of satellite-based Internet connectivity to enable surveillance of remote locations. Respondent's common stock is registered under Section 12(g) of the Securities Exchange Act of 1934. Respondent's common stock is traded over the counter and quoted on the OTC Bulletin Board.

2. These proceedings arise out of a November 2005 reverse merger, involving HS3, and Respondent's coincident failure to comply with the securities registration requirements of Sections 5(a) and 5(c) of the Securities Act. Prior to the merger, HS3 was named Zeno, Inc. ("Zeno") and ostensibly operated as a pre-exploration-stage mining company, based in Gabriola Island, British Columbia, Canada. Zeno's stated plan of operation involved an intent to explore mineral claims held on its behalf in Ontario, Canada.

3. In August 2004, Zeno filed a Form SB-2 registration statement with the Commission on behalf of 32 shareholders seeking to resell restricted shares that they had bought directly from Zeno. In its registration statement, Respondent represented that: (1) the selling shareholders would determine when and how they would sell the shares and had no agreements with underwriters, and (2) Respondent would receive no proceeds from the sale of these shares.

4. In November 2005, Zeno merged with a privately-held surveillance startup. This transaction took the form of a reverse merger, with Zeno adopting the surveillance startup's business plan and replacing its own management with that of the surveillance startup.

5. A stock promotion firm directed the reverse merger as part of an agreement with the surveillance startup to take the startup public and raise funds for implementation of its business plan. Contemporaneously, the stock promotion firm and its associates commenced a distribution of the majority of the shares listed in Respondent's registration statement, and Respondent changed its name to HS3. The stock promotion firm and its associates acted as underwriters for the distribution by acquiring the majority of the shares listed in the registration statement and selling such shares to a network of investors, transferring $500,000 of the proceeds to Respondent in October 2005.

6. The distribution described above violated Respondent's representations in its August 2004 Form SB-2 and differed materially from the proposed sale of shares that Respondent had registered with the Commission by filing the registration statement. No other registration statements were filed or in effect with respect to the distributed shares, and no exemption from registration applied.

7. Respondent thus participated in, and shared in the proceeds of, an unregistered distribution of its shares. Respondent failed to verify whether the distribution of shares and Respondent's receipt of proceeds complied with representations made by prior management in the August 2004 Form SB-2.

8. As a result of the conduct described above, Respondent violated Sections 5(a) and 5(c) of the Securities Act, which prohibit the offer or sale of unregistered securities in interstate commerce unless such securities are offered or sold pursuant to an exemption from registration.

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 8A of the Securities Act, Respondent cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9015 / March 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13405

In the Matter of

CANCER DETECTION CORPORATION, formerly known as Xpention Genetics, Inc.,

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), against Cancer Detection Corporation, formerly known as Xpention Genetics, Inc. ("Respondent"). Respondent changed its name to Cancer Detection Corporation in September 2008.

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, 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. Respondent is a development stage, Nevada corporation based in Conifer, Colorado. It has licensed a patent related to a tumor-associated "marker" protein known as the p65

marker and funded research related to the marker's correlation with the incidence of cancer in dogs. Respondent is a reporting company pursuant to Section 15(d) of the Securities Exchange Act of 1934. Respondent's common stock is traded over the counter and quoted on the OTC Bulletin Board.

2. These proceedings arise out of a February 2005 reverse merger, involving Respondent, and a coincident failure to comply with the securities registration requirements of Sections 5(a) and 5(c) of the Securities Act. Prior to the merger, Respondent was named Bayview Corporation ("Bayview") and ostensibly operated as an exploration-stage mining company, based in Vancouver, British Columbia, Canada. Bayview's stated plan of operation involved exploration of two Ontario, Canada mineral claims in which Bayview held an option to acquire an ownership interest.

3. In March 2004, Respondent filed a Form SB-2/A amended registration statement with the Commission on behalf of 40 shareholders seeking to resell restricted shares that they had bought directly from Bayview. In its registration statement, Respondent represented that: (1) the described sale of shares by the 40 shareholders would occur without the involvement of underwriters; and (2) Respondent would receive no proceeds from the sale of these shares.

4. In February 2005, Bayview merged with a privately-held biotech startup. This transaction took the form of a reverse merger, with Bayview adopting the biotech startup's business plan and replacing its own management with that of the biotech startup.

5. A stock promotion firm directed the reverse merger as part of an agreement with the biotech startup to take the startup public and raise funds for implementation of its business plan. Contemporaneously, the stock promotion firm and its associates commenced a distribution of the majority of the shares listed in Respondent's registration statement, and Respondent changed its name to Xpention Genetics, Inc. The stock promotion firm and its associates acted as underwriters for the distribution by acquiring the majority of the shares listed in the registration statement and selling such shares to a network of investors, transferring $400,000 of the proceeds to Respondent in June 2005.

6. The distribution described above violated Respondent's representations in its March 2004 Form SB-2/A and differed materially from the proposed sale of shares that Respondent had registered with the Commission by filing the registration statement. No other registration statements were filed or in effect with respect to the distributed shares, and no exemption from registration applied.

7. Respondent thus participated in, and shared in the proceeds of, an unregistered distribution of its shares. Respondent failed to verify whether the distribution of shares and Respondent's receipt of proceeds complied with representations made by prior management in the March 2004 Form SB-2/A.

8. As a result of the conduct described above, Respondent violated Sections 5(a) and 5(c) of the Securities Act, which prohibit the offer or sale of unregistered securities in interstate commerce unless such securities are offered or sold pursuant to an exemption from registration.

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 8A of the Securities Act, Respondent cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act.

By the Commission.

Elizabeth M. Murphy
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
Rel. No. 59550 / March 10, 2009

INVESTMENT COMPANY ACT OF 1940
Rel. No. 28644 / March 10, 2009

Admin. Proc. File No. 3-12753

In the Matter of JOSEPH JOHN VANCOOK c/o Lewis D. Lowenfels, Esq. Law Offices of Tolins & Lowenfels 747 Third Avenue New York, NY 10017 and Michael J. Sullivan, Esq. Coughlin Duffy LLP 350 Mount Kemble Avenue Morristown, NJ 07962	ORDER DENYING REQUEST FOR EXTENSION OF TIME, POSTPONEMENT, OR ADJOURNMENT

On July 18, 2008, Joseph VanCook, a registered representative formerly associated with broker-dealer Pritchard Capital Partners, LLC, filed a timely petition for review of an administrative law judge's initial decision finding that VanCook violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, 1/ and aided and abetted and caused other violations of the securities laws, based on allegations that VanCook engaged in late trading of mutual fund shares on behalf of hedge fund clients. 2/ On October 21, 2008, VanCook filed a reply brief and, with it, a motion to stay this proceeding.

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

2/ In his initial decision, the law judge defined "late trading" as "the practice of placing orders to buy or sell mutual fund shares after the time when the fund has calculated its [net asset value], but receiving the price based on the prior [net asset value] already determined as of 4:00 p.m."

VanCook notes that the Commission is currently prosecuting an enforcement action in federal court against Simpson Capital Management, Inc. ("Simpson"), an investment adviser alleged to have engaged in late trading. 3/ VanCook is not named as a defendant in the Simpson matter, but VanCook asserts the case shares factual and analytical similarities to his. The complaint in the Simpson case describes mutual fund trades that two registered representatives at Simpson placed with VanCook's firm, and with other firms, and charges that the trading violated various provisions of the securities laws and rules.

In his motion, VanCook argues that the pendency of the Simpson matter "places the Commission in at least a temporarily conflicted position in which the Commission cannot rule favorably for VanCook without destroying the Commission's position as party/advocate in the Simpson matter." He asserts that, "[a]s a matter of due process, VanCook is entitled to have the Commission, as adjudicator, judge his case free from bias" and that, because of its prosecution of the Simpson matter, "the Commission cannot be unbiased in ruling on VanCook's case." VanCook therefore seeks a stay of the proceedings against him pending the resolution of the litigation against Simpson. The Division of Enforcement opposes VanCook's motion. 4/

VanCook fails to cite a particular Rule of Practice in support of his motion for a stay. Rule of Practice 401 governs our issuance of stays. 5/ Rule 401(c) permits motions for stays by persons aggrieved by a Commission order "who would be entitled to review in a federal court of appeals." 6/ However, Rule 401(c) is inapplicable here because the Commission has not yet entered a final order, reviewable by an appellate court, that we could consider staying. 7/

3/ SEC v. Simpson Capital Mgmt., Inc., No. 07-cv-6072 (JGK) (S.D.N.Y. filed June 27, 2007).

4/ On December 3, 2008, the Division of Enforcement ("Division") filed an opposition to VanCook's motion, at the same time moving for leave to file it out of time. The Division represents that VanCook consented to its request. Although we strongly disfavor requests for extensions of time, see Rule of Practice 161(b)(1), 17 C.F.R. § 201.161(b)(1), we have determined to grant the Division's motion and accept their late-filed brief.

5/ 17 C.F.R. § 201.401.

6/ 17 C.F.R. § 201.401(c).

7/ See Michael J. Markowski, Order Denying Request for A Stay and Granting Extension of Time for Filing Briefs, Securities Exchange Act Rel. No. 40748 (Dec. 4, 1998), 68 SEC Docket 2156, 2159 ("Neither the initial decision of the law judge nor our order scheduling briefing in this proceeding is a Commission order entitling [respondent] to appellate review.").

Although Rule 401 is inapplicable, we will consider VanCook's motion as a request for an extension of time, postponement, or adjournment under Rule 161. 8/ That rule provides that "the Commission, at any time, . . . may, for good cause shown . . . postpone or adjourn any hearing" so long as any such postponement or adjournment meets certain requirements. 9/ When deciding whether to grant such a motion, we "adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice their case." 10/ We find that VanCook has not made the requisite showing.

VanCook's argument – i.e., that "the position of the Commission as both party/advocate and adjudicator on exactly the same issues involving exactly the same parties is a direct conflict, is a recipe for a biased decision, and raises an appearance of impropriety" – is contrary to established precedent. As we have previously stated, "[c]ourts repeatedly have held that the mere fact that an agency both investigates and adjudicates alleged violations does not demonstrate bias or prejudice. Courts have permitted agencies to investigate, file complaints resulting from the investigation, receive evidence, and judge the resulting proceedings." 11/

In Withrow v. Larkin, the Supreme Court held that combining investigative, prosecutorial, and adjudicative functions within a single state administrative agency did not violate due process. 12/ The Court noted that it is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or

---

8/ 17 C.F.R. § 201.161(a). In determining whether to postpone a proceeding under Rule 161, we consider such factors as the length of the proceeding to date, the number of postponements previously granted, the stage of the proceeding at the time of the request for a postponement, the efficient and timely administration of justice, and any other matters justice requires. 17 C.F.R. § 201.161(b)(1).

9/ Id.

10/ Id.

11/ John Montelbano, Order Denying Requests for Withdrawal of the Commission and for a Stay, Exchange Act Rel. No. 45107 (Nov. 27, 2001), 76 SEC Docket 1023, 1025.

12/ 421 U.S. 35 (1975) (holding that procedure whereby a state medical licensing board both investigated and adjudicated the suspension of a physician's license did not violate due process). Accord Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1174 (D.C. Cir. 1998) ("[W]e find dispositive the Supreme Court's holding in [Withrow] that the combination of investigative and adjudicative functions does not, without more, constitute a violation of due process."); Cousin v. Office of Thrift Supv., 73 F.3d 1242, 1250 (2d Cir. 1996) (finding that combination of authority over investigative, prosecutorial, and adjudicative functions "fall[s] well within the mandates of the Fifth Amendment [of the U.S. Constitution]") (citing Withrow, 421 U.S. at 57-58).

formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate . . . due process of law." 13/ The Court also noted that, where the same board both instituted proceedings against a person and then judged the outcome of those same proceedings, "the risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." 14/ The Court further explained that "legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons." 15/ As a result, the Administrative Procedure Act requires that an employee of a federal administrative agency may not both investigate or prosecute a matter and also adjudicate it. 16/ However, as the Supreme Court recognized, that prohibition does not extend to "the member or members of the body comprising the agency." 17/

Further, in Blinder, Robinson v. SEC, the United States Court of Appeals for the District of Columbia Circuit specifically recognized that the structure of the Commission, as established by Congress, presumptively provides sufficient protection from the potential harm in combining prosecutorial and adjudicative functions; that court found that it would be a "strange rule indeed" that inferred bias in determining the sanction in an administrative proceeding on the ground that the Commission had previously rejected the respondent's settlement offer. 18/ The court stated that finding such bias

> would manifest profound disrespect for Congress' deliberately structuring agencies as (typically) multi-member bodies, with staggered terms and with requirements that the President appoint a certain number of members from the political party other than his own. To give credence to [appellant's] dark suspicion of bias notwithstanding this carefully crafted structure would flout what

---

13/ Withrow, 421 U.S. at 56.

14/ Id. at 57.

15/ Id. at 51.

16/ See 5 U.S.C. § 554(d).

17/ See id.; Withrow, 421 U.S. at 52.

18/ 837 F.2d 1099, 1106 (D.C. Cir. 1988).

Justice White, in writing for the Court in Withrow, called a "presumption of honesty and integrity" on the part of those who serve in office. 19/

Here, the alleged due process violation is even more attenuated than those presented in Withrow and Blinder, Robinson. VanCook's claimed due process violation arises from the Commission's role in prosecuting a related but different matter while adjudicating his own. We perceive no inherent "potential conflict" between the Commission presenting evidence of alleged violations of the securities laws in federal court in the Simpson matter and determining, based on the evidence presented in this administrative proceeding whether VanCook has himself engaged in any violations and, if so, what, if any, sanction is necessary to protect the public interest. 20/ The risk of bias in the instant case is not, therefore, sufficient to support postponing or adjourning these proceedings.

VanCook asserts that In re Murchison 21/ calls for an "examination of the shifting interrelationships among the parties [to litigation and adjudication] and the circumstances of potential conflict." In Murchison, the Supreme Court held that due process was violated when the same judge presided over a contempt hearing after having presided over a "one-man grand jury" indictment proceeding out of which the contempt charges arose. 22/ However, the Withrow court specifically considered Murchison's application to the sound functioning of administrative agencies and concluded that "Murchison has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications." 23/

VanCook does not argue, and the record does not suggest, that there is actual bias on the part of any of the Commissioners adjudicating this matter, or that any Commissioner otherwise

---

19/ Id. at 1106-07 (citing Withrow, 421 U.S. at 47). Accord MFS Sec. Corp. v. SEC, 380 F.3d 611, 618-20 (2d Cir. 2004) (noting similarities between Blinder, Robinson and the case at issue and rejecting argument that Commission was biased).

20/ See Withrow, 421 U.S. at 57 (noting there is no "logical inconsistency" when a single administrative body files a complaint based on probable cause and then subsequently decides, "when all the evidence is in, that there has been no violation of the statute"). Cf. Michael T. Studer, 57 S.E.C. 890, 896-97 (2004) (noting the Commission's authority to bring administrative proceeding for sanctions based on an injunction entered by district court, even when the Commission is still engaged in litigating an appeal of the underlying injunction) (citing Elliott v. SEC, 36 F.3d 86, 87 (11th Cir. 1994)), aff'd, 148 Fed. Appx. 58 (2d Cir. 2005).

21/ 349 U.S. 133, 136 (1955).

22/ Id. at 139.

23/ Withrow, 421 U.S. at 53.

has a personal interest in the outcome of this proceeding. Barring a showing that the "special facts and circumstances present" in this case demonstrate that "the risk of unfairness is intolerably high," there is no basis for postponing or adjourning the proceedings against VanCook because the combination of investigative, prosecutorial, and adjudicative functions does not, without more, constitute a due process violation. 24/ VanCook's motion is therefore appropriately denied.

Accordingly, IT IS ORDERED that Joseph VanCook's October 21, 2008 motion for a stay of these proceedings be, and hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

24/ Withrow, 421 U.S. at 56-58.

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59554 / March 11, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13406

In the Matter of **HEADLINERS ENTERTAINMENT GROUP, INC.,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES**

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Section 12(j) of the Securities Exchange Act of 1934, Making Findings, and Revoking Registration of Securities ("Order"), as set forth below.

III.

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

A. Headliners is a Delaware corporation based in Montclair, New Jersey. The common stock of Headliners has been registered with the Commission pursuant to Section 12(g) of the Exchange Act since September 2001.

B. Headliners has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-KSB since April 2006 or quarterly reports on Form 10-QSB for any fiscal period subsequent to its fiscal quarter ending September 30, 2006.

IV.

Section 12(j) of the Exchange Act provides as follows:

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

In view of the foregoing, the Commission finds that it is necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

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

By the Commission.

Elizabeth M. Murphy
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. 59555 / March 11, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2851 / March 11, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13407

In the Matter Of MERRILL LYNCH, PIERCE, FENNER, & SMITH INCORPORATED Respondent.	ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING CEASE-AND-DESIST ORDER, 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 Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), be and hereby are instituted against Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch" or "Respondent").

II.

In anticipation of the institution of these proceedings, the Respondent has submitted an Offer of Settlement ("Offer") 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 Respondent, without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and over the subject matter of these proceedings, consents to the entry of this Order Instituting Proceedings Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Cease-and-Desist Orders, Penalties, and Other Relief ("Order").

III.

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

A. RESPONDENT

Merrill Lynch, Pierce, Fenner & Smith Incorporated is a Delaware corporation with its principal place of business in New York, New York. Merrill Lynch is a broker-dealer and investment adviser registered with the Commission pursuant to Section 15(b) of the Exchange Act and Section 203 of the Advisers Act. Merrill Lynch engages in a nationwide securities business.

B. SUMMARY

From 2002 to 2004, several Merrill Lynch retail brokers permitted day traders to hear confidential information regarding Merrill Lynch institutional customers' unexecuted orders as they were transmitted over Merrill Lynch's squawk box system. The equity squawk box is an industry-standard audio communication tool that Merrill Lynch's institutional equities business uses to allow position traders to transmit internally customer order information, among other information. The day traders used the customer order information to "trade ahead" of the institutional customer orders and, in many instances, profited from price movements that were caused by the market impact of the institutional customer order. The day traders compensated the brokers for access to this material, nonpublic order information through commissions and cash payments. The brokers' misuse of material, nonpublic information was in violation of the antifraud provisions of the federal securities laws and was the subject of civil enforcement actions by the Commission. *See SEC v. Amore, et al.*, CV-053885 (Glasser) (E.D.N.Y. August 15, 2005); *SEC v. A.B. Watley Group, Inc., et al.*, CV-061274 (Glasser) (E.D.N.Y. March 21, 2006).

Merrill Lynch maintained policies prohibiting insider trading, the front running of customer orders, and the improper disclosure of information about customer orders. Merrill Lynch informed its brokers, including those brokers who improperly disclosed customer order information to day traders, of these policies. However, Merrill Lynch lacked written policies or procedures to limit access to the equity squawk box, to track which employees had access to the equity squawk box or to monitor employees' use of the equity squawk box. Consequently, an undetermined number of retail brokers received access to equity squawk boxes despite the

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

absence of any bona fide need for the information, such as demonstrating any ability to fill block orders; Merrill Lynch was unable to identify which employees had equity squawk boxes; and several retail brokers were able to provide equity squawk box information to day traders simply by placing their telephone receiver next to the equity squawk box for the entire trading day.

As a result, Merrill Lynch violated Section 15(f) of the Exchange Act and Section 204A of the Advisers Act, which require registered broker dealers and registered investment advisers to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information.

C. FACTS

Merrill Lynch Retail Brokers Made Available Confidential Information Concerning Institutional Customer Orders to Day Trading Firms

From 2002 to 2004, several Merrill Lynch retail brokers permitted day traders to hear confidential information on the large unexecuted block orders of Merrill Lynch institutional customers. The retail brokers were located in three separate Merrill Lynch offices, Branch 1, Branch 2, and Branch 3. The order information was transmitted over Merrill Lynch's equity squawk box.

One common use of the squawk box system is to allow Merrill Lynch position traders to communicate information, including customer order information, to the sales force who might be able to assist in finding customers to complete potential trades. Although customer order information is broadcast over the squawk box, the information communicated over the equity squawk box does not include the customer name.

The retail brokers first obtained from Merrill Lynch access to an equity squawk box. Then, each day, the retail brokers called the day trading firm and placed their telephone receiver next to the equity squawk box for the entire trading day. As a result, the day traders received real-time access to the equity squawk box and the confidential order information transmitted over it. The day traders compensated the brokers for access to the confidential order information through kickbacks in the form of commissions and cash. The day traders used the information to trade ahead of the customer orders and many times profited when the price of the security moved in their favor because of the market impact of the institutional customer orders.

For example, on September 5, 2003, at 11:09 a.m., a Merrill Lynch trader announced over the squawk box a block order to buy stock in "Company A". A Merrill Lynch retail broker gave access to the order information to day traders by leaving his open phone line next to the squawk box. From 11:09 a.m. through 11:11 a.m., at least fifteen day traders who received the information bought 52,400 shares of Company A stock at an average price of $25.28 (plus an additional 8,400 shares over the next 20 minutes). From 11:09 a.m. through 11:48 a.m., Merrill Lynch purchased 405,800 shares of Company A stock for its customer at an average price above $25.28 per share. From 11:12 a.m. through 11:48 a.m., at least seventeen day traders sold over 60,800 shares of Company A stock at an average price of $25.43. As a result, the day traders made a profit of $7,798.

Merrill Lynch Lacked Policies and Procedures Reasonably Designed to Prevent the Misuse of Material, Nonpublic Order Information

Merrill Lynch's Policies

Merrill Lynch maintained policies prohibiting insider trading, the front running of customer orders, and the improper disclosure of information about customer orders. Merrill Lynch notified its brokers of these policies.

For example, the compliance outline for retail brokers contained a prohibition on insider trading: "Persons who trade while in possession of inside information on the security or its issuer, or pass the information along to others who may trade on the basis of it, may be subject to severe criminal and civil penalties…." In addition, the compliance outline for retail brokers also contained a provision on the confidentiality of customer orders and a prohibition on front running: "You may not take advantage of a contemplated or pending client transaction by first entering orders for your employee accounts or any accounts you service or control ("front running"). Information on client orders may not be disclosed to any other person for other than bona fide business purposes, or used as the basis of any solicitation."

However, Merrill Lynch did not have written policies and procedures reasonably designed to prevent the misuse of material, nonpublic institutional customer order flow information.

Access to the Squawk Box

Merrill Lynch lacked written policies or procedures to limit access to the information broadcast on the equity squawk box. Consequently, an undetermined number of Merrill Lynch brokers, including the retail brokers in this case, were able to obtain access to the equity squawk box despite the absence of any bona fide need for the information, such as having demonstrated any ability to fill block orders.

The purpose for broadcasting customer order information over the equity squawk box is to facilitate execution of the orders by generating contra-side liquidity from other Merrill Lynch customers. However, Merrill Lynch did not restrict access by brokers to the equity squawk box based on the brokers' bona fide need to know such information. An undetermined number of retail brokers obtained access to the equity squawk box by making an administrative request to Merrill Lynch's telecommunications group. No approval by Merrill Lynch's equities management was required. Accordingly, Merrill Lynch did not limit access to the equity squawk box based on any need for access to the information.

Tracking Access to the Squawk Box

Merrill Lynch also lacked written policies and procedures to keep track of who had access to the equity squawk box. Consequently, Merrill Lynch was unable to determine or identify all of the employees who had access to institutional customer order information transmitted over the equity squawk box. This hampered efforts by Merrill Lynch to investigate instances of suspected leakage of customer order information.

In connection with an internal effort to limit retail broker access to the equity squawk box, a Merrill Lynch telecommunications consultant also pointed out deficiencies in Merrill Lynch's ability to track access to the equity squawk box. In a March 2004 email to a technology employee, the consultant wrote, "I have no way of knowing who is in the office and possibly listening to the circuit. I really can't control how many boxes are hooked up to the circuit either . . . . Also, many offices can splice the wire and hook up additional speakers without us knowing. So, to answer your question, we can not [sic] police the circuit."

Lack of Supervision of Use of the Squawk Box

Merrill Lynch also lacked written supervisory policies or surveillance procedures, particularly for branch managers in retail offices or compliance officers, to monitor the use of the equity squawk box. Merrill Lynch's branch management did not have an understanding of which retail brokers had access to the equity squawk box and were not required by policy to evaluate the manner in which the equity squawk box was being used by retail brokers. Consequently, the retail brokers in this case were able to provide day traders with continuous, real-time access to the equity squawk box simply by placing an open telephone line next to the squawk box on their desks.

Remedial Efforts

Merrill Lynch has implemented certain remedial measures concerning access to the equity squawk box and use of the equity squawk box to communicate internally institutional equity customer order information.

D. 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, or the rules or regulations thereunder, of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer. Similarly, Section 204A of the Advisers Act requires investment advisers registered with the Commission to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such investment adviser's business, to prevent the misuse in violation of the Advisers Act or Exchange Act, or the rules or regulations thereunder, of material, nonpublic information by such investment adviser or any person associated with such investment adviser.

Given Merrill Lynch's extensive financial businesses, certain categories of employees are regularly in possession of material, nonpublic information or in contact with employees who are in possession of such information pertaining to Merrill Lynch's customers and clients. For example, Merrill Lynch's institutional customers, such as pension funds, mutual funds, and large hedge funds, routinely place orders to buy and sell blocks of securities. Depending on the size of the order and the volume of trading in the security, these institutional customers' order information can constitute material, nonpublic information. Institutional customers understand that Merrill Lynch, with appropriate discretion, may share their order information with other Merrill Lynch customers who are reasonably considered potential counterparties, but they expect that Merrill Lynch will otherwise keep their orders and order information confidential for a variety of reasons, including the fact that: 1) the customers consider their order information confidential; 2) knowledge of a pending order can negatively affect the price at which Merrill Lynch could execute the customer's order; and 3) other market participants could discern the identity of the customer, to the detriment of the customer's market strategies.

As described above, Merrill Lynch failed to maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of Merrill Lynch's business, to prevent misuse, in violation of the federal securities laws, of material, nonpublic information by Merrill Lynch or any person associated with it. In fact, Merrill Lynch brokers in several offices did violate the antifraud provisions of the securities laws. Merrill Lynch failed to maintain written policies or procedures that reasonably: (a) limited access to the equity squawk box to those employees with a bona fide business need for the customer order information; (b) tracked who had access to the equity squawk box; (c) instructed supervisors on how to control access to, or monitor the use of, the equity squawk box. As a result of Merrill Lynch's failure to maintain and enforce policies and procedures reasonably designed to prevent misuse of the information carried on the equity squawk boxes, retail brokers were able to provide day traders with access to material, nonpublic information concerning customer orders broadcast over the squawk box, in violation of Merrill Lynch's more general policies and in violation of the securities laws. These day traders then traded ahead of customer orders to the detriment of Merrill Lynch's institutional customers.

The Commission has consistently made clear that broker-dealers and investment advisers must take seriously their responsibilities to design and enforce sufficiently robust policies and procedures to prevent the misuse of material, nonpublic information. *See, e.g, In re Goldman, Sachs & Co.*, Exch. Act. Rel. No. 48436; Admin. Proceeding No. 3-11240 (September 4, 2003) (finding violations of Section 15(f)); *In re Gintel Asset Management, Inc., et al.*, Exch. Act Rel. No. 46798; Admin. Proceeding No. 3-10930 (November 8, 2002) (finding violations of Sections 15(f) and 204A); *In re DePrince, Race & Zollo, Inc., et al.,* Adv. Act Rel. No. 2035; Admin. Proceeding No. 3-10798 (June 12, 2002) (finding violations of Section 204A); *In re Guy P. Wyser-Pratte et al.,* Exch. Act Rel. No. 44283; Adv. Act Rel. No. 1943 (May 9, 2001) (finding violations of Section 15(f) and Section 204A); *In re Gabelli & Co., Inc. and Gamco Investors, Inc.,* Exch. Act Rel. No. 35057 (December 8, 1994) (finding violations of Section 15(f) and Section 204A). Taking into consideration the extensive trading and retail brokerage activities of Merrill Lynch, its written policies and procedures were not reasonably designed to prevent the misuse of material, nonpublic information. Merrill Lynch therefore willfully violated Section 15(f) of the Exchange Act and Section 204A of the Advisers Act.[2]

IV.

Merrill Lynch has undertaken to implement (or to continue, as the case may be) and maintain the policies and procedures set forth below. Nothing in this Order or in these undertakings shall relieve Merrill Lynch of its obligations under Sections 15(f) of the Exchange Act and Section 204A of the Advisers Act.

(A) Merrill Lynch will continue, by means of its policies and procedures manuals, to inform its employees that information concerning customer orders is confidential. Merrill Lynch will maintain policies and procedures providing that its employees can obtain access to the equity squawk box only after his/her manager has approved such access in writing because the employee's responsibilities include the facilitation of customer securities transactions through providing contra-side liquidity for large orders.

(B) Merrill Lynch will require all employees who are granted access to the equity squawk box to certify that he/she has read and agrees to abide by Merrill Lynch's policies and procedures related to the equity squawk box, as set forth in subsection C.2 below.

(C) Merrill Lynch will design and implement a program to effectuate its policies and procedures concerning the confidentiality of customer order information communicated through the equity squawk box. As part of this program, Merrill Lynch has undertaken to:

1. Grant an employee access to the equity squawk box, the webwall (an intranet webpage containing limit price and quantity information concerning institutional customer orders), or any successor technology or other technology utilized to disseminate internally institutional equity customer order information for the purpose of seeking contra-side liquidity ("squawk-related technology") only after obtaining a written authorization from the manager responsible for supervising that employee. The written authorization should state that the manager has verified that the employee's responsibilities include the facilitation of customer securities transactions through providing contra-side liquidity to large orders. The Head of U.S. Cash Equity Trading must then approve this authorization in writing. On an annual basis, the Head of U.S. Cash Equity Trading will review whether those who have access to customer order information should continue to have access. Merrill Lynch must maintain the manager's written authorizations and the Head of U.S. Cash Equity Trading's written approvals and written annual reviews.

---

2 A willful violation of the securities laws means merely "'that the [party] charged with the duty knows what [it] is doing.'" *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).

2. Every employee requesting access to squawk-related technology is required to submit a certification form acknowledging that a) he/she must protect confidential information relating to customer trading activities that he/she receives or has access to over these applications; b) he/she may generally disclose customer trading information only to persons who have a legitimate and bona fide need to know such information and who there is a reasonable basis to believe can be trusted to handle such information in an appropriate manner; and c) he/she must immediately inform his/her manager if he/she believes a recipient is using the confidential information to trade against the interests of the customer that provided the information.

3. Place signs on all equity trading floors reminding employees that customer order information is confidential.

4. Continue compliance training for all employees who use squawk-related technology regarding access procedures to these applications and the employees' obligations to safeguard confidential customer order information.

5. Discontinue access to squawk-related technology for all employees who have not been approved by the Head of U.S. Equity Cash Trading to retain access, and maintain a list of all employees who have access to squawk-related technology.

6. Design and implement appropriate surveillance regimens to enforce its policies and procedures concerning the confidentiality of customer order information.

(D) Merrill Lynch's internal audit department shall audit Merrill Lynch's policies and procedures at least every two years for at least six years following the date of this order. For each of these audits, the firm will provide the Staff with a copy of the audit report; the firm will implement any recommendations in the report within the time period specified by internal audit; and internal audit will confirm the completion of any required actions within 90 days following the date specified for completion.

(E) Merrill Lynch may, as necessary and appropriate, modify its policies and procedures in the future in response to changes in technology and the evolution of its business. Any such modifications to policies and procedures will be reasonably designed to safeguard confidential customer order information and prevent the misuse of material, nonpublic information.

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 that:

A. Pursuant to Section 15(b)(4) of the Exchange Act and Section 203(e)(5) of the Advisers Act, Merrill Lynch be, and hereby is, censured;

B. Pursuant to Section 21C of the Exchange Act and Section 203(k) of the Advisers Act, Merrill Lynch shall cease and desist from committing or causing any violations and any future violations, of Section 15(f) of the Exchange Act and Section 204(A) of the Advisers Act;

C. Within ten days of the issuance of this Order, Merrill Lynch shall pay a civil money penalty in the aggregate amount of $7,000,000 to the United States Treasury. Such payment shall be: (1) made by United States postal money order, certified check, bank cashier's check or bank money order; (2) made payable to the Securities and Exchange Commission; (3) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (4) submitted under cover letter that identifies Merrill Lynch, Pierce, Fenner & Smith Incorporated as the Respondent in these proceedings, and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Kay L. Lackey, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281; and

D. Merrill Lynch shall comply with the undertakings enumerated in Section IV A - D above.

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-28647; 812-13641]

Automated Trading Desk Specialists, LLC, et al.; Notice of Application and Temporary Order

March 12, 2009

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against Automated Trading Desk Specialists, LLC ("ATDS") on March 11, 2009 by the United States District Court for the Southern District of New York (the "Injunction"), until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: ATDS, Citigroup Global Markets Inc. ("CGMI"), CEFOF GP I Corp. ("CEFOF"), CELFOF GP Corp. ("CELFOF"), Citibank, N.A. ("Citibank"), Citigroup Alternative Investments LLC ("Citigroup Alternative"), Citigroup Investment Advisory Services Inc. ("Citigroup Advisory"), Citigroup Capital Partners I GP I Corp. ("CCP I") and Citigroup Capital Partners I GP II Corp. ("CCP II," and along with CGMI, CEFOF, CELFOF, Citibank, Citigroup Alternative, Citigroup Advisory and CCP I, the "Fund Servicing Applicants," together with ATDS, the "Applicants").[1]

Filing Date: The application was filed on March 12, 2009.

---

1 Applicants request that any relief granted pursuant to the application also apply to any other company of which ATDS is or hereafter may become an affiliated person within the meaning of section 2(a)(3) of the Act (together with the Applicants, the "Covered Persons").

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 6, 2009, and should be accompanied by proof of service on Applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. Applicants: ATDS, 401 S. LaSalle Street, Chicago, IL 60605; CGMI and Citigroup Advisory, 787 Seventh Avenue, New York, NY 10019; CEFOF, CELFOF, CCP I and CCP II, 388 Greenwich Street, New York, NY 10013; Citibank, 399 Park Avenue, New York, NY 10043; and Citigroup Alternative, 731 Lexington Avenue, 28th Floor, New York, NY 10022.

For Further Information Contact: Jaea F. Hahn, Senior Counsel, at (202) 551-6870, or Julia Kim Gilmer, Branch Chief, at (202) 551-6821, (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street NE, Washington DC 20549-1520 (tel. 202-551-5850).

Applicants' Representations:

1. Each of the Applicants is an indirect wholly-owned subsidiary of Citigroup Inc. ("Citigroup"), a financial holding company whose businesses provide a broad range of

financial services to consumer and corporate customers. ATDS is a broker-dealer that was registered with the Commission under the Securities Exchange Act of 1934 ("Exchange Act").[2] Citigroup acquired the parent company of ATDS, ATD Holdings, Inc., in 2007. ATDS has never served or acted an investment adviser or depositor to registered investment companies ("Funds"), including unit investment trusts ("UITs") and face amount certificate companies, or as principal underwriter to Funds, nor does ATDS have any present intention of doing so in the future. ATDS currently has no operations.

2. CGMI is registered as a broker-dealer under the Exchange Act and serves as principal underwriter for one or more registered investment companies and as the depositor of certain unit investment trusts ("UITs," together with all other registered investment companies, "Funds"). Citigroup Alternative and Citigroup Advisory are registered as investment advisers under the Investment Advisers Act of 1940 and serve as investment advisers for one or more Funds. CEFOF, CELOF, Citibank, and CCP I and CCP II ("ESC Advisers") serve as investment advisers to certain employees' securities companies within the meaning of section 2(a)(13) of the Act, which provide investment opportunities for certain eligible employees, officers, directors and persons on retainer of Citigroup and its affiliates ("ESCs" and included in the term "Funds").[3]

3. On March 11, 2009, the United States District Court for the Southern District of New York entered a final judgment, which included the Injunction, against ATDS

---

2 ATDS deregistered with the Commission as a broker-dealer on July 16, 2004.

3 Greenwich Street Employees Fund, L.P., et al., Investment Company Act Release Nos. 25324 (Dec. 21, 2001) (notice) and 25367 (Jan. 16, 2002) (order).

("Judgment") in a matter brought by the Commission.[4] The Commission alleged in the complaint ("Complaint") that ATDS violated certain rules of the Chicago Stock Exchange by engaging in improper trades for its own proprietary accounts by trading ahead of, instead of matching customer orders, interpositioning and trading ahead of unexecuted open or cancelled orders. The Complaint also alleged that ATDS violated section 17(a) of the Exchange Act and rule 17a-3 by failing to make or keep a current blotter containing an itemized daily record of all purchases and sales of securities effected by ATDS for its proprietary accounts. Without admitting or denying the allegations in the Complaint, except as to jurisdiction, ATDS consented to the entry of the Judgment that included, among other things, the entry of the Injunction.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security or in connection with activities as a broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered UIT or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicants state

4 Securities and Exchange Commission v. Automated Trading Desk Specialists, LLC., Final Consent Judgment as to Automated Trading Desk Specialists LLC., 1:09cv1977 (LTS) (S.D.N.Y., Mar. 11, 2009).

that ATDS is an affiliated person of each of the Fund Servicing Applicants within the meaning of section 2(a)(3) of the Act. Applicants state that the entry of the Injunction results in Applicants being subject to the disqualification provisions of section 9(a) of the Act.

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to Applicants, are unduly or disproportionately severe or that the Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting them and Covered Persons from the disqualification provisions of section 9(a) of the Act.

3. Applicants believe they meet the standard for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to the Fund Servicing Applicants would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity of investment adviser, subadviser or depositor to a Fund, or principal underwriter for any open-end Fund or UIT and that the conduct occurred prior to Citigroup's acquisition of the parent company of ATDS when the Fund Servicing Applicants were not affiliated persons of ATDS. Applicants also state that none of the current or former directors, officers, or employees of the Fund Servicing Applicants had any involvement in the conduct alleged in the Complaint. Applicants further state that the personnel at ATDS who allegedly participated in the conduct giving rise to the

Injunction have had no and will not have any future involvement in providing advisory, subadvisory or depository services to Funds, or principal underwriting services to open-end Funds or UITs and are no longer employed by ATDS.

5. Applicants state that the inability of the Fund Servicing Applicants to continue to serve as investment adviser, depositor or principal underwriter to the Funds would result in potentially severe financial hardships for the Funds and their shareholders. Applicants have distributed, or will distribute as soon as reasonably practical, written materials, including an offer to meet in person to discuss the materials, to the board of directors of each Fund, including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Fund, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any, regarding the Judgment, any impact on the Funds, and the application. Applicants state they will provide the Funds with all information concerning the Judgment and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if the Fund Servicing Applicants were barred from serving as investment adviser, depositor or principal underwriter to the Funds, the effect on their businesses and employees would be severe. Applicants state that the Fund Servicing Applicants have committed substantial resources to establish an expertise in providing services covered by section 9(a) of the Act to Funds. Applicants further state that prohibiting the Fund Servicing Applicants from providing advisory and distribution services would not only adversely affect their businesses, but would also adversely affect approximately 50 employees that are involved in those activities. Applicants also state that disqualifying the ESC Advisers from continuing to provide investment advisory services to ESCs is not in the

public interest or in furtherance of the protection of investors. Because the ESCs have been formed for the benefit of certain eligible employees, officers, directors and persons on retainer of Citigroup and its affiliates, it would not be consistent with the purposes of the ESC provisions of the Act or the ESC Order to require another entity not affiliated with the ESC Advisers to manage the ESCs. In addition, the employees of Citigroup and its affiliates subscribed for interests in the ESCs with the expectation that the ESCs would be managed by an affiliate of Citigroup.

7. Applicants previously have received exemptions under section 9(c) as the result of conduct that triggered section 9(a) as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

> Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that the Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from March 11, 2009, until the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59568 / March 12, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2852 / March 12, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13409

In the Matter of

MATTHEW E. KOPSKY,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Matthew E. Kopsky ("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 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Kopsky was employed by Prudential Securities, Inc. and its successor Wachovia Securities LLC as a registered representative from July 2000 to October 2005. Prudential Securities, Inc. was a broker-dealer and an investment adviser registered with the Commission, and Wachovia Securities LLC was a broker-dealer registered with the Commission. Kopsky is currently an owner of an investment adviser registered with the State of Missouri. Kopsky, 41 years old, is a resident of Chesterfield, Missouri.

2. On February 24, 2009, a final judgment was entered by consent against Kopsky, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled SEC v. Matthew E. Kopsky, et al., Civil Action Number 4:07-cv-379-RWS, in the United States District Court for the Eastern District of Missouri.

3. The Commission's complaint alleged that Kopsky engaged in insider trading in the securities of Engineered Support Systems, Inc. ("ESSI"). The complaint alleged that Ronald Davis, ESSI's former President of Business Development, tipped Kopsky before each of ESSI's first three quarterly earnings announcements in 2003, and that Kopsky purchased ESSI securities for himself and his clients based on material, nonpublic information received from Davis. According to the complaint, Kopsky made a total profit of $276,259 on these trades, including $107,062 personally, and $169,197 for his clients.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Kopsky be, and hereby is suspended from association with any broker, dealer, or investment adviser, for a period of twelve months, effective on the second Monday following the entry of this Order. Respondent shall provide to the Commission, within 20 days after the end of the twelve month suspension period described above, an affidavit that he has complied fully with the suspension.

By the Commission.

Elizabeth M. Murphy
Secretary

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

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-28645; 812-13639]

E*TRADE Capital Markets LLC, et al.; Notice of Application and Temporary Order

March 12, 2009

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against E*TRADE Capital Markets LLC ("ETCM") on March 11, 2009, by the United States District Court for the Southern District of New York ("Injunction") until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: ETCM, E*TRADE Financial Corporation ("ETFC"), E*TRADE Asset Management, Inc. ("E*TRADE Asset Management"), E*TRADE Securities LLC ("E*TRADE Securities") and Kobren Insight Management, Inc. ("Kobren") (collectively, other than ETCM and ETFC, the "Fund Servicing Applicants," and together, the "Applicants").[1]

Filing Dates: The application was filed on March 4, 2009 and amended on March 12, 2009.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 6, 2009, and

---

1 Applicants request that any relief granted pursuant to the application also apply to any other company of which ETCM is or hereafter becomes an affiliated person within the meaning of section 2(a)(3) of the Act (together with the Applicants, the "Covered Persons").

should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: ETCM, 440 S. LaSalle Street, Suite 3030, Chicago, IL 60605; ETFC and E*TRADE Securities, 135 E. 57th Street, New York, NY 10022; E*TRADE Asset Management, 4500 Bohannon Drive, Menlo Park, CA 94025; and Kobren, 20 William Street, Suite 200, Wellesley Hills, MA 02481.

For Further Information Contact: Jaea F. Hahn, Senior Counsel, at 202-551-6878 or Julia Kim Gilmer, Branch Chief, at 202-551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street NE, Washington DC 20549-1520 (tel. 202-551-5850).

Applicants' Representations:

1. ETFC is a global financial services company organized under the laws of Delaware. Through its subsidiaries and affiliates, ETFC provides a wide range of financial services including an assortment of trading, investing, banking and lending products. ETCM is a wholly owned subsidiary of ETFC and is registered as a broker-dealer under the Securities Exchange Act of 1934 ("Exchange Act"). ETCM is primarily engaged in the business of over-the-counter market making activities. E*TRADE Asset Management and Kobren (together, the "Adviser Applicants") are each a wholly owned subsidiary of ETFC and registered as an

investment adviser under the Investment Advisers Act of 1940. Each Adviser Applicant currently provides investment management and advisory services to registered investment companies ("Funds"). E*TRADE Securities is registered as a broker-dealer under the Exchange Act and acts as principal underwriter to various open-end Funds.

2. On March 11, 2009, the United States District Court for the Southern District of New York entered a judgment, which included the Injunction, against ETCM ("Judgment") in a matter brought by the Commission.[2] The Commission alleged in the complaint ("Complaint") that ETCM violated certain rules of the Chicago Stock Exchange by engaging in improper trades for its own proprietary accounts by trading ahead of, instead of matching customer orders, interpositioning and trading ahead of unexecuted open or cancelled orders. The Complaint also alleged that ETCM violated section 17(a) of the Exchange Act and rule 17a-3 thereunder by failing to make or keep a current blotter containing an itemized daily record of all purchases and sales of securities effected by ETCM for its proprietary accounts. Without admitting or denying any of the allegations in the Complaint, ETCM consented to the entry of the Injunction.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust, or registered face-amount certificate company. Section 9(a)(3) of the Act

2 Securities and Exchange Commission v. E*TRADE Capital Markets LLC. Final Consent Judgment as to E*TRADE Capital Markets LLC., 09 Civ. 1976 (S.D.N.Y., filed March 11, 2009).

makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control, with the other person. Applicants state that ETCM is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3). Applicants state that, as a result of the Injunction, they would be subject to the prohibitions of section 9(a).

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to Applicants, are unduly or disproportionately severe or that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to section 9(c) seeking a temporary and permanent order exempting the Applicants and the other Covered Persons from the disqualification provisions of section 9(a).

3. Applicants believe that they meet the standards for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the requested exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity of investment adviser, subadviser or depositor or principal underwriter for any Fund. Applicants also state that none of the current or former directors, officers, or employees of ETFC and the Fund Servicing Applicants had any

knowledge or involvement in the conduct alleged in the Complaint. Applicants further state that the personnel at ETCM who were involved in the violations alleged in the complaint have had no and will not have any future involvement in providing advisory, subadvisory, depository or underwriting services to Funds.

5. Applicants state that the inability of the Adviser Applicants to provide investment advisory services and E*TRADE Securities to provide principal underwriter services to Funds would result in potentially severe financial hardships for the Funds and their shareholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the boards of trustees of the Funds (the "Boards"), including the trustees who are not "interested persons," as defined in section 2(a)(19) of the Act, of such Funds, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any, of the circumstances that led to the Injunction, any impact on the Funds, and the application. Applicants state that they will provide the Boards with all information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if the Fund Servicing Applicants were barred from providing investment advisory services to the Funds, and underwriting services to open-end Funds and UITs, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establishing advisory and underwriting expertise. Applicants further state that prohibiting them from providing advisory and underwriting services would not only adversely affect their businesses, but would also adversely affect over 1500 employees that are involved in such services.

7. None of the Applicants have previously received an order under section 9(c) of the Act.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that the Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from March 11, 2009, until the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59578; File No. S7-06-09)

March 13, 2009

ORDER GRANTING TEMPORARY EXEMPTIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934 IN CONNECTION WITH REQUEST OF CHICAGO MERCANTILE EXCHANGE INC. AND CITADEL INVESTMENT GROUP, L.L.C. RELATED TO CENTRAL CLEARING OF CREDIT DEFAULT SWAPS, AND REQUEST FOR COMMENTS

I. Introduction

In response to the recent turmoil in the financial markets, the Securities and Exchange Commission ("Commission") has taken multiple actions to protect investors and ensure the integrity of the nation's securities markets.[1] Today the Commission is taking further action designed to address concerns related to the market in credit default swaps ("CDS"). The over-the-counter ("OTC") market for CDS has been a source of concerns to us and other financial regulators. These concerns include the systemic risk posed by CDS, highlighted by the possible

---

[1] A nonexclusive list of the Commission's actions to stabilize financial markets during this credit crisis include: adopting a package of measures to strengthen investor protections against naked short selling, including rules requiring a hard T+3 close-out, eliminating the options market maker exception of Regulation SHO, and expressly targeting fraud in short selling transactions (See Securities Exchange Act Release No. 58572 (September 17, 2008), 73 FR 54875 (September 23, 2008)); issuing an emergency order to enhance protections against naked short selling in the securities of primary dealers, Federal National Mortgage Association ("Fannie Mae"), and Federal Home Loan Mortgage Corporation ("Freddie Mac") (See Securities Exchange Act Release No. 58166 (July 15, 2008), 73 FR 42379 (July 21, 2008)); taking temporary emergency action to ban short selling in financial securities (See Securities Exchange Act Release No. 58592 (September 18, 2008), 73 FR 55169 (September 24, 2008)); approving emergency rulemaking to ensure disclosure of short positions by hedge funds and other institutional money managers (See Securities Exchange Act Release No. 58591A (September 21, 2008), 73 FR 55557 (September 25, 2008)); proposing rules to strengthen the regulation of credit rating agencies and making the limits and purposes of credit ratings clearer to investors (See Securities Exchange Act Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008); entering into a Memorandum of Understanding with the Board of Governors of the Federal Reserve System ("FRB") to make sure key federal financial regulators share information and coordinate regulatory activities in important areas of common interest (See Memorandum of Understanding Between the U.S. Securities and Exchange Commission and the Board of Governors of the Federal Reserve System Regarding Coordination and Information Sharing in Areas of Common Regulatory and Supervisory Interest (July 7, 2008), http://www.sec.gov/news/press/2008/2008-134_mou.pdf).

inability of parties to meet their obligations as counterparties and the potential resulting adverse effects on other markets and the financial system.[2] Recent credit market events have demonstrated the seriousness of these risks in a CDS market operating without meaningful regulation, transparency,[3] or central counterparties ("CCPs").[4] These events have emphasized the need for CCPs as mechanisms to help control such risks.[5] A CCP for CDS could be an important step in reducing the counterparty risks inherent in the CDS market, and thereby help mitigate potential systemic impacts. In November 2008, the President's Working Group on Financial Markets stated that the implementation of a CCP for CDS was a top priority[6] and, in furtherance of this recommendation, the Commission, the FRB and the Commodity Futures Trading Commission ("CFTC") signed a Memorandum of Understanding[7] that establishes a framework for consultation and information sharing on issues related to CCPs for CDS. Given the continued uncertainty in this market, taking action to help foster the prompt development of

---

2 In addition to the potential systemic risks that CDS pose to financial stability, we are concerned about other potential risks in this market, including operational risks, risks relating to manipulation and fraud, and regulatory arbitrage risks.

3 See Policy Objectives for the OTC Derivatives Market, The President's Working Group on Financial Markets, November 14, 2008, available at http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public.").

4 See The Role of Credit Derivatives in the U.S. Economy Before the H. Agric. Comm., 110th Cong. (2008) (Statement of Erik Sirri, Director of the Division of Trading and Markets, Commission).

5 See id.

6 See Policy Objectives for the OTC Derivatives Market, The President's Working Group on Financial Markets (November 14, 2008), http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf. See also Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets (March 13, 2008), http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf; Progress Update on March Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets (October 2008), http://www.treas.gov/press/releases/reports/q4progress%20update.pdf.

7 See Memorandum of Understanding Between the Board of Governors of the Federal Reserve System, the U.S. Commodity Futures Trading Commission and the U.S. Securities and Exchange Commission Regarding Central Counterparties for Credit Default Swaps (November 14, 2008), http://www.treas.gov/press/releases/reports/finalmou.pdf.

CCPs, including granting conditional exemptions from certain provisions of the federal securities laws, is in the public interest.

A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller under a CDS to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in bonds or in segments of the debt market as represented by an index, or to capitalize on the volatility in credit spreads during times of economic uncertainty. In recent years, CDS market volumes have rapidly increased.[8] This growth has coincided with a significant rise in the types and number of entities participating in the CDS market.[9]

The Commission's authority over this OTC market for CDS is limited. Specifically, Section 3A of the Securities Exchange Act of 1934 ("Exchange Act") limits the Commission's authority over swap agreements, as defined in Section 206A of the Gramm-Leach-Bliley Act.[10] For those CDS that are swap agreements, the exclusion from the definition of security in Section 3A of the Exchange Act, and related provisions, will continue to apply. The Commission's

---

[8] See Semiannual OTC derivatives statistics at end-December 2007, Bank for International Settlements ("BIS"), available at http://www.bis.org/statistics/otcder/dt1920a.pdf.

[9] CDS were initially created to meet the demand of banking institutions looking to hedge and diversify the credit risk attendant with their lending activities. However, financial institutions such as insurance companies, pension funds, securities firms, and hedge funds have entered the CDS market.

[10] 15 U.S.C. 78c-1. Section 3A excludes both a non-security-based and a security-based swap agreement from the definition of "security" under Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10). Section 206A of the Gramm-Leach-Bliley Act defines a "swap agreement" as "any agreement, contract, or transaction between eligible contract participants (as defined in section 1a(12) of the Commodity Exchange Act. . .) . . . the material terms of which (other than price and quantity) are subject to individual negotiation." 15 U.S.C. 78c note.

action today does not affect these CDS, and this Order does not apply to them. For those CDS that are not swap agreements ("non-excluded CDS"), the Commission's action today provides conditional exemptions from certain requirements of the Exchange Act.

The Commission believes that using well-regulated CCPs to clear transactions in CDS would help promote efficiency and reduce risk in the CDS market and among its participants. These benefits could be particularly significant in times of market stress, as CCPs would mitigate the potential for a market participant's failure to destabilize other market participants, and reduce the effects of misinformation and rumors. CCP-maintained records of CDS transactions would also aid the Commission's efforts to prevent and detect fraud and other abusive market practices.

A well-regulated CCP also would address concerns about counterparty risk by substituting the creditworthiness and liquidity of the CCP for the creditworthiness and liquidity of the counterparties to a CDS. In the absence of a CCP, participants in the OTC CDS market must carefully manage their counterparty risks because the default by a counterparty can render worthless, and payment delay can reduce the usefulness of, the credit protection that has been bought by a CDS purchaser. CDS participants currently attempt to manage counterparty risk by carefully selecting and monitoring their counterparties, entering into legal agreements that permit them to net gains and losses across contracts with a defaulting counterparty, and often requiring counterparty exposures to be collateralized.[11] A CCP could allow participants to avoid these risks specific to individual counterparties because a CCP "novates" bilateral trades by entering

---

[11] See generally R. Bliss and C. Papathanassiou, "Derivatives clearing, central counterparties and novation: The economic implications" (March 8, 2006), at 6. See also "New Developments in Clearing and Settlement Arrangements for OTC Derivatives," Committee on Payment and Settlement Systems, BIS, at 25 (March 2007), available at http://www.bis.org/pub/cpss77.pdf; "Reducing Risks and Improving Oversight in the OTC Credit Derivatives Market," Before the Sen. Subcomm. On Secs., Ins. and Investments, 110th Cong. (2008) (Statement of Patrick Parkinson, Deputy Director, Division of Research and Statistics, FRB).

into separate contractual arrangements with both counterparties – becoming buyer to one and seller to the other.[12] Through novation, it is the CCP that assumes counterparty risks.

For this reason, a CCP for CDS would contribute generally to the goal of market stability. As part of its risk management, a CCP may subject novated contracts to initial and variation margin requirements and establish a clearing fund. The CCP also may implement a loss-sharing arrangement among its participants to respond to a participant insolvency or default.

A CCP would also reduce CDS risks through multilateral netting of trades.[13] Trades cleared through a CCP would permit market participants to accept the best bid or offer from a dealer in the OTC market with very brief exposure to the creditworthiness of the dealer. In addition, by allowing netting of positions in similar instruments, and netting of gains and losses across different instruments, a CCP would reduce redundant notional exposures and promote the more efficient use of resources for monitoring and managing CDS positions. Through uniform margining and other risk controls, including controls on market-wide concentrations that cannot be implemented effectively when counterparty risk management is decentralized, a CCP can help prevent a single market participant's failure from destabilizing other market participants and, ultimately, the broader financial system.

In this context, The Chicago Mercantile Exchange Inc. ("CME") and Citadel Investment Group, L.L.C. ("Citadel") have requested that the Commission grant exemptions from certain

---

12 "Novation" is a "process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts." Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, Recommendations for Central Counterparties (November 2004) at 66.

13 See "New Developments in Clearing and Settlement Arrangements for OTC Derivatives," supra note 11, at 25. Multilateral netting of trades would permit multiple counterparties to offset their open transaction exposure through the CCP, spreading credit risk across all participants in the clearing system and more effectively diffusing the risk of a counterparty's default than could be accomplished by bilateral netting alone.

requirements under the Exchange Act with respect to their proposed activities in clearing and settling certain CDS, as well as the proposed activities of certain other persons, as described below.[14]

Based on the facts that CME and Citadel have presented and the representations they have made,[15] and for the reasons discussed in this Order, the Commission temporarily is exempting, subject to certain conditions, CME from the requirement to register as a clearing agency under Section 17A of the Exchange Act solely to perform the functions of a clearing agency for certain non-excluded CDS transactions. The Commission also temporarily is exempting eligible contract participants and others from certain Exchange Act requirements with respect to non-excluded CDS cleared by CME. The Commission's exemptions are temporary and will expire on December 14, 2009. To facilitate the operation of one or more CCPs for the CDS market, the Commission has also approved interim final temporary rules providing exemptions under the Securities Act of 1933 and the Exchange Act for non-excluded CDS.[16] Finally, the Commission has provided temporary exemptions in connection with Sections 5 and 6 of the Exchange Act for transactions in non-excluded CDS.[17]

II. Discussion

A. Description of CME and Citadel's Proposal

[14] See Letter from Adam Cooper, Citadel Investment Group, L.L.C. and Ann K. Shuman, Chicago Mercantile Exchange, Inc., to Elizabeth M. Murphy, Secretary, Commission, March 12 , 2008.

[15] See id. The exemptions we are granting today are based on representations made by CME and Citadel. We recognize, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if any of these exemptions were to become unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in non-excluded CDS associated with persons subject to those unavailable exemptions would remain unchanged, but no new positions could be established pursuant to the exemptions until all of the underlying representations were again accurate.

[16] See Securities Act Release No. 8999 (January 14, 2009).

[17] See Securities Exchange Act Release No. 59165 (December 24, 2008).

The exemptive request by CME and Citadel describes how their proposed arrangements for central clearing of CDS would operate, and makes representations about the safeguards associated with those arrangements, as described below:

1. CME Organization

CME Group Inc. ("CME Group"), a Delaware stock corporation, is the holding company for CME, as well as Board of Trade of the City Of Chicago, Inc., New York Mercantile Exchange, Inc., Commodity Exchange, Inc. and their subsidiaries.

CME is a designated contract market ("DCM"), regulated by the CFTC, for the trading of futures and options on futures contracts. In addition, CME Group operates its own clearing house, which is a division of CME. The CME clearing house is a derivates clearing organization ("DCO") regulated by the CFTC. The clearing house clears, settles and guarantees the performance of all transactions matched through the execution facilities and on third party exchanges for which CME Group provides clearing services. The clearing house operates with the oversight of the Clearing House Risk Committee ("CHRC"). The CHRC is made up of a group of clearing member representatives who represent the interests of the clearing house as well as clearing members of CME Group.

CME is required to comply with the eighteen CFTC Core Principles applicable to registered DCMs and the fourteen CFTC Core Principles applicable to DCOs.[18] The CFTC conducts regular audits or risk reviews of CME with respect to these Core Principles. CME is registered and in good standing with the CFTC. In addition, CME is notice registered with the Commission as a special purpose national securities exchange for the purpose of trading securities futures products. In the U.K., CME is a Recognised Overseas Investment Exchange

18 The DCM and DCO Core Principles are set forth in 7 U.S.C. 7(b), 7a-1(c)(2)(A).

and a Recognised Overseas Clearing House, subject to regulation by the U.K. Financial Services Authority.

2. CME Central Counterparty Services for CDS

CME as part of its clearing services would be interposed as central counterparty for transactions in Cleared CDS (as defined below).[19] CME would provide clearing and settlement services for transactions in Cleared CDS submitted to or executed on the CMDX platform.[20] CME would also accept for clearing directly from participants trades in Cleared CDS that are not executed on or processed through CMDX.

Specifically, CME would accept for clearing (i) trades that are matched on the CMDX platform, (ii) pre-existing non-standard trades that are submitted to clearing through the CMDX migration facility, and (iii) new bilaterally-executed trades in standardized products that are submitted to CME for clearing directly by the participants (using CME's Clearing 360™ API or similar facility that CME makes available).[21]

---

19 See note 29, infra.

20 Citadel and CME have entered into a joint venture (to be named "CMDX") to provide a trading and clearing solution for CDS. CMDX trading, booking and migration services would be available only to persons that satisfy the definition of an "eligible contract participant" in Section 1a(12) of the Commodity Exchange Act ("CEA") (other than paragraph (C) thereof). In addition, each participant on the CMDX platform must be a clearing member of CME or have a clearing relationship with a CME clearing member that agrees to assume responsibility for the participant's CDS contracts cleared by CME. Initially, CMDX would offer CDS that mirror as closely as possible the terms of existing OTC CDS. The coupons and maturities would be standardized to the extent necessary to permit centralized clearing.

21 Non-standard trades that are migrated to CME would ultimately be converted to a standard, centrally cleared contract. Migration may only occur if both counterparties to a trade agree to the process and both are clearing members or have the appropriate relationship with a clearing member. CMDX would also supply participants a data file of the original bilateral positions that were accepted into clearing via the migration process, so that participants may send appropriate exit records to the DTCC Trade Information Warehouse.

The trades submitted to or executed on the CMDX platform would be processed straight-through to CME for clearing and settlement. CME clearing and settlement of Cleared CDS would operate using the established systems, procedures and financial safeguards package that stand behind trading in CME's primary futures market, and such activities would be subject to CFTC oversight of risk management and collateralization procedures. CME Rulebook Chapter 8-F sets forth the rules governing clearing and settlement of all products, instruments, and contracts in OTC derivatives, including but not limited to CDS contracts, swaps and forward rate agreements that the CME clearinghouse has designated as eligible for clearing.

3. CME Risk Management

CME clearing members that are broker-dealers or futures commission merchants maintain capital and liquidity in accordance with relevant SEC and CFTC rules and regulations. In addition, CME has requirements for minimum capital contribution, contribution to the guaranty fund based on risk factors, maintenance margin, and mark to market with immediate payment of losses applicable to clearing member firms.

CME has adopted a risk-based capital requirement. Capital requirements are monitored by CME's Audit Department and vary to reflect the risk of each clearing member's positions as well as CME's assessment of each clearing member's internal controls, risk management policies and back office operations.

Clearing members also would have tools to manage appropriate requirements with respect to their customers. CME Rule 982 requires clearing members to establish written risk management policies and procedures, including monitoring the risks assumed by specific customers. To facilitate such controls with respect to CDS transactions, CME's clearing systems include functionality that permits clearing members to register customer accounts and specify customer credit limits.

CME would extend its current monitoring procedures to Cleared CDS cleared by CME. CME would monitor for and investigate unusual trading patterns or volumes. Customer account reporting would allow CME to view the positions held by individual accounts. The positions of each account would be analyzed throughout the day to monitor any accounts that may have significant losses due to market moves. In addition, significant changes in positions from day to day would be analyzed and reported to CME clearing house senior management.

CME would include stress testing of the different CDS clearing house margin factors to capture moves beyond the one-day 99% standard on the macro and sector moves and the five-day 99% standard for the idiosyncratic shocks. This would be considered in designing the financial safeguards package, adding concentration types of margining and routine stress testing. Also, the CDS clearing house margin factor parameters would be reviewed daily as a back-testing procedure to ensure the parameters are providing the desired coverage. CME would also review on a daily basis the margin collected by CME on CDS portfolios and compare those amounts to next-day market moves so that actual portfolio effects can be determined and gauged against the margin coverage. In addition, CME would evaluate the concentration of CDS positions beyond the margin factors and compare them against overall open interest and liquidity in the CDS market.

CME will extend its scenario based stress testing techniques for concentration margining to Cleared CDS. The concentration stress test results will be evaluated relative to excess adjusted net capital for each segregated pool. If the hypothetical losses exceed the excess adjusted net capital for a clearing member's segregated pool, then an additional margin charge will be applied to the clearing member's position. The additional margin charge is calculated based on the magnitude of the hypothetical losses in excess of the clearing member's excess adjusted net capital.

CME determines the acceptability of different collateral types and determines appropriate haircuts.[22] Collateral requirements for Cleared CDS would endeavor to reflect the specific risks of Cleared CDS, including jump-to-default and the consequences of a liquidity event caused by the defaults.

4. Member Default

If a clearing member is troubled (i.e., it fails to meet minimum financial requirements or its financial or operational condition may jeopardize the integrity of the CME, or negatively impact the financial markets), the CME may take action pursuant to Rules 974 (Failure to Meet Minimum Financial Requirements) or 975 (Emergency Financial Conditions). In the event of a default by a clearing member of CME, the process would be governed by applicable CME Rules.[23]

In the event of a member default, CME may access its financial safeguard package as necessary. CME's financial safeguards package is a combination of each clearing member's

---

[22] A list of acceptable collateral and applicable haircuts is available at www.cme.com.

[23] See, e.g., CME Rulebook Chapter 8-F (Over-the-Counter Derivative Clearing), including but not limited to Rules 8F06 (Clearing Member Default), 8F07 (Security Deposit) and 8F13 (Insolvency and Liquidation). Chapter 8-F further incorporates the general CME Rules relating to defaults, including but not limited to Rules 913 (Withdrawal From Clearing Membership), 974 (Failure to Meet Minimum Financial Requirements), 975 (Emergency Financial Conditions), 976 (Suspension of Clearing Members), 978 (Open Trades of Suspended Clearing Members), and 979 (Suspended or Expelled Clearing Members).

collateral on deposit to support its positions, the collateral of its customers to support their positions, CME surplus funds, security deposits and assessment powers.[24]

5. Customer Rules and Other Requirements

Prior to issuance of an order from the CFTC under Section 4d of the CEA ("4d order"), all Cleared CDS submitted to CME for clearing for the account of a clearing member's customer must be assigned and held in an account subject to CFTC Regulation 30.7.[25] Regulation 30.7 requires that customer positions and property be separately held and accounted for from the positions and property of the futures commission merchant, and that customer property be deposited under an account name that clearly identifies it as customer property. CME Rule 8F03 reiterates that "[a]ll collateral deposited as performance bond to support positions in such Regulation § 30.7 account and all positions, collateral or cash in such account shall be segregated from the Clearing Member's proprietary account."

Upon the issuance of a 4d order from the CFTC, the segregation and protection of customer funds and property would be controlled by Section 4d of the CEA[26] and the regulations pertinent thereto; all funds and property received from customers of futures commission merchants in connection with purchasing, selling or holding CDS positions would be subject to the requirements of CFTC Regulation 1.20, et seq. promulgated under Section 4d. This

---

24 CME indicates that excluding collateral supporting open positions, which total approximately \$116 billion, the total financial safeguards package is nearly \$7 billion, comprised of: 1) CME surplus funds of \$57 million; 2) clearing member security deposits of approximately \$1.751 billion; and 3) assessment powers of approximately \$4.816 billion (as of December 31, 2008). Clearing members that clear Cleared CDS would be subject to an additional \$5 million security deposit requirement. Furthermore, the calculation of that portion of a clearing member's security deposit that is related to the risk of its CDS position would be scaled upward by a factor of three.

25 17 CFR 30.7.

26 7 U.S.C. 6d.

regulation would apply to the purchasing, selling, and holding of CDS positions. This regulation would require that customer positions and property be separately accounted for and segregated from the positions and property of the futures commission merchant. Customer property will be deposited under an account name that clearly identifies it as such and shows it is appropriately segregated as required by the CEA and Regulation 1.20, et seq.

In addition, customer margin requirements for a broker-dealer are generally set by the broker-dealer's self-regulatory organizations (e.g., the Financial Industry Regulatory Authority, commonly referred to as "FINRA"). One purpose for customer margin requirements is to assure that broker-dealers collect sufficient margin from customers to protect the broker-dealer against the event that an adverse price move causes a customer default, leaving the broker-dealer with the responsibility for the transaction. FINRA intends to amend its customer margin rule to include margin requirements for Cleared CDS.[27]

B. Temporary Conditional Exemption from Clearing Agency Registration Requirement

Section 17A of the Exchange Act sets forth the framework for the regulation and operation of the U.S. clearance and settlement system, including CCPs. Specifically, Section 17A directs the Commission to use its authority to promote enumerated Congressional objectives and to facilitate the development of a national clearance and settlement system for securities transactions. Absent an exemption, a CCP that novates trades of non-excluded CDS that are securities and generates money and settlement obligations for participants is required to register with the Commission as a clearing agency.

Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons,

---

27 See SR-FINRA-2009-012, available at http://www.finra.org/Industry/Regulation/RuleFilings/2009/P118121.

securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[28]

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 14, 2009 to CME from Section 17A of the Exchange Act, solely to perform the functions of a clearing agency for Cleared CDS,[29] subject to the conditions discussed below.

Our action today balances the aim of facilitating the prompt establishment of CME as a CCP for non-excluded CDS transactions – which should help reduce systemic risks during a period of extreme turmoil in the U.S. and global financial markets – with ensuring that important elements of Commission oversight are applied to the non-excluded CDS market. In doing so, we are mindful that applying the full scope of the Exchange Act to transactions involving non-excluded CDS could deter the prompt establishment of CME as a CCP to settle those transactions.

---

28 15 U.S.C. 78mm.

29 For purposes of this exemption, and the other exemptions addressed in this Order, "Cleared CDS" means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to CME, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which: (1) the reference entity, the issuer of the reference security, or the reference security is one of the following: (i) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available; (ii) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States; (iii) a foreign sovereign debt security; (iv) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or (v) an asset-backed security issued or guaranteed by the Fannie Mae, the Freddie Mac, or the Government National Mortgage Association ("Ginnie Mae"); or (2) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (1). As discussed above, the Commission's action today does not affect CDS that are swap agreements under Section 206A of the Gramm-Leach-Bliley Act. See text at note 10, supra.

While we are acting so that the prompt establishment of CME as a CCP for non-excluded CDS will not be delayed by the need to apply the full scope of Exchange Act Section 17A's requirements that govern clearing agencies, the relief we are providing is temporary and conditional. The limited duration of the exemptions will permit the Commission to gain more direct experience with the non-excluded CDS market after CME becomes operational, giving the Commission the ability to oversee the development of the centrally cleared non-excluded CDS market as it evolves. During the exemptive period, the Commission will closely monitor the impact of the CCPs on the CDS market. In particular, the Commission will seek to assure itself that the CCPs do not act in anticompetitive manner or indirectly facilitate anticompetitive behavior with respect to fees charged to members, the dissemination of market data and the access to clearing services by independent CDS exchanges or CDS trading platforms. The Commission will take that experience into account in future actions.

Moreover, this temporary exemption in part is based on CME's representation that it meets the standards set forth in the Committee on Payment and Settlement Systems ("CPSS") and International Organization of Securities Commissions ("IOSCO") report entitled: Recommendation for Central Counterparties ("RCCP").[30] The RCCP establishes a framework that requires a CCP to have: (i) the ability to facilitate the prompt and accurate clearance and settlement of CDS transactions and to safeguard its users' assets; and (ii) sound risk management, including the ability to appropriately determine and collect clearing fund and

---

[30] The RCCP was drafted by a joint task force ("Task Force") composed of representative members of IOSCO and CPSS and published in November 2004. The Task Force consisted of securities regulators and central bankers from 19 countries and the European Union. The U.S. representatives on the Task Force included staff from the Commission, the FRB, and the CFTC.

monitor its users' trading. This framework is generally consistent with the requirements of Section 17A of the Exchange Act.

In addition, this Order is designed to assure that – as CME and Citadel have represented – information will be available to market participants about the terms of the CDS cleared by CME, the creditworthiness of CME or any guarantor, and the clearing and settlement process for the CDS. Moreover, to be within the definition of Cleared CDS for purposes of this exemption (as well as the other exemptions granted through this Order), a CDS may only involve a reference entity, a reference security, an issuer of a reference security, or a reference index that satisfies certain conditions relating to the availability of information about such persons or securities. For non-excluded CDS that are index-based, the definition provides that at least 80 percent of the weighting of the index must be comprised of reference entities, issuers of a reference security, or reference securities that satisfy the information conditions. The definition does not prescribe the type of financial information that must be available nor the location of the particular information, recognizing that eligible contract participants have access to information about reference entities and reference securities through multiple sources. The Commission believes, however, that it is important in the CDS market, as in the market for securities generally, that parties to transactions should have access to financial information that would allow them to appropriately evaluate the risks relating to a particular investment and make more informed investment decisions.[31] Such information availability also will assist CME and the buyers and sellers in valuing their Cleared CDS and their counterparty exposures. As a result of the Commission's actions today, the

---

[31] The Commission notes the recommendations of the President's Working Group on Financial Markets regarding the informational needs and due diligence responsibilities of investors. See Policy Statement on Financial Market Developments, The President's Working Group on Financial Markets, March 13, 2008, available at http://www.treas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf.

Commission believes that information should be available for market participants to be able to make informed investment decisions, and value and evaluate their Cleared CDS and their counterparty exposures.

This temporary exemption is subject to a number of conditions that are designed to enable Commission staff to monitor CME's clearance and settlement of CDS transactions and help reduce risk in the CDS market. These conditions require that CME: (i) make available on its Web site its annual audited financial statements; (ii) preserve records of all activities related to the business of CME as a CCP for Cleared CDS for at least five years (in an easily accessible place for the first two years); (iii) supply information relating to its Cleared CDS clearance and settlement services[32] to the Commission and provide access to the Commission to conduct on-site inspections of facilities and records related to its Cleared CDS clearance and settlement services and will provide the Commission access to its personnel to answer reasonable questions during any such inspections;[33] (iv) notify the Commission about material disciplinary actions taken against CME clearing members with respect to Cleared CDS clearance and settlement services, and about the involuntary termination of the membership of an entity using those services; (v) notify the Commission of all changes to rules as defined under the CFTC rules, fees, and any other material events affecting its Cleared CDS clearance and settlement services; (vi) provide the Commission with reports prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation

---

[32] Clearance and settlement services would include services in association with CME's CMDX migration facility, as well as activities associated with margin services.

[33] The Commission will conduct routine examinations no more often than annually, although it may inspect more frequently for cause. Moreover, the Commission will limit the scope of such inspections to confirming compliance with the requirements set forth in this Order, including compliance with the securities laws applicable to CME's Cleared CDS business and operations. The Commission will make reasonable efforts to coordinate any inspections with the CFTC or other regulatory bodies with jurisdiction in order to conduct joint inspections where possible.

Review Policy Statements[34] and its annual audited financial statements prepared by independent audit personnel; (vii) report all significant systems outages to the Commission; and (viii) not materially change its methodology for determining Cleared CDS margin levels without prior written approval from the Commission, and from FINRA with respect to customer margin requirements that would apply to broker-dealers.

In addition, this relief is conditioned on CME, directly or indirectly, making available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that CME may establish to calculate mark-to-market margin requirements for CME participants; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by CME. The Commission believes this is an appropriate condition for CME's exemption from registration as a clearing agency. In Section 11A of the Exchange Act, Congress found that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."[35] The President's Working Group on Financial Markets has stated that increased transparency is a policy objective for the over-the-counter derivatives market,[36] which includes the market for CDS. The condition is designed to further this policy objective of both Congress and the President's Working Group by requiring

---

34 See Automated Systems of Self-Regulatory Organization, Exchange Act Release No. 27445 (November 16, 1989), File No. S7-29-89, and Automated Systems of Self-Regulatory Organization (II), Exchange Act Release No. 29185 (May 9, 1991), File No. S7-12-91.

35 15 U.S.C. 78k-1(a)(1)(C)(iii). See also 15 U.S.C. 78k-1(a)(1)(D).

36 See President's Working Group on Financial Markets, Policy Objectives for the OTC Derivatives Market (November 14, 2008), available at http://www.ustreas.gov/press/releases/reports/policyobjectives.pdf ("Public reporting of prices, trading volumes and aggregate open interest should be required to increase market transparency for participants and the public.").

CME to make useful pricing data available to the public on terms that are fair and reasonable and not unreasonably discriminatory. Congress adopted these standards for the distribution of data in Section 11A. The Commission long has applied the standards in the specific context of securities market data, and it anticipates that CME will distribute its data on terms that generally are consistent with the application of these standards to securities market data. For example, data distributors generally are required to treat subscribers equally and not grant special access, fees, or other privileges to favored customers of the distributor. Similarly, distributors must make their data feeds reasonably available to data vendors for those subscribers who wish to receive their data indirectly through a vendor rather than directly from the distributor. In addition, a distributor's attempt to tie data products that must be made available to the public with other products or services of the distributor would be inconsistent with the statutory requirements. The Commission carefully evaluates any type of discrimination with respect to subscribers and vendors to assess whether there is a reasonable basis for the discrimination given, among other things, the Exchange Act objective of promoting price transparency. Moreover, preventing unreasonable discrimination is a practical means to promote fair and reasonable terms for data distribution because distributors are more likely to act appropriately when the terms applicable to the broader public also must apply to any favored classes of customers.

As a CCP, CME will collect and process information about CDS transactions and positions from all of its participants. With this information, a CCP will, among other things, calculate and disseminate current values for open positions for the purpose of setting appropriate margin levels. The availability of such information can improve fairness, efficiency, and competitiveness of the market – all of which enhance investor protection and facilitate capital formation. Moreover, with pricing and valuation information relating to Cleared CDS, market participants would be able to derive information about underlying securities and indexes. This may improve the efficiency and effectiveness of the securities markets by allowing investors to better understand credit conditions generally.

C. Temporary General Exemption for CME and Certain Eligible Contract Participants

Applying the full panoply of Exchange Act requirements to participants in transactions in non-excluded CDS likely would deter some participants from using CCPs to clear CDS transactions. At the same time, it is important that the antifraud provisions of the Exchange Act apply to transactions in non-excluded CDS; indeed, OTC transactions subject to individual negotiation that qualify as security-based swap agreements already are subject to these antifraud provisions.[37]

We thus believe that it is appropriate in the public interest and consistent with the protection of investors temporarily to apply substantially the same framework to transactions by market participants in non-excluded CDS that applies to transactions in security-based swap agreements. Applying substantially the same set of requirements to participants in transactions

---

[37] While Section 3A of the Exchange Act excludes "swap agreements" from the definition of "security," certain antifraud and insider trading provisions under the Exchange Act explicitly apply to security-based swap agreements. See (a) paragraphs (2) through (5) of Section 9(a), 15 U.S.C. 78i(a), prohibiting the manipulation of security prices; (b) Section 10(b), 15 U.S.C. 78j(b), and underlying rules prohibiting fraud, manipulation or insider trading (but not prophylactic reporting or recordkeeping requirements); (c) Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices; (d) Sections 16(a) and (b), 15 U.S.C. 78p(a) and (b), which address disclosure by directors, officers and principal stockholders, and short-swing trading by those persons, and rules with respect to reporting requirements under Section 16(a); (e) Section 20(d), 15 U.S.C. 78t(d), providing for antifraud liability in connection with certain derivative transactions; and (f) Section 21A(a)(1), 15 U.S.C. 78u-1(a)(1), related to the Commission's authority to impose civil penalties for insider trading violations.

"Security-based swap agreement" is defined in Section 206B of the Gramm-Leach-Bliley Act as a swap agreement in which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or any interest therein.

in non-excluded CDS as apply to participants in OTC CDS transactions will avoid deterring market participants from promptly using CCPs, which would detract from the potential benefits of central clearing.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 14, 2009 from certain requirements under the Exchange Act. This temporary exemption applies to CME and to certain eligible contract participants[38] other than: eligible contract participants that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons;[39] eligible contract participants that are self-regulatory organizations; or eligible contract participants that are registered brokers or dealers).[40]

---

38 This exemption in general applies to eligible contract participants, as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order, other than persons that are eligible contract participants under paragraph (C) of that section.

39 Solely for purposes of this requirement, an eligible contract participant would not be viewed as receiving or holding funds or securities for purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons, if the other persons involved in the transaction would not be considered "customers" of the eligible contract participant in a parallel manner when certain persons would not be considered "customers" of a broker-dealer under Exchange Act Rule 15c3-3(a)(1). For these purposes, and for the purpose of the definition of "Cleared CDS," the terms "purchasing" and "selling" mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing the rights or obligations under, a Cleared CDS, as the context may require. This is consistent with the meaning of the terms "purchase" or "sale" under the Exchange Act in the context of security-based swap agreements. See Exchange Act Section 3A(b)(4).

A separate temporary conditional exemption addresses members of CME that hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons. See Part II.D, infra.

40 A separate temporary exemption addresses the Cleared CDS activities of registered-broker-dealers. See Part II.E, infra. Solely for purposes of this Order, a registered broker-dealer, or a broker or dealer registered under Section 15(b) of the Exchange Act, does not refer to someone that would otherwise be required to register as a broker or dealer solely as a result of activities in Cleared CDS in compliance with this Order.

Under this temporary exemption, and solely with respect to Cleared CDS, these persons generally are exempt from provisions of the Exchange Act and the rules and regulations thereunder that do not apply to security-based swap agreements. Those persons thus would still be subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements.[41] In addition, all provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions would remain applicable.[42] In this way, the temporary exemption would apply the same Exchange Act requirements in connection with non-excluded CDS as apply in connection with OTC credit default swaps.

This temporary exemption, however, does not extend to Sections 5 and 6 of the Exchange Act. The Commission separately issued a conditional exemption from these provisions to all broker-dealers and exchanges.[43] This temporary exemption also does not extend to Section 17A of the Exchange Act; instead, CME is exempt from registration as a clearing agency under the conditions discussed above. In addition, this exemption does not apply to Exchange Act Sections 12, 13, 14, 15(d), and 16;[44] eligible contract participants and other persons instead should refer to the interim final temporary rules issued by the Commission. Finally, this

---

41 See note 37, supra.

42 Thus, for example, the Commission retains the ability to investigate potential violations and bring enforcement actions in the federal courts and administrative proceedings, and to seek the full panoply of remedies available in such cases.

43 See note 17, supra. A national securities exchange that effects transactions in Cleared CDS would continue to be required to comply with all requirements under the Exchange Act applicable to such transactions. A national securities exchange could form subsidiaries or affiliates that operate exchanges exempt under that order. Any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link, the exempt CDS exchange with the registered exchange including the premises or property of such exchange for effecting or reporting a transaction without being considered a "facility of the exchange." See Section 3(a)(2), 15 U.S.C. 78c(a)(2).

44 15 U.S.C. 78l, 78m, 78n, 78o(d), 78p.

temporary exemption does not extend to the Commission's administrative proceeding authority under Sections 15(b)(4) and (b)(6),[45] or to certain provisions related to government securities.[46]

D. Conditional Temporary General Exemption for Certain Clearing Members of CME

Absent an exception, persons that effect transactions in non-excluded CDS that are securities may be required to register as broker-dealers pursuant to Section 15(a)(1) of the Exchange Act.[47] Moreover, certain reporting and other requirements of the Exchange Act could apply to such persons, as broker-dealers, regardless of whether they are registered with the Commission.

---

45 Exchange Act Sections 15(b)(4) and 15(b)(6), 15 U.S.C. 78o(b)(4) and (b)(6), grant the Commission authority to take action against broker-dealers and associated persons in certain situations. Accordingly, while this exemption generally extends to persons that act as inter-dealer brokers in the market for Cleared CDS and do not hold funds or securities for others, such inter-dealer brokers may be subject to actions under Sections 15(b)(4) and (b)(6) of the Exchange Act.

In addition, such inter-dealer brokers may be subject to actions under Exchange Act Section 15(c)(1), 15 U.S.C. 78o(c)(1), which prohibits brokers and dealers from using manipulative or deceptive devices. As noted above, Section 15(c)(1) explicitly applies to security-based swap agreements. Sections 15(b)(4), 15(b)(6) and 15(c)(1), of course, would not apply to persons subject to this exemption who do not act as broker-dealers or associated persons of broker-dealers.

46 This exemption specifically does not extend to the Exchange Act provisions applicable to government securities, as set forth in Section 15C, 15 U.S.C. 78o-5, and its underlying rules and regulations; nor does the exemption extend to related definitions found at paragraphs (42) through (45) of Section 3(a), 15 U.S.C. 78c(a). The Commission does not have authority under Section 36 to issue exemptions in connection with those provisions. See Exchange Act Section 36(b), 15 U.S.C. 78mm(b).

47 15 U.S.C. 78o(a)(1). This section generally provides that, absent an exception or exemption, a broker or dealer that uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security must register with the Commission.

Section 3(a)(4) of the Exchange Act generally defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," but provides 11 exceptions for certain bank securities activities. 15 U.S.C. 78c(a)(4). Section 3(a)(5) of the Exchange Act generally defines a "dealer" as "any person engaged in the business of buying and selling securities for his own account," but includes exceptions for certain bank activities. 15 U.S.C. 78c(a)(5). Exchange Act Section 3(a)(6) defines a "bank" as a bank or savings association that is directly supervised and examined by state or federal banking authorities (with certain additional requirements for banks and savings associations that are not chartered by a federal authority or a member of the Federal Reserve System). 15 U.S.C. 78c(a)(6).

It is consistent with our investor protection mandate to require that intermediaries in securities transactions that receive or hold funds and securities on behalf of others comply with standards that safeguard the interests of their customers. For example, registered broker-dealers are required to segregate assets held on behalf of customers from proprietary assets, because segregation will assist customers in recovering assets in the event the intermediary fails. To the extent that funds and securities are not segregated, they could be used by a participant to fund its own business and could be attached to satisfy debts of the participant were the participant to fail. Moreover, the maintenance of adequate capital and liquidity protects customers, CCPs and other market participants. Adequate books and records (including both transactional and position records) are necessary to facilitate day to day operations as well as to help resolve situations in which a participant fails and either a regulatory authority or receiver is forced to liquidate the firm. Appropriate records also are necessary to allow examiners to review for improper activities, such as insider trading or fraud.

At the same time, requiring intermediaries that receive or hold funds and securities on behalf of customers in connection with transactions in non-excluded CDS to register as broker-dealers may deter the use of CCPs in CDS transactions, to the detriment of the markets and market participants generally. Also, as noted above with regard to other eligible contract participants to non-excluded CDS transactions, immediately applying the panoply of Exchange Act requirements to centrally cleared transactions may deter the use of CCPs for CDS transactions.

Those factors argue in favor of flexibility in applying the requirements of the Exchange Act to these intermediaries. Along with those factors, in granting an exemption here we are particularly relying on the representation of CME that CME's rules alone or in combination with laws and regulations applicable to CME and its clearing members require that any CME clearing member that purchases, sells, or holds CDS positions for other persons, solely as they relate to CDS: (1) must be registered with the CFTC as a futures commission merchant; (2) effectively segregates funds and securities of other persons (except positions held in proprietary accounts of the clearing member, which may include, for example, positions of employees or affiliates of the clearing member) that it holds in its custody or control for the purpose of purchasing, selling, or holding CDS positions; (3) maintains adequate capital and liquidity; and (4) maintains sufficient books and records to establish (a) that the CME clearing member is maintaining adequate capital and liquidity, and (b) separate ownership of the funds, securities, and positions it may hold for the purpose of purchasing, selling, or holding CDS positions for other persons and those it holds for its proprietary accounts.

Accordingly, pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant a conditional exemption until December 14, 2009 from certain Exchange Act requirements. In general, we are providing a temporary exemption, subject to the conditions discussed below, to any CME clearing member registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act ("FCM") (but that is not registered as a broker-dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS positions for other persons. Solely with respect to Cleared CDS, those members generally will be exempt from those provisions of the Exchange Act and the underlying rules and regulations that do not apply to security-based swap agreements.

As with the exemption discussed above that is applicable to CME and certain eligible contract participants, and for the same reasons, this exemption for CME clearing members that receive or hold funds and securities does not extend to Exchange Act provisions that explicitly apply in connection with security-based swap agreements,[48] or to related enforcement authority provisions.[49] As with the exemption discussed above, we also are not exempting those members from Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.[50]

This temporary exemption is subject to the member complying with conditions that are important for protecting customer funds and securities. Particularly, the member must be in material compliance with the rules of CME, and applicable laws and regulations, relating to capital, liquidity, and segregation of customers'[51] funds and securities (and related books and records provisions) with respect to non-excluded CDS.[52] Also, to the extent that the member receives or holds funds or securities of U.S. eligible contract participants for the purpose of purchasing, selling, clearing, settling or holding non-excluded CDS positions for those persons, this exemption is predicated on the member satisfying the following condition: the member must segregate such funds and securities of U.S. customers from the member's own assets (i.e., the member may not permit U.S. customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the person to "opt out").

---

48 See note 37, supra.

49 See note 42, supra.

50 Nor are we exempting those members from provisions related to government securities, as discussed above.

51 The term "customer," solely for purposes of Part III(c) and (d), infra, and corresponding references in this Order, means a "customer" as defined under CFTC Regulation 1.3(k). 17 CFR 1.3(k).

52 A member would not be "in material compliance" if it failed in any way to segregate customer funds and securities consistent with these rules, laws and regulations. In that circumstance, the member could not rely on this exemption.

E. Temporary General Exemption for Certain Registered Broker-Dealers including Certain Broker-Dealer-FCMs

The temporary exemptions addressed above – with regard (i) to CME and certain eligible contract participants and (ii) to certain CME clearing members that receive or hold funds and securities of others – are not available to persons that are registered as broker-dealers with the Commission (other than those that are notice registered pursuant to Section 15(b)(11)).[53] The Exchange Act and its underlying rules and regulations require broker-dealers to comply with a number of obligations that are important to protecting investors and promoting market integrity. We are mindful of the need to avoid creating disincentives to the prompt use of CCPs, and we recognize that the factors discussed above suggest that the full panoply of Exchange Act requirements should not immediately be applied to registered broker-dealers that engage in transactions involving Cleared CDS. At the same time, we also are sensitive to the critical importance of certain broker-dealer requirements to promoting market integrity and protecting customers (including those broker-dealer customers that are not involved with CDS transactions).

This calls for balancing the facilitation of the development and prompt implementation of CCPs with the preservation of certain key investor protections. Pursuant to Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest and is consistent with the protection of investors to exercise its authority to grant an exemption until December 14, 2009 from certain Exchange Act requirements. Consistent with the temporary exemptions discussed above, and solely with respect to Cleared CDS, we are exempting registered broker-dealers (including registered broker-dealers that are also FCMs ("BD-FCMs"))

[53] Exchange Act Section 15(b)(11) provides for notice registration of certain persons that effect transactions in security futures products. 15 U.S.C. 78o(b)(11).

in general from provisions of the Exchange Act and its underlying rules and regulations that do not apply to security-based swap agreements. As above, we are not excluding registered broker-dealers, including BD-FCMs, from Exchange Act provisions that explicitly apply in connection with security-based swap agreements or from related enforcement authority provisions.[54] As above, and for similar reasons, we are not exempting registered broker-dealers, including BD-FCMs, from: Sections 5, 6, 12(a) and (g), 13, 14, 15(b)(4), 15(b)(6), 15(d), 16 and 17A of the Exchange Act.[55]

Further we are not exempting registered broker-dealers from the following additional provisions under the Exchange Act: (1) Section 7(c),[56] which addresses the unlawful extension of credit by broker-dealers; (2) Section 15(c)(3),[57] which addresses the use of unlawful or manipulative devices by broker-dealers; (3) Section 17(a),[58] regarding broker-dealer obligations to make, keep and furnish information; (4) Section 17(b),[59] regarding broker-dealer records subject to examination; (5) Regulation T,[60] a Federal Reserve Board regulation regarding extension of credit by broker-dealers; (6) Exchange Act Rule 15c3-1, regarding broker-dealer net

---

[54] See notes 37 and 42, supra. As noted above, broker-dealers also would be subject to Section 15(c)(1) of the Exchange Act, which prohibits brokers and dealers from using manipulative or deceptive devices, because that provision explicitly applies in connection with security-based swap agreements. In addition, to the extent the Exchange Act and any rule or regulation thereunder imposes any other requirement on a broker-dealer with respect to security-based swap agreements (e.g., requirements under Rule 17h-1T to maintain and preserve written policies, procedures, or systems concerning the broker or dealer's trading positions and risks, such as policies relating to restrictions or limitations on trading financial instruments or products), these requirements would continue to apply to broker-dealers' activities with respect to Cleared CDS.

[55] We also are not exempting those members from provisions related to government securities, as discussed above.

[56] 15 U.S.C. 78g(c).

[57] 15 U.S.C. 78o(c)(3).

[58] 15 U.S.C. 78q(a).

[59] 15 U.S.C. 78q(b).

[60] 12 CFR 220.1 et seq.

capital; (7) Exchange Act Rule 15c3-3, regarding broker-dealer reserves and custody of securities; (8) Exchange Act Rules 17a-3 through 17a-5, regarding records to be made and preserved by broker-dealers and reports to be made by broker-dealers; and (9) Exchange Act Rule 17a-13, regarding quarterly security counts to be made by certain exchange members and broker-dealers.[61] Registered broker-dealers should comply with these provisions in connection with their activities involving non-excluded CDS because these provisions are especially important to helping protect customer funds and securities, ensure proper credit practices and safeguard against fraud and abuse.[62]

However, CME clearing members that are BD-FCMs that holds customer funds and securities for the purpose of purchasing, selling, clearing, settling or holding CDS positions cleared by CME in a futures account (as that term is defined in Rule 15c3-3(a)(15) [17 CFR 240.15c3-3(a)(15)]) also shall be exempt from Exchange Act Rule 15c3-3, subject to the following conditions: (1) the CME clearing member shall be in material compliance with the rules of CME, and applicable laws and regulations, relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS;[63] (2) the CME clearing member shall segregate such funds and securities of U.S. customers from the CME clearing member's own assets (*i.e.*, the member may not permit U.S. customers to "opt out" of applicable segregation requirements for such funds and securities even

---

61 Solely for purposes of this exemption, in addition to the general requirements under the referenced Exchange Act sections, registered broker-dealers shall only be subject to the enumerated rules under the referenced Exchange Act sections. Broker-dealers will, however, continue to be subject to applicable rules of self-regulatory organizations of which they are a member, including applicable margin rules.

62 Indeed, Congress directed the Commission to promulgate broker-dealer financial responsibility rules, including rules regarding custody, the use of customer securities and the use of customers' deposits or credit balances, and regarding establishment of minimum financial requirements.

63 See note 52, supra.

if regulations or laws would permit the customer to "opt out"); and (3) the CME clearing member shall comply with the margin rules for Cleared CDS of the self-regulatory organization that is its designated examining authority[64] (e.g., FINRA).

F. Solicitation of Comments

The Commission intends to monitor closely the development of the CDS market and intends to determine to what extent, if any, additional regulatory action may be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated. Moreover, because these exemptions are temporary, the Commission will in the future consider whether they should be extended or allowed to expire. The Commission believes it would be prudent to solicit public comment on its action today, and on what action it should take with respect to the CDS market in the future. The Commission is soliciting public comment on all aspects of these exemptions, including:

1. Whether the length of this temporary exemption (until December 14, 2009) is appropriate. If not, what should the appropriate duration be?
2. Whether the conditions to these exemptions are appropriate. Why or why not? Should other conditions apply? Are any of the present conditions to the exemptions provided in this Order unnecessary? If so, please specify and explain why such conditions are not needed.
3. Whether CME ultimately should be required to register as a clearing agency under the Exchange Act. Why or why not?
4. Whether CME members that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling or holding non-excluded CDS positions for

64 See 17 CFR 240.17d-1 for a description of a designated examining authority.

other persons ultimately should be required to register as broker-dealers? Why or why not?

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-06-09 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 S7-06-09. 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. We will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 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.

III. Conclusion

IT IS HEREBY ORDERED, pursuant to Section 36(a) of the Exchange Act, that, until December 14, 2009:

(a) Exemption from Section 17A of the Exchange Act.

The Chicago Mercantile Exchange Inc. ("CME") shall be exempt from Section 17A of the Exchange Act solely to perform the functions of a clearing agency for Cleared CDS (as defined in paragraph (e) of this Order), subject to the following conditions:

(1) CME shall make available on its Web site its annual audited financial statements.

(2) CME shall keep and preserve records of all activities related to the business of CME as a central counterparty for Cleared CDS. These records shall be kept for at least five years and for the first two years shall be held in an easily accessible place.

(3) CME shall supply such information and periodic reports relating to its Cleared CDS clearance and settlement services as may be reasonably requested by the Commission. CME shall also provide access to the Commission to conduct on-site inspections of all facilities (including automated systems and systems environment), and records related to its Cleared CDS clearance and settlement services. CME will provide the Commission with access to its personnel to answer reasonable questions during any such inspections related to its Cleared CDS clearance and settlement services.

(4) CME shall notify the Commission, on a monthly basis, of any material disciplinary actions taken against any CME clearing members utilizing its Cleared CDS clearance and settlement services, including the denial of services, fines, or penalties. CME shall notify the Commission promptly when CME involuntarily terminates the

membership of an entity that is utilizing CME's Cleared CDS clearance and settlement services. Both notifications shall describe the facts and circumstances that led to CME's disciplinary action.

(5) CME shall notify the Commission of all changes to rules as defined under the CFTC rules, fees, and any other material events affecting its Cleared CDS clearance and settlement services, including material changes to risk management models. In addition, CME will post any rule or fee changes on the CME Web site. CME shall provide the Commission with notice of all changes to its rules not less than one day prior to effectiveness or implementation of such rule changes or, in exigent circumstances, as promptly as reasonably practicable under the circumstances. Such notifications will not be deemed rule filings that require Commission approval.

(6) CME shall provide the Commission with annual reports and any associated field work concerning its Cleared CDS clearance and settlement services prepared by independent audit personnel that are generated in accordance with risk assessment of the areas set forth in the Commission's Automation Review Policy Statements. CME shall provide the Commission (beginning in its first year of operation) with its annual audited financial statements prepared by independent audit personnel for CME.

(7) CME shall report to the Commission all significant outages of clearing systems having a material impact on its Cleared CDS clearance and settlement services. If it appears that the outage may extend for 30 minutes or longer, CME shall report the systems outage immediately. If it appears that the outage will be resolved in less than 30 minutes, CME shall report the systems outage within a reasonable time after the outage has been resolved.

(8) CME, directly or indirectly, shall make available to the public on terms that are fair and reasonable and not unreasonably discriminatory: (i) all end-of-day settlement prices and any other prices with respect to Cleared CDS that CME may establish to calculate mark-to-market margin requirements for CME clearing members; and (ii) any other pricing or valuation information with respect to Cleared CDS as is published or distributed by CME.

(9) CME shall not materially change its methodology for determining Cleared CDS margin levels without prior written approval from the Commission, and from FINRA with respect to customer margin requirements that would apply to broker-dealers.

(b) Exemption for CME and certain eligible contract participants.

(1) Persons eligible. The exemption in paragraph (b)(2) is available to:

(i) CME; and

(ii) Any eligible contract participant (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), other than: (A) an eligible contract participant that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions for other persons; (B) an eligible contract participant that is a self-regulatory organization, as that term is defined in Section 3(a)(26) of the Exchange Act; or (C) a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof).

(2) Scope of exemption.

(i) In general. Such persons generally shall, solely with respect to Cleared CDS, be exempt from the provisions of the Exchange Act and the rules and regulations thereunder that do not apply in connection with security-based swap agreements. Accordingly, under this exemption, those persons would remain subject to those Exchange Act requirements that explicitly are applicable in connection with security-based swap agreements (i.e., paragraphs (2) through (5) of Section 9(a), Section 10(b), Section 15(c)(1), paragraphs (a) and (b) of Section 16, Section 20(d) and Section 21A(a)(1) and the rules thereunder that explicitly are applicable to security-based swap agreements). All provisions of the Exchange Act related to the Commission's enforcement authority in connection with violations or potential violations of such provisions also remain applicable.

(ii) Exclusions from exemption. The exemption in paragraph (b)(2)(i), however, does not extend to the following provisions under the Exchange Act:

(A) Paragraphs (42), (43), (44), and (45) of Section 3(a);

(B) Section 5;

(C) Section 6;

(D) Section 12 and the rules and regulations thereunder;

(E) Section 13 and the rules and regulations thereunder;

(F) Section 14 and the rules and regulations thereunder;

(G) Paragraphs (4) and (6) of Section 15(b);

(H) Section 15(d) and the rules and regulations thereunder;

(I) Section 15C and the rules and regulations thereunder;

(J) Section 16 and the rules and regulations thereunder; and

(K) Section 17A (other than as provided in paragraph (a)).

(c) Exemption for certain CME clearing members.

Any CME clearing member registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act (but that is not registered as a broker or dealer under Section 15(b) of the Exchange Act (other than paragraph (11) thereof)) that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS for other persons shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (b)(2), solely with respect to Cleared CDS, subject to the following conditions:

(1) The CME clearing member shall be in material compliance with the rules of CME, and applicable laws and regulations, relating to capital, liquidity, and segregation of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS; and

(2) To the extent that the CME clearing member receives or holds funds or securities of U.S. customers for the purpose of purchasing, selling, clearing, settling, or holding Cleared CDS positions, the CME clearing member shall segregate such funds and securities of U.S. customers from the CME clearing member's own assets (i.e., the member may not permit U.S. customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out").

(d) Exemption for certain registered broker-dealers.

A broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) shall be exempt from the provisions of the Exchange Act and the rules and regulations thereunder specified in paragraph (b)(2), solely with respect to Cleared CDS, except:

(1) Section 7(c);

(2) Section 15(c)(3);

(3) Section 17(a);

(4) Section 17(b);

(5) Regulation T, 12 CFR 200.1 et seq.;

(6) Rule 15c3-1;

(7) Rule 15c3-3;

(8) Rule 17a-3;

(9) Rule 17a-4;

(10) Rule 17a-5; and

(11) Rule 17a-13;

provided, that a CME clearing member that is a broker or dealer registered under Section 15(b) of the Exchange Act (other than paragraph (11) thereof) and that is also registered as a futures commission merchant pursuant to Section 4f(a)(1) of the Commodity Exchange Act and that holds customer funds and securities for the purpose of purchasing, selling, clearing, settling or holding Cleared CDS in a futures account (as that term is defined in Rule 15c3-3(a)(15) [17 CFR 240.15c3-3(a)(15)]) also shall be exempt from Exchange Act Rule 15c3-3, subject to the following conditions:

(1) The CME clearing member shall be in material compliance with the rules of CME, and applicable laws and regulations, relating to capital, liquidity, and segregation

of customers' funds and securities (and related books and records provisions) with respect to Cleared CDS;

(2) The CME clearing member shall segregate such funds and securities of U.S. customers from the CME clearing member's own assets (i.e., the member may not permit U.S. customers to "opt out" of applicable segregation requirements for such funds and securities even if regulations or laws would permit the customer to "opt out"); and

(3) The CME clearing member shall collect from each customer the amount of margin that is not less than the amount required for Cleared CDS under the margin rule of the self-regulatory organization that is its designated examining authority.

(e) For purposes of this Order, "Cleared CDS" shall mean a credit default swap that is submitted (or offered, purchased or sold on terms providing for submission) to CME, that is offered only to, purchased only by, and sold only to eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this Order (other than a person that is an eligible contract participant under paragraph (C) of that section)), and in which:

(1) the reference entity, the issuer of the reference security, or the reference security is one of the following:

(i) an entity reporting under the Exchange Act, providing Securities Act Rule 144A(d)(4) information, or about which financial information is otherwise publicly available;

(ii) a foreign private issuer whose securities are listed outside the United States and that has its principal trading market outside the United States;

(iii) a foreign sovereign debt security;

(iv) an asset-backed security, as defined in Regulation AB, issued in a registered transaction with publicly available distribution reports; or

(v) an asset-backed security issued or guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae; or

(2) the reference index is an index in which 80 percent or more of the index's weighting is comprised of the entities or securities described in subparagraph (1).

By the Commission.

Florence E. Harmon

Florence E. Harmon
Deputy Secretary

Commissioner Casey and Commissioner Aguilar not participating

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59577 / March 13, 2009

Admin. Proc. File No. 3-13128

In the Matter of

RICHARD B. FEINBERG

c/o Peter J. Mooney, Esq.
White and Williams LLP
1800 One Liberty Place
Philadelphia, PA 19103-7395

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE – REVIEW OF EXCHANGE ACTION

National securities exchange member suspended for failure to pay $464,418.51 in legal fees and expenses incurred by the exchange in connection with a lawsuit filed by the member. Held, exchange's findings of fees, expenses and sanctions are set aside.

APPEARANCES:

Peter J. Mooney, Esq., White and Williams LLP, for Richard B. Feinberg.

Stephen J. Kastenberg, Esq., Ballard Spahr Andrews & Ingersoll, LLP, for the Philadelphia Stock Exchange.

Appeal filed: August 12, 2008
Last brief received: November 26, 2008

I.

Richard B. Feinberg, a member and former stockholder of the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange"), appeals a ruling by the Special Committee to Review Delinquencies and Payments of the Board of Governors of the PHLX ("Special Committee") that Feinberg pay fees and expenses of $464,418.51 incurred by the PHLX in connection with a lawsuit Feinberg filed against a governor on the PHLX Board of Governors. The Special Committee also ruled that it would suspend Feinberg's membership if he did not pay the fees and expenses within ten business days of the Special Committee's decision. This appeal followed. We base our findings on an independent review of the record.

II.

A. Feinberg's Sale of PHLX Stock to Benton Partners

This case arises from the PHLX's attempt to recoup fees and expenses in connection with Feinberg's unsuccessful insider trading suit against a governor on the PHLX's Board of Governors. Feinberg became a member of the PHLX in 2003 by purchasing a seat on the Exchange for approximately $18,000. In January 2004, the PHLX converted from a nonprofit mutual organization to a for-profit corporation through a process called demutualization. As a result of this process, each of the PHLX's seat-holders became shareholders, with each seat converting into 100 shares of common stock. Feinberg's seat was thus converted into 100 shares of PHLX common stock.

In the fall of 2004, Feinberg decided to sell his shares of PHLX stock. He initially offered the shares for $25,000 but was unable to attract a buyer. After lowering his price to $20,000, Feinberg sold the shares on December 1, 2004 to Benton Partners II LLP ("Benton Partners"). At the time of the sale, Benton Partners was controlled by I. Isabelle Benton, a governor on the PHLX Board of Governors and a member on the PHLX's executive, options, floor procedure and strategic alliance committees. Feinberg did not know who the buyer was, however, until after Benton Partners had accepted his offer.

Around the time Benton Partners purchased Feinberg's shares, the PHLX was in private negotiations to sell all or part of the Exchange. For example, shortly before Benton's transaction with Feinberg, the PHLX had begun negotiations with Archipelago Holdings LLC ("Archipelago"). Archipelago apparently offered the PHLX $50 million to purchase all of the PHLX's outstanding stock. While the PHLX eventually rejected this offer, the PHLX announced a partial sale of its stock in June 2005 to Citadel Derivatives Group, LLC ("Citadel") and Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"). 1/ Under the terms of this deal, Citadel and Merrill Lynch each obtained a ten-percent stake in the PHLX, with a potential option to double that stake. The record is unclear on how much Citadel or Merrill Lynch paid to obtain these stakes. Two months later, the PHLX announced another sale of its stock. In this second transaction, the PHLX sold a ten-percent stake to Morgan Stanley & Co., Inc. for $7.5 million and a five-percent stake to each of Citigroup, Credit Suisse First Boston and UBS Securities, LLC for $3.75 million. Similar to the deal announced in June, each of these investors retained an option to double its interest. At the same time it announced this second transaction, the PHLX also announced its intention to implement a share buyback offer, pursuant to which the PHLX

1/ The PHLX apparently first began negotiating with Citadel sometime in the fall of 2004.

would offer to repurchase its shares at $900 per share – a price $700 per share greater than the price at which Feinberg sold his shares to Benton Partners.

B. Insider Trading Suit

In September 2005, Feinberg sued Benton and Benton Partners for securities fraud in the U.S. District Court for the Eastern District of Pennsylvania. Feinberg alleged that Benton Partners violated Section 10(b) of the Securities Exchange Act of 1934 2/ and Rule 10b-5 3/ promulgated thereunder, and that Benton was liable as a control person of Benton Partners under Section 20(a) of the Exchange Act. 4/ Feinberg claimed that Benton Partners had failed to disclose three pieces of material nonpublic information: (i) that, in November 2004, the PHLX had begun negotiations to sell the Exchange to Archipelago, (ii) that, in the fall of 2004, the PHLX had negotiated with Citadel to sell a stake in the Exchange, and (iii) that, in 2002, Keefe Bruyette & Woods had performed a valuation of the PHLX that placed the PHLX's value at between $250 and $350 million. Feinberg alleged that, had he been aware of this information at the time of the sale, "[he] would not have sold the 100 shares of PHLX stock to anyone for $20,000." 5/

The ensuing litigation lasted approximately two and a half years, but details of what occurred at the district court level are unclear. The record before us on appeal contains only the district court docket and a sampling of various filings. These documents make clear, however, that Feinberg served a number of discovery requests on various nonparty witnesses, including the PHLX and certain affiliates. Feinberg first sought documents informally from the PHLX, and after negotiating a confidentiality order, the PHLX produced certain materials. It is not clear from the record the number of documents the PHLX produced or the content of those documents. Feinberg also issued formal discovery subpoenas to the PHLX and individuals who appear to have been PHLX officers and governors. The PHLX largely fought these subpoenas, and other than successfully conducting one deposition, Feinberg was unable to obtain much of the discovery he sought from either the PHLX or its affiliates.

The record provides little insight into the court's rationale for granting the PHLX's various motions to quash or for imposing sanctions. We can glean, however, that the district court granted one of the PHLX's motions because the time for discovery had elapsed and granted another motion because Feinberg failed to file a timely opposition to that motion. The district court twice sanctioned Feinberg in connection with his discovery requests, for a total of $5,867.

2/ 15 U.S.C. § 78j.

3/ 17 C.F.R. § 240.10b-5.

4/ 17 C.F.R. § 78t.

5/ Complaint at 8, Feinberg v. Benton, No. 05-4847 (E.D. Pa. Sept. 9, 2005).

The district court docket indicates that Feinberg was more successful in other areas of the case, including defeating both a motion to dismiss and a motion for summary judgment. The record includes the order denying Benton's motion for summary judgment, in which the court concluded that Feinberg had produced enough evidence to create "a strong inference" that Benton was aware of the PHLX's negotiations with Archipelago at the time she purchased Feinberg's stock. In support of this conclusion, the court pointed to Benton's position as governor, the timing of Benton Partner's purchase from Feinberg, and the size of profits Benton Partners made from the transaction.

Feinberg's suit was finally tried before the district court on March 4, 2008. After Feinberg presented his case in chief, the court entered a directed judgment in favor of Benton and Benton Partners. The record does not contain the basis for the court's decision.

C. PHLX-Issued Invoice

One month after the district court entered the directed judgment, the PHLX sent Feinberg an invoice for $470,285.51 in legal fees and expenses the PHLX incurred during the Benton lawsuit. Of these fees and expenses, $320,281.31 were attributable to indemnifying Benton for the costs she incurred defending herself and Benton Partners during trial 6/ and $150,823.05 were attributable to responding to Feinberg's third-party discovery requests, preparing witnesses for deposition and trial, and "generally represent[ing] PHLX's interests with respect to the litigation." The PHLX stated that it was issuing the invoice pursuant to PHLX Rule 651, which requires members to repay legal costs incurred by the PHLX in defending itself or its board members from certain suits that are "related to the business of the Exchange."

Feinberg objected to the invoice and filed a brief in opposition with the Special Committee. Feinberg argued that Rule 651 did not apply to expenses incurred responding to third-party subpoenas, that he did not name the Exchange as a party to his suit, and that his suit against Benton was not "related to the business of Exchange." The Special Committee held a hearing and, on July 17, 2008, issued an opinion rejecting Feinberg's objections. 7/ The Special Committee summarily "found that expenses incurred related to the business of the Exchange, which includes protecting the integrity of trading and ensuring that its Board members are comporting themselves in conformance with the securities laws, and the Exchange's own code of conduct." The committee gave Feinberg ten days in which to pay the amount due or to agree to a payment schedule. The Special Committee further ordered that Feinberg be suspended from the PHLX pursuant to PHLX By-Law Article XIV, Section 14-5, if he did not meet the ten-day

---

6/ The PHLX agreed to indemnify Benton at the outset of the suit and to advance the fees and costs incurred by her counsel.

7/ The Special Committee adjusted the amount owed to $464,418.51, which represents the PHLX's original invoice minus $5,867 in sanctions imposed by the district court and previously paid by Feinberg.

deadline. 8/ The record contains no evidence that Feinberg ever paid any portion of the fees. This appeal follows.

III.

A.

Before addressing the merits of Feinberg's appeal, we must first determine whether we have jurisdiction to review the PHLX's decision to impose litigation costs and to suspend Feinberg from the PHLX for nonpayment. 9/ Neither Feinberg nor the PHLX questions our jurisdiction, and our own consideration of the issue leads us to conclude that we have jurisdiction to review this matter.

According to Section 19(d) of the Exchange Act, we may review any self-regulatory organization ("SRO") action that (i) "involves a final disciplinary sanction imposed on a member" or (ii) "prohibits or limits any person in respect to access to services offered by [the SRO] . . . ." 10/ The PHLX's order suspending Feinberg for nonpayment arguably fits within either of these two prongs. Case law, however, suggests that we categorize the Special Committee's action as a final disciplinary sanction, as the Special Committee made a determination of wrongdoing (i.e., that Feinberg failed to pay the PHLX invoice pursuant to Rule 651) and imposed a sanction (i.e., ordered that Feinberg be suspended if he failed to pay). 11/

B.

To affirm a final disciplinary sanction, we must determine that (i) the member engaged in the conduct found by the SRO, (ii) the conduct violated the SRO rules at issue, and (iii) the SRO

8/ Article XIV, Section 14-5 of the PHLX By-Laws sets forth the penalties for non-payment of fees or other charges. In particular, the section allows the PHLX to suspend or terminate the permit, rights or privileges of any member for non-payment.

9/ Matthew Proman, Securities Exchange Act Rel. No. 57740 (April 30, 2008), 93 SEC Docket 5513, 5514.

10/ 15 U.S.C. § 78s(d).

11/ See Wedbush Morgan Sec., Inc., Exchange Act Rel. No. 57138 (Jan. 14, 2008), 92 SEC Docket 1306, 1310 (noting that suspending a member for failing to pay interest on an arbitration award would amount to a final disciplinary sanction for purposes of Section 19(d)(i) of the Exchange Act); see also Morgan Stanley & Co., 53 S.E.C. 379, 385 (1997) (stating that a final disciplinary action is "a sanction . . . following a determination of wrongdoing").

applied those rules in a manner consistent with the purposes of the Exchange Act. 12/ There is little dispute that Feinberg was a member of the Exchange, 13/ that Feinberg unsuccessfully brought a suit against a PHLX governor, that the PHLX issued an invoice to Feinberg for legal fees and expenses related to that suit, that the Special Committee ordered Feinberg to be suspended if he failed to pay the invoice, or that Feinberg refused to pay.

The core of the parties' disagreement is whether the PHLX's rules entitled the Exchange to recoup litigation fees and expenses from Feinberg, the nonpayment of which provided the basis for the Special Committee's order to suspend Feinberg under its by-laws. In asserting its right to recover costs, the PHLX relies on Rule 651, which states that "[a]ny member . . . who fails to prevail in a lawsuit or other legal proceeding instituted by such person or entity against the Exchange or any of its board members, officers, committee members, employees, or agents, and related to the business of the Exchange, shall pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding . . . ."

Rule 651 is similar to rules adopted by the American Stock Exchange, the Chicago Board Options Exchange, the Pacific Stock Exchange, and the Chicago Stock Exchange. 14/ When approving the Chicago Stock Exchange's fee-shifting rule, we stated that such rules "reflect[] a reasonable business decision by the membership to shift the financial burden of litigation to the responsible member under certain circumstances." 15/ In part because Rule 651 was "consistent with existing rules," we designated Rule 651 effective upon filing on August 5, 2004. 16/

12/ 15 U.S.C. § 78s(e).

13/ Feinberg contends that he brought his suit against Benton in his capacity as a shareholder, rather than as a member. According to Feinberg, "PHLX cannot expand the scope of Rule 651 to allow it to recover legal expenses from a shareholder simply because that shareholder also happens to be a PHLX member." We disagree. Rule 651 requires only that Feinberg was a member, of which there is no dispute here. Nothing in the rule suggests that Feinberg's membership status must have played a role in the suit.

14/ Compare Exchange Act Rel. No. 50159 (Aug. 5, 2004), 83 SEC Docket 1768 (adopting PHLX Rule 651) with Exchange Act Rel. No. 47842 (May 13, 2003), 80 SEC Docket 655 (adopting American Stock Exchange rule); Exchange Act Rel. No. 37421 (July 11, 1996), 62 SEC Docket 853 (adopting Chicago Board Options Exchange rule); Exchange Act Rel. No. 37563 (Aug. 14, 1996), 62 SEC Docket 1661 (adopting Pacific Stock Exchange rule) and Exchange Act Rel. No. 34505 (Aug. 9, 1994), 57 SEC Docket 909 (adopting Chicago Stock Exchange rule).

15/ 57 SEC Docket at 912.

16/ 83 SEC Docket at 1769.

Although the PHLX's fee-shifting rule largely mimics the Chicago Stock Exchange's rule, the PHLX added a requirement that the underlying lawsuit be "related to the business of the Exchange." This added requirement is where Feinberg claims the PHLX's case now fails. Specifically, Feinberg claims his suit revolved around a private-party transaction and was in no way "related to the business of the Exchange."

The Special Committee rejected Feinberg's claim that his suit was unrelated to the business of the Exchange when considering Feinberg's arguments below. In reaching this conclusion, the Special Committee provided no authority and virtually no analysis in support of its interpretation of Rule 651. In fact, very little authority appears to address Rule 651: our own research has failed to uncover any adjudicatory decisions interpreting the scope of Rule 651, and the Commission's release approving Rule 651 does not expressly address the scope of the phrase "related to the business of the Exchange." We approach the interpretation of an SRO rule as we do a statute or Commission regulation, 17/ and an examination of the rule's language and history indicates that the Special Committee misinterpreted Rule 651.

The wording "related to the business of the Exchange" is relatively broad, as the Supreme Court has defined the phrase "related to" as "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." 18/ Despite this broad wording, we must not interpret the phrase so broadly as to render it superfluous. 19/ The phrase must have limits.

The PHLX itself acknowledged one such limit when it sought the Commission's approval to adopt Rule 651. In describing the rule's purpose, the PHLX stated that Rule 651 would apply

---

17/ Compare, e.g., Sisung Sec. Corp., Exchange Act Rel. No. 56741 (Nov. 5, 2007), 91 SEC Docket 3050, 3060-61 (interpreting a rule of the Municipal Securities Rulemaking Board by examining the rule's language and submission history) with George C. Kern, Jr., 50 S.E.C. 596, 598 (1991) (stating that, under "established principles of statutory construction, the starting point of our analysis is the statutory language, and if the language is unclear, we may look to the legislative history for guidance").

18/ Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)) (interpreting the Airline Deregulation Act, which includes a provision that preempts the states from enforcing any law "relating to rates, routes, or services of any air carrier").

19/ See, e.g., Duncan v. Walker, 533 U.S. 167, 174 (2001) (stating that "a cardinal principle of statutory construction" is that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted).

to suits brought against "the Exchange and/or persons acting on the Exchange's behalf." 20/ The PHLX's statement indicates that, for the Exchange to recoup costs under Rule 651 for litigation against a board member, officer, or employee of the Exchange, the underlying suit must relate to actions the defendant took in his or her role as governor – and on behalf of the Exchange. This seems a pertinent limitation given the PHLX's emphasis on protecting the Exchange and its resources. As the PHLX explained when seeking approval for Rule 651, the Exchange believed the rule would "reduce non merit-based or vexatious legal proceedings against the Exchange by member litigants," which the Exchange in turn hoped would "help protect against Exchange resources being unnecessarily diverted from the Exchange's regulatory and business objectives, thus strengthening the overall organization."

On appeal, however, the PHLX takes a more generous view of its authority under Rule 651. The PHLX claims that internal governance rules connect Feinberg's suit to the business of the Exchange, pointing, for instance, to the fact that the PHLX has barred governors from purchasing or selling PHLX stock or required them to obtain specific permission from a Board committee during certain periods. The PHLX acknowledges, however, that "Benton was not under such a constraint when she purchased the relevant stock from Mr. Feinberg." Moreover, Feinberg's lawsuit did not question whether Benton violated any internal governance rules when purchasing Feinberg's shares, and Feinberg never alleged that the PHLX facilitated or negligently allowed Benton to trade on inside information. Feinberg's suit, at most, put the Exchange on notice of a possible rule or ethics violation by one of its members. Any such determination, however, would require the PHLX to perform its own analysis of its rules and Benton's conduct. Such an analysis is an internal matter between the Exchange and its governor; the PHLX has not proffered any theory of how its response to Feinberg's discovery requests and reimbursement of Benton's legal fees could further its goal of preventing governors from violating internal governance rules, or why it should trigger an outside obligation for Feinberg to reimburse the PHLX's expenses.

The PHLX also relies on the fact that Benton was aware of material nonpublic information by virtue of her position as governor as evidence that Feinberg's suit related to the business of the Exchange. The PHLX reasons that, "[b]ecause a Governor's awareness of material non-public information is part and parcel of her oversight and management of the Exchange as a member of the Board, [Feinberg's suit] relates to the business of the Exchange." The PHLX adds "[t]hat the information Ms. Benton was alleged to have here pertains to strategic initiatives and transactions only underscores the relationship." This argument also fails. Benton's position as governor may have provided a means by which Benton learned of inside information, but her alleged possession of inside information does not establish that Benton ever acted on the Exchange's behalf, or that her actions otherwise related to the business of the Exchange, when purchasing Feinberg's shares.

20/ 83 SEC Docket at 1768 (emphasis added).

The PHLX finally argues that "the fact that the Exchange had a duty to indemnify Ms. Benton further proves the relatedness of [Feinberg's suit] to the business of the Exchange." The only document in the record related to the Exchange's determination to indemnify Benton does not explain the basis for this determination. In its brief on appeal, the PHLX summarily concludes that "Delaware law is clear that Board members wrongfully accused of insider trading, like Ms. Benton, are entitled to indemnification." 21/ Delaware law, however, is not so clear.

The PHLX's Certificate of Incorporation and By-Laws require the Exchange to indemnify a governor in certain actions in which the governor is a party "by reason of the fact that the person is or was a Governor." This language closely tracks the language in Delaware's indemnification statute, which permits corporations to "indemnify any person who was or is a party to any [lawsuit] by reason of the fact that he is or was a director." 22/ The PHLX, however, provides no analysis of this language. The PHLX instead quotes a corporate law treatise, which states that indemnification under the Delaware code is "intended to cover the cost of at least the successful defense of suits based on executives' trading in the corporation's securities for their own account, particularly suits under Sections 10(b) and 16(b) of the [Exchange Act]." 23/ Delaware indemnification law may cover the costs of a successful defense of an insider trading suit in some circumstances, but such a determination first requires an analysis of whether Benton was sued "by reason of the fact" that she was governor, along with an exploration of any other prerequisites to Benton's indemnification claim.

The only case that the PHLX cites in support of its position falls short of establishing that Benton was entitled to indemnification. In Merritt-Chapman & Scott Corp. v. Wolfson, the Superior Court of Delaware held that a corporation was required to indemnify a director who had allegedly participated in a plan to cause his company to purchase shares of its own stock. 24/ The Merritt-Chapman director was thus alleged to have caused his company to play an active – although apparently unwitting – role in the fraudulent activity, establishing a strong connection between the director's conduct and the company. Benton's conduct, by comparison, does not establish such a connection, as Feinberg did not allege that Benton caused the PHLX to do anything, or that Benton and the PHLX acted in concert.

Regardless, the question here is not whether the PHLX was required to indemnify Benton, but whether the PHLX was entitled to reimbursement from Feinberg under Rule 651.

21/ The PHLX is a Delaware corporation.

22/ Del. Code Ann. Tit. 8, § 145(a) (emphasis added).

23/ JOSEPH WARREN BISHOP, JR., THE LAW OF CORPORATE OFFICERS & DIRECTORS: INDEMNIFICATION AND INSURANCE § 2:3 (Rev. 2008).

24/ 321 A.2d 138, 140 (Del. Super. Ct. 1975).

Delaware's indemnification statute serves a very different purpose than the PHLX's fee-shifting rule. The Delaware indemnification statute "ensure[s] that capable persons would be willing to serve as directors, officers, employees, and agents of Delaware corporations." 25/ As a result, courts interpret Delaware's indemnification statute expansively. 26/ By comparison, fee-shifting rules such as PHLX Rule 651 represent a "business decision by the membership to shift the financial burden of litigation to the responsible member under certain circumstances." 27/ Such a practical, financial purpose does not justify the same expansive application as Delaware's indemnification statute.

The PHLX acknowledges that the scope of its authority under Rule 651 is not limitless, conceding that the rule would not apply "to a private tort claim between Mr. Feinberg and Ms. Benton arising from an auto accident, even if Ms. Benton 'was an official of the PHLX' at the time of the accident." This is certainly true because the PHLX should not be entitled to reimbursement for a suit where the only connection to the Exchange is that the defendant just happens to be an official of the PHLX. Although Feinberg's suit is not as extreme as the PHLX's example, Feinberg's suit is still not sufficiently connected to the business of the Exchange. Although Benton's employment at the Exchange may have been a means by which she had access to inside information, she acted for her personal interests, and not on behalf of the Exchange, in purchasing the PHLX shares, which was the subject of the litigation between Feinberg and Benton.

As stated at the outset of our analysis, the Exchange Act requires that an SRO apply its rules consistently with the Act's purposes. Generally, we do not believe that the policies of the Exchange Act permit Rule 651 to be used as the basis for shifting legal fees in insider trading cases, effectively insulating the PHLX and its directors from liability in all but the most distantly connected cases.

As noted earlier, in addition to indemnifying Benton, the PHLX incurred costs responding to Feinberg's discovery requests, preparing witnesses for deposition and trial, and "generally represent[ing] PHLX's interests with respect to the litigation." The PHLX singles out these costs, arguing that Rule 651 requires only that costs be incurred in a "legal proceeding . . . against the Exchange" and that the definition of "legal proceeding" includes "all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a

---

25/ Levy v. HLI Operating Co., Inc., 924 A.2d 210, 226-27 (Del. Ch. 2007).

26/ See Witco Corp. v. Beekhuis, 38 F.3d 682, 691 (3d Cir. 1994) (discussing the policy behind Delaware's indemnification statute and noting "[c]ourts have interpreted these indemnification rights very broadly").

27/ 57 SEC Docket at 912 (approving the Chicago Stock Exchange rule).

right or the enforcement of a remedy." 28/ We find no basis, nor does the PHLX provide any, for finding that these trial and pre-trial activities were separate legal proceedings from Feinberg's lawsuit against Benton. Rather, they were integral parts of Feinberg's suit against Benton, not against the Exchange. Moreover, Rule 651 still requires that any proceeding be "related to the business of the Exchange." For the reasons discussed above, we find that the above-mentioned trial and pre-trial proceedings did not relate to the business of the Exchange and that allowing the Exchange to recoup costs related to them would be inconsistent with the purposes of the Exchange Act. 29/

For these reasons, we set aside the Special Committee's opinion imposing $464,418.51 in fees and expenses and suspending Feinberg's membership.

An appropriate order will issue. 30/

By the Commission (Chairman SCHAPIRO and Commissioners WALTER and PAREDES; Commissioners CASEY and AGUILAR not participating.)

Elizabeth M. Murphy
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

28/ BLACK'S LAW DICTIONARY 896 (6th ed. 1990).

29/ Feinberg also argues that Rule 651 does not apply because (i) Feinberg did not bring a "lawsuit or other legal proceeding" against the PHLX, (ii) a subpoena is not a "lawsuit or other legal proceeding," (iii) Benton was not sued in her official capacity as a governor, and (iv) Benton and the PHLX should have sought recoupment of their legal expenses in district court. Because we conclude that Feinberg's suit was not related to the business of the Exchange, we need not address these issues.

30/ 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. 59577 / March 13, 2009

Admin. Proc. File No. 3-13128

In the Matter of

RICHARD B. FEINBERG

c/o Peter J. Mooney, Esq.
White and Williams LLP
1800 One Liberty Place
Philadelphia, PA 19103-7395

ORDER SETTING ASIDE ACTION OF NATIONAL SECURITIES EXCHANGE

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

ORDERED that the action taken by the Philadelphia Stock Exchange, Inc. imposing costs and expenses on Richard B. Feinberg and suspending his membership, be, and it hereby is, set aside.

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9016 / March 16, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13407

In the Matter of **MERRILL LYNCH, PIERCE, FENNER, & SMITH INCORPORATED** **Respondent.**	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION**

I.

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") has submitted a letter, dated November 3, 2008, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from Merrill Lynch's settlement of an administrative proceeding commenced by the Commission.

II.

On March 11, 2009, pursuant to Merrill Lynch's Offer of Settlement, the Commission issued an Order Instituting Proceedings Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing a Cease-and-Desist Orders, Penalties, and Other Relief. Under the Order, the Commission found that Merrill Lynch violated Section 15(f) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 204A of the Investment Advisers Act of 1940 ("Advisers Act") by lacking written policies or procedures to limit access to the equity order information of its institutional customers communicated over Merrill Lynch's equity squawk box, to track which employees had access to the equity squawk box, or to monitor employees' use of the equity squawk box. Consequently, retail brokers received access to equity squawk boxes despite the absence of any bona fide need for the information, such as demonstrating any ability to fill block orders; Merrill Lynch was unable to identify which employees had equity squawk boxes; and several retail brokers were able to provide equity squawk box information to day traders simply by placing their telephone receiver next to the equity squawk box for the entire trading day. In the Order, the Commission censured Merrill Lynch and ordered Merrill Lynch to cease and desist from committing or causing any violations and any future violations, of Section 15(f) of the Exchange Act and Section 204(A) of the Advisers Act; pay a civil money penalty in the aggregate amount of $7,000,000; and comply with remedial undertakings.

III.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if, among other things, any investment adviser or underwriter of the securities to be offered, or any partner, director or officer of such investment adviser or underwriter is "subject to an order of the Commission entered pursuant to Section 15(b) or 15A(1) of the Securities Exchange Act of 1934 or Section 203(d) or (e) of the Investment Advisers Act of 1940 ...." 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 Merrill Lynch'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.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9017 / March 17, 2009

Administrative Proceeding File No. 3-13394

In the Matter of **Goldman Sachs Execution & Clearing, L.P. and SLK-Hull Derivatives LLC,** **Respondents.**	**CORRECTED ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION**

I.

Goldman Sachs Execution & Clearing, L.P. and SLK-Hull Derivatives LLC (collectively, the "Respondents") have submitted a letter, dated October 29, 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 March 4, 2009, pursuant to Respondents' Offer of Settlement, the Commission issued an Order Instituting Proceedings Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Orders, Penalties, and Other Relief against Respondents. The Commission Order found that, from 1999 through 2005, Respondents violated their basic obligations as specialists to serve public customer orders over their own proprietary interests while executing trades on the American Stock Exchange[1] ("AMEX"), the Chicago Board Options Exchange ("CBOE"), and the Philadelphia Stock Exchange (the "PHLX"), in violation of Section 11(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 11b-1 thereunder, and the following Exchange rules in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707. In the Order, the Commission censured the Respondents, ordered them to cease and desist from committing future violations of Section 11(b) of the Exchange Act and Rule 11b-1 thereunder, and ordered the

[1] On October 1, 2008, AMEX was acquired by NYSE Euronext and has since been renamed NYSE Alternext US LLC.

Respondents to pay disgorgement of $6 million and a civil money penalty of $1.2 million.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if, among other things, any investment adviser or underwriter of the securities to be offered is "subject to an order of the Commission pursuant to section 15(b) of the Exchange Act." *See* Rule 602(c)(3) of the Securities Act of 1933 ("Securities Act"). Rule 602(e) 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."

III.

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.

Elizabeth M. Murphy
Secretary

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

Chairman Schapiro and Commissioner Walter not participating

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 28648 / March 17, 2009

In the Matter of

Wachovia Securities, LLC
One North Jefferson Avenue
St. Louis, MO 63103

Evergreen Investment Management Company, LLC
200 Berkeley Street
Boston, MA 02116

Tattersall Advisory Group, Inc.
6802 Paragon Place
Suite 200
Richmond, VA 23230

First International Advisors, LLC
3 Bishopsgate
London, England
UK EC2N3AB

Metropolitan West Capital Management, LLC
610 Newport Center Drive
Suite 1000
Newport Beach, CA 92660

J.L. Kaplan Associates, LLC
200 Berkeley Street
Boston, MA 02116

Golden Capital Management, LLC
5 Resource Square
Suite 150
10715 David Taylor Drive
Charlotte, NC 28262

Evergreen Investment Services, Inc.
200 Berkeley Street
Boston, MA 02116

Prudential Investment Management, Inc.
100 Mulberry Street
Gateway Center Two
Newark, NJ 07102

Prudential Investments LLC
100 Mulberry Street
Gateway Center Three
Newark, NJ 07102

The Prudential Insurance Company of America
751 Broad Street
Newark, NJ 07102

Jennison Associates LLC
466 Lexington Avenue
New York, NY 10017

Prudential Bache Asset Management, Inc.
One New York Plaza
13th Floor
New York, NY 10292

Quantitative Management Associates LLC
100 Mulberry Street
Gateway Center Two
Newark, NJ 07102

Pruco Securities, LLC
751 Broad Street
Newark, NJ 07102

AST Investment Services, Inc.
One Corporate Drive
Shelton, CT 06484

Prudential Annuities Distributors, Inc.
One Corporate Drive
Shelton, CT 06484

Prudential Investment Management Services LLC)
100 Mulberry Street)
Gateway Center Three)
Newark, NJ 07102)
)
Pruco Life Insurance Company)
213 Washington Street)
Newark, NJ 07102)
)
Pruco Life Insurance Company of New Jersey)
213 Washington Street)
Newark, NJ 07102)
)
Prudential Annuities Life Assurance Corporation)
One Corporate Drive)
Shelton, CT 06484)
)
Prudential Retirement Insurance and Annuity Company)
280 Trumbull Street)
Hartford, CT 06103-3509)
)
Wells Fargo Funds Management, LLC)
525 Market Street, 12th Floor)
San Francisco, CA 94105)
)
Wells Capital Management Incorporated)
525 Market Street, 10th Floor)
San Francisco, CA 94105)
)
Peregrine Capital Management, Inc.)
800 LaSalle Avenue, Suite 1850)
Minneapolis, MN 55402)
)
Galliard Capital Management, Inc.)
800 LaSalle Avenue, Suite 2060)
Minneapolis, MN 55402)
)
Wells Fargo Private Investment Advisors, LLC)
d/b/a Nelson Capital Management)
1860 Embarcadero Road, #140)
Palo Alto, CA 94303)

Wells Fargo Funds Distributor, LLC)
525 Market Street, 12th Floor)
San Francisco, CA 94105)
)
Lowry Hill Investment Advisors, Inc.)
90 South Seventh Street, Suite 5300)
Minneapolis, MN 55402)
)
Wells Fargo Alternative Asset Management, LLC)
333 Market Street, 29th Floor)
MAC# A0119-291)
San Francisco, CA 94105)
)
(812-13632))
)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

Wachovia Securities, LLC ("Wachovia Securities"), Evergreen Investment Management Company, LLC, Tattersall Advisory Group, Inc., First International Advisors, LLC, Metropolitan West Capital Management, LLC, J.L. Kaplan Associates, LLC, Golden Capital Management, LLC, Evergreen Investment Services, Inc., Prudential Investment Management, Inc., Prudential Investments LLC, The Prudential Insurance Company of America, Jennison Associates LLC, Prudential Bache Asset Management, Inc., Quantitative Management Associates LLC, Pruco Securities, LLC, AST Investment Services, Inc., Prudential Annuities Distributors, Inc., Prudential Investment Management Services LLC, Pruco Life Insurance Company, Pruco Life Insurance Company of New Jersey, Prudential Annuities Life Assurance Corporation, Prudential Retirement Insurance and Annuity Company, Wells Fargo Funds Management, LLC, Wells Capital Management Incorporated, Peregrine Capital Management, Inc., Galliard Capital Management, Inc., Wells Fargo Private Investment Advisors, LLC d/b/a Nelson Capital Management, Wells Fargo Funds Distributor, LLC, Lowry Hill Investment Advisors, Inc., and Wells Fargo Alternative Asset Management, LLC (collectively, "Applicants") filed an application on February 18, 2009 requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which Wachovia Securities is or hereafter becomes an affiliated person (together with Applicants, "Covered Persons") from section 9(a) of the Act with respect to an injunction entered by the United States District Court for the Northern District of Illinois on February 17, 2009.

On February 18, 2009, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act from February 17, 2009 until the Commission takes final action on the application for a permanent order (Investment Company Act Release No. 28618). The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the prohibitions of section 9(a) as applied to the Applicants would be unduly and disproportionately severe and the conduct of the Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application filed by Wachovia Securities et al. (File No. 812-13632), that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, entered by the United States District Court for the Northern District of Illinois on February 17, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E Harmon

By: Florence E. Harmon
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9018 / March 17, 2009

In the Matter of Automated Trading Desk Specialists, LLC, Respondent.	ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(b)(4) AND RULE 602(c)(2) DISQUALIFICATION PROVISIONS

I.

Automated Trading Desk Specialists, LLC ("ATDS") has submitted a letter, dated December 10, 2008, requesting a waiver of the Rule 602(b)(4) and 602(c)(2) disqualifications from the exemption from registration under Regulation E arising from ATDS' settlement of an injunctive action commenced by the Commission.

II.

On March 4, 2009, the Commission filed a civil injunctive action in the United States District Court for the Southern District of New York alleging that, from 1999 through 2005, ATDS violated its basic obligation as a specialist on the Chicago Stock Exchange ("CHX") to serve public customer orders over its own proprietary interests while executing trades on the CHX, in violation of CHX Article XXX, Rule 2 (since repealed) and CHX Article 9, Rule 17. The Commission's complaint further alleged that by failing to make or keep current a blotter containing an itemized daily record of all purchases and sales of securities effected by ATDS for its proprietary accounts, ATDS violated Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 17a-3(a)(1) thereunder. On March 11, 2009, the Court entered a Final Consent Judgment permanently enjoining ATDS from violating CHX Article 9, Rule 17, and Section 17(a) of Exchange Act and Rule 17a-3(a)(1) thereunder, ordering $4.2 million in disgorgement and imposing $800,000 in civil penalties.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if, among other things, any investment adviser or underwriter of the securities to be offered is subject to any order, judgment or decree of any court of competent jurisdiction "temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security." *See* Rule 602(b)(4) of the Securities Act or 1933 ("Securities Act"). The Regulation E exemption is also not available for the securities of an issuer if any of its directors, officers, principal security holders, any investment adviser or underwriter of the securities to be offered, or any partner, director or officer of such investment adviser or underwriter is temporarily or permanently retrained or enjoined by any court from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser. *See* 602(c)(2). Rule 602(e) of 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."

III.

Based upon the representations set forth in ATDS' 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 Final Consent Judgment.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provisions of Rule 602(b)(4) and 602(c)(2) under the Securities Act resulting from the entry of the Final Consent Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9017 / March 17, 2009

In the Matter of **Goldman Sachs Execution & Clearing, L.P. and SLK-Hull Derivatives 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.

Goldman Sachs Execution & Clearing, L.P. and SLK-Hull Derivatives LLC (collectively, the "Respondents") have submitted a letter, dated October 29, 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 March 4, 2009, pursuant to Respondents' Offer of Settlement, the Commission issued an Order Instituting Proceedings Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Orders, Penalties, and Other Relief against Respondents. The Commission Order found that, from 1999 through 2005, Respondents violated their basic obligations as specialists to serve public customer orders over their own proprietary interests while executing trades on the American Stock Exchange[1] ("AMEX"), the Chicago Board Options Exchange ("CBOE"), and the Philadelphia Stock Exchange (the "PHLX"), in violation of Section 11(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 11b-1 thereunder, and the following Exchange rules in effect during the Relevant Period: AMEX rules 150(a), 150(b), 155 and 170(d); CBOE rules 8.80 and 8.85; and PHLX rules 1020(c), 1019 and 707. In the Order, the Commission censured the Respondents, ordered them to cease and desist from committing future violations of Section 11(b) of the Exchange Act and Rule 11b-1 thereunder, and ordered the Respondents to pay disgorgement of $6 million and a civil money penalty of $1.2 million.

[1] On October 1, 2008, AMEX was acquired by NYSE Euronext and has since been renamed NYSE Alternext US LLC.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if, among other things, any investment adviser or underwriter of the securities to be offered is "subject to an order of the Commission pursuant to section 15(b) of the Exchange Act." *See* Rule 602(c)(3) of the Securities Act of 1933 ("Securities Act"). Rule 602(e) 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."

III.

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.

Elizabeth M. Murphy
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. 59584 / March 17, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2950 / March 17, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13410

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Andrew Sims, CPA ("Sims" or "Respondent") pursuant to Sections 4C[1] and 21C of the Securities

[1] Section 4C provides, in relevant part, that "[t]he Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . (2) ... to have engaged in unethical or improper professional conduct; or (3) to have willfully violated, or willfully aided and abetted the violation of, any provision of the securities laws or the rules and regulations thereunder."

Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) and 102(e)(1)(iii) of the Commission's Rules of Practice.[2]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

This matter involves a violation of the auditor independence rules by an auditor seeking employment with his audit client. Between November 2004 and June 2005, Andrew Sims, an audit partner at Mazars LLP, engaged in employment discussions with his audit client Publicis Groupe, S.A. ("Publicis") to become the chief accounting officer of Re:Sources, a U.S. back-office organization owned by Publicis that was to become responsible for the financial reporting of Publicis' U.S. operations. During this period, Sims was responsible for auditing the financial statements of Publicis' U.S. operations for Mazars LLP, a U.S. audit firm and an affiliate of Mazars & Guerard, S.A ("M&G"). M&G, a French auditing firm, was one of Publicis' two joint auditors (the other being Ernst & Young). Contrary to auditor independence rules that required Sims to report the employment discussions to his firm and remove himself from the Publicis audit, Sims continued working on the engagement and concealed his employment discussions with Publicis from his firm until the employment negotiations were almost complete in early June 2005.

---

[2] Rule 102(e)(1)(ii) provides, in pertinent part, that "[t]he Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct." Rule 102(e)(1)(iii) provides, in pertinent part, that "[t]he Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found...to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder."

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

Respondent

Andrew Sims, CPA, age 36, of New York, New York, is a certified public accountant licensed in New York and Maine. Sims was the Mazars LLP audit partner responsible for auditing the financial statements of Publicis' U.S. operations for the fiscal year ended December 31, 2004. During all times relevant to this case, Sims was also a partner with Mazars SCRL and Weiser LLP.

Other Relevant Entities

1. **Publicis Groupe S.A.**, based in Paris, France, is an international advertising and media services conglomerate with offices throughout the world. During the relevant period, Publicis was a foreign private issuer whose American Depository Receipts were registered with the Commission pursuant to Exchange Act Section 12(g), and were listed on the NYSE. In September 2007, Publicis voluntarily terminated its registration with the Commission.

2. **Mazars SCRL**, is an international audit and advisory organization based in Paris, France, and incorporated in Belgium. It has a worldwide network of member firms and joint venture partnerships. Its member firms include M&G and Mazars LLP. One of its joint venture partners is Weiser LLP.

3. **Mazars and Guerard, S.A.** is an accounting firm based in Paris, France. It is a member firm of the Mazars SCRL international network. M&G and Ernst &Young ("E&Y") were joint auditors responsible for the audit of Publicis' financial statements for the fiscal year ended December 31, 2004 and issued a joint audit opinion. M&G is registered with the Public Company Accounting Oversight Board ("PCAOB").

4. **Mazars LLP**, is an accounting firm based in New York, New York, that is a member of the Mazars SCRL network. It was responsible for auditing the financial statements of Publicis' U.S. operations for the fiscal year ended December 31, 2004. It has few employees and relies on employees of Weiser LLP to perform most of the audit work on its engagements. Mazars LLP is registered with the PCAOB.

5. **Weiser LLP,** is an accounting firm based in New York, New York. As a joint venture partner of Mazars SCRL, its employees perform most of the audit work on Mazars LLP engagements. Consequently, while Mazars LLP was responsible for auditing Publicis' U.S. operations on behalf of M&G, it was Weiser LLP employees who actually performed the audit. Weiser LLP is registered with the PCAOB.

Facts

1. Between November 2004 and June 2005, Sims engaged in employment discussions with his audit client Publicis to become the chief accounting officer ("CAO") of Re:Sources, a U.S. back-office organization Publicis owned. Re:Sources was to become responsible for the financial reporting of Publicis' U.S. operations.

2. Between January and March 2005, Sims had multiple discussions with the managing director of Re:Sources regarding Sims' potential employment as the CAO of Re:Sources. The managing director was leading the employment discussions on behalf of Publicis. These employment discussions occurred while Sims was overseeing the Mazars LLP audit work for the fiscal 2004 audit of Publicis' U.S. operations. On February 7, 2005, Sims informed the managing director that he wanted to complete the year-end audit work before informing his supervisors about his interest in joining Publicis in order to avoid the perception that his audit objectivity had been impaired.

3. In early June 2005, Sims learned that Publicis would be sending him an employment contract shortly. On or about June 8, 2005, Sims disclosed his employment discussions with Publicis to M&G, Mazars LLP, and Weiser LLP, and asked to be removed from the Publicis audit. By June 9, 2005, Sims had informed the managing director that he intended to accept the offer to become Re:Sources' CAO.

4. Sims concealed his employment discussions with Publicis from M&G, Mazars LLP, and Weiser LLP, including through affirmative misstatements to the partners responsible for the Publicis engagement, until he received an employment offer from Re:Sources. During his employment discussions with Publicis, Sims twice signed confirmations required by M&G and Weiser LLP attesting that he had complied with the auditor independence rules.

5. Sims continued to make misrepresentations about his employment discussions with Publicis even after he disclosed to M&G, Mazars LLP, and Weiser LLP his intention to become a Publicis employee. On June 29, 2005, in anticipation of a quality control review by Weiser LLP regarding his expected employment by Publicis, Sims prepared a memorandum falsely claiming that Publicis first approached him about possible employment in early June 2005 and that he promptly stopped working on the Publicis audit at that time. After speaking with the Weiser LLP quality control partner, Sims prepared another memorandum correctly stating that Publicis first approached him about possible employment in November 2004.

6. On June 24, 2005, Publicis filed its Form 20-F for its fiscal year ended December 31, 2004. The audit report included in the Form 20-F, which M&G and E&Y issued jointly,[4] states that M&G was independent and had conducted its audit in accordance with PCAOB standards.

7. After Publicis filed its Form 20-F in June 2005, concerns were raised about M&G's lack of independence as a result of Sims' employment discussions with Publicis. Consequently, Publicis self-reported the matter to the Commission and instructed E&Y to perform additional audit procedures so that E&Y could issue a new audit opinion on Publicis' fiscal year 2004 financial statements as the company's sole auditor. On December 23, 2005, Publicis filed an amended Form 20-F for the year ended December 31, 2004, with an audit opinion from E&Y as the sole auditor. The additional audit procedures conducted by E&Y did not detect any errors from work that Sims previously performed.

---

[4] The date of the audit report was March 10, 2005, except as to footnote 31 to the financial statements ("Summary of differences between generally accepted accounting principles in France and the U.S."), which was dated June 24, 2005.

Violations

1. Professional independence standards for auditors, as set forth in PCAOB Rule 3600T, AICPA Code of Professional Conduct ET Section 101, and Independence Standards Board Independence Standard No. 3, require an auditor who is considering employment by an audit client promptly to notify his audit firm and remove himself from the audit of that client.[5] These standards further require that upon removal of the auditor from the audit, the audit firm should consider what additional procedures may be necessary to provide reasonable assurance that any work performed for the client by that person was performed with objectivity and integrity.

2. Sims lacked independence under the aforementioned professional standards due to his employment discussions with Re:Sources. As a result, Publicis violated Exchange Act Section 13(a) and Rule 13a-1, which require issuers to file annual reports containing financial statements certified by independent public accountants.

3. As a result of the conduct described above, Sims caused and willfully aided and abetted Publicis' violations of Exchange Act Section 13(a) and Rule 13a-1 thereunder.

4. As a result of the conduct described above, M&G violated Regulation S-X Rule 2-02(b)(1). This provision requires accountants' reports to state "whether the audit was made in accordance with generally accepted auditing standards." "[R]eferences in Commission rules and staff guidance and in the federal securities laws to GAAS or to specific standards under GAAS, as they relate to issuers, should be understood to mean the standards of the PCAOB . . . ." SEC Release No. 34-49708. Thus, an auditor violates Regulation S-X Rule 2-02(b)(1) if it issues a report stating that it had conducted its audit in accordance with PCAOB standards when it had not. M&G did not conduct its audit in accordance with PCAOB standards because Sims lacked independence.

5. As a result of the conduct described above, Sims caused and willfully aided and abetted M&G's violation of Regulation S-X Rule 2-02(b)(1).

6. As a result of the conduct described above, Sims engaged in improper professional conduct. For accountants, improper professional conduct includes "intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards." Rule 102(e)(1)(iv)(A). Sims' actions – negotiating employment with his audit client while conducting an audit and failing promptly to remove himself from the Publicis audit – violated PCAOB Rule 3600T, AICPA ET Rule 101.04, and ISB Standard No. 3 and were, at a minimum, reckless.

Findings

1. Based on the foregoing, the Commission finds that Sims caused and willfully aided and abetted Publicis' violations of Exchange Act Section 13(a) and Rule 13a-1 thereunder.

---

[5] Although the ISB no longer exists, its rules were in force at all times relevant to this matter.

2. Based on the foregoing, the Commission finds that Sims caused and willfully aided and abetted M&G's violation of Regulation S-X Rule 2-02(b)(1).

3. Based on the foregoing, the Commission finds that Sims engaged in improper professional conduct within the meaning of Rule 102(e)(1)(ii) of the Commission's Rules of Practice, as defined by Rule 102(e)(1)(iv)(A), and willfully aided and abetted the violation of provisions of the federal securities laws and rules thereunder within the meaning of Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

IV.

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

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

1. Sims shall cease and desist from causing any violations and any future violations of Exchange Act Section 13(a) and Rule 13a-1 thereunder and Regulation S-X Rule 2-02(b)(1).

2. Sims is denied the privilege of appearing or practicing before the Commission as an accountant.

3. After three years from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

A. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he/ practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
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. 59595 / March 18, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-12591

In the Matter of	**Order Extending Deadline To Certify Compliance With Undertakings Pursuant to Section 15(f) of the Securities Exchange Act of 1934**
Banc of America Securities LLC,	
Respondent.	

Pursuant to the Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 (Order) in the Matter of Banc of America Securities LLC (Admin. Proc. File No. 3-12591, March 14, 2007), Respondent has requested a forty-five day extension of its deadline to certify compliance with certain undertakings pursuant to Section 15(f) of the Securities Exchange Act of 1934, pursuant to paragraph VI.A.11 of the Order. The Commission has determined to grant the request.

IT IS HEREBY ORDERED THAT:

The deadline for Respondent to certify compliance with certain undertakings pursuant to Section 15(f) of the Securities Exchange Act of 1934 pursuant to Paragraph VI.A.11 of the Order is extended for forty-five days from the date of this Order.

Upon a showing of good cause by Respondent, the Commission staff may, in its sole discretion, grant further such extensions of the deadline as it deems appropriate.

By the Commission.

Elizabeth M. Murphy
Secretary

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

Commissioner Casey and Commissioner Aguilar not participating Commissioner Paredes Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59594 / March 18, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2951 / March 18, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13411

In the Matter of

Allion Healthcare, Inc. and
James G. Spencer,

Respondents.

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 Allion Healthcare, Inc. ("Allion") and James G. Spencer ("Spencer") (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 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 Respondents' Offers, the Commission finds[1] that:

Summary

1. This matter concerns Allion's failure to properly record and report two significant warrant grants made during the second quarter of 2005. Because Allion failed to recognize interest expense for the warrants in conformity with Generally Accepted Accounting Principles ("GAAP"), the company materially overstated its net income and understated its loss per share when reporting results for the second quarter of 2005 and the nine months ended September 30, 2005. Allion restated its results in March 2006 after the company's independent auditor inquired about the errors. In its restatement, the company reduced its net income by 1372% for the second quarter of 2005, from net income of $70,431 to a net loss of $895,569, and increased its loss per share for this period by 77%, from $0.31 to $0.55 per share. Allion also reduced its net income for the nine months ended September 30, 2005 by 97%, from $932,517 to $26,517, and increased its loss per share for this period by 233%, from $0.06 to $0.20 per share. Allion violated the federal securities laws by filing materially inaccurate periodic reports with the Commission, failing to make and keep accurate books and records, and failing to devise and maintain an adequate system of accounting controls.

2. Allion's former chief financial officer, James G. Spencer, was a cause of the company's violations and certified the company's inaccurate Form 10-Qs for the second and third quarters of 2005. Spencer knew the warrants had potentially significant value, and was aware of the potential impact on the company's earnings associated with the larger of the two grants. Nevertheless, he failed to ensure that the company properly recorded and reported the warrant transactions.

Respondents

3. Allion, a Delaware corporation with its headquarters in Melville, New York, is a national provider of specialty pharmacy and disease management services focused on HIV/AIDS patients. During all relevant times, Allion's common stock has been registered with the Commission pursuant to Section 12(g) of the Exchange Act and traded on the NASDAQ National Market under the symbol "ALLI."

4. Spencer, 40, a resident of Baltimore, Maryland, served as Allion's chief financial officer ("CFO") from May 2004 to July 2007. Spencer worked for Allion as an independent consultant for approximately seven months before becoming CFO. Since July 2007, Spencer has been senior vice president and CFO for a privately-held company. Spencer has never been a certified public accountant ("CPA").

Facts

Director's Personal Guarantee of Allion's Line of Credit

5. In late 1999 or early 2000, an Allion director agreed to personally guarantee a $1.5 million line of credit for Allion and Allion granted the director a warrant to purchase 375,000

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

shares of common stock as consideration for his guarantee. The warrant expires in March 2010 and the shares are exercisable at $1.00 per share. In June 2002, Allion issued another warrant to purchase 150,000 shares of common stock to the director as consideration for extending his guarantee of the loan. This warrant had a ten year life and an exercise price of $3.50 per share.[2] Allion issued these warrants prior to the time Spencer began working at the company.

Allion's Second Quarter 2005 Warrant Grants

6. Allion's line of credit was due to expire in March 2005, by which time the company was preparing to file a registration statement for its initial public offering ("IPO"). Because Allion did not have sufficient cash available to repay the line of credit, it needed to extend it to continue operating until the company could raise funds through the IPO. The bank that had issued the line of credit agreed to extend it for six months contingent upon, among other things, the director maintaining his personal guarantee.

7. The director asked Allion for a warrant to purchase additional shares of Allion stock in return for extending his guarantee. Allion's board had numerous discussions regarding the value of the warrant grant. During these discussions, Spencer told Allion's chief executive officer ("CEO") and two members of the board that the estimated value of such a warrant grant would be $1.75 to $2 per share, based on the calculations performed by an independent valuation firm that Allion had used when valuing warrants issued in connection with two acquisitions it made during early 2005.

8. On April 13, 2005, Allion's board of directors held a special meeting to grant the director a warrant to purchase 100,000 shares of Allion common stock at an exercise price equal to the IPO price or, if no IPO were to occur by April 20, 2006, at $6.26 per share (the "Director Warrant"). As anticipated at the time the Director Warrant was granted, Allion publicly filed its registration statement for the IPO with the Commission two days later, and the IPO took place approximately two months later at a price of $13 per share. Consequently, the exercise price of the Director Warrant became $13 per share. The Director Warrant has never been exercised, and expires on April 15, 2015.

9. During the evening of April 14, Spencer received an e-mail from an assistant to the director who had been granted the Director Warrant, asking "what is earnings hit for these warrants??" Spencer replied that the value of warrants recently issued by the company in connection with a March 2005 acquisition had been approximately $1.65 per share; however, he also noted that if the company were to go public there was a "good chance" the company's auditor would want to reassess the volatility factor used in the Black-Scholes model.[3]

---

[2] At the time of the grants, Allion recognized an insufficient expense for the 2000 grant and disclosed, but did not recognize any expense for, the 2002 grant. In 2006, Allion calculated the expense for these grants and determined the associated increases were immaterial when recognized over the term of the loan. The director exercised the 2002 warrant and sold the shares at $12.83 in Allion's January 2006 secondary offering.

[3] Although GAAP does not require its use, the Black-Scholes model is commonly used to estimate the fair value of stock options and other equity instruments, including warrants. The inputs to the Black-Scholes model include: (a) the exercise price of the warrant; (b) the expected life of the warrant; (c) the current price of the underlying stock; (d) its expected volatility; (e) expected dividends; and (f) the risk-free interest rate for the expected term of the warrant.

10. In response, the director's assistant asked Spencer for a Black-Scholes model to estimate the value of the Director Warrant. Later that evening, Spencer e-mailed the assistant and Allion's CEO the results of his Black-Scholes model, which showed that a ten-year warrant with an exercise price of $10 would be valued at $3.74 per share and a ten-year warrant with an exercise price of $12 would be valued at $4.49 per share.[4] The valuations produced by Spencer's model were higher than the estimates he previously had communicated to Allion's CEO and two directors during the board of directors' discussions regarding the grant. Furthermore, Spencer did not consult the company's auditor or the independent valuation firm Allion previously had used regarding the correct volatility factor or any other aspect of the Black-Scholes model he used to produce these valuations.

11. Allion disclosed the issuance of the Director Warrant in its IPO registration statement filed with the Commission on April 15, 2005. A few days later, on April 21, Allion again disclosed the issuance of the Director Warrant in a Form 8-K filing that attached the warrant agreement as an exhibit. Also on April 21, the director himself filed a Form 4 disclosing his receipt of the Director Warrant.

12. In mid-May 2005, Allion issued a $2 million note to an investor. As partial consideration for the note, Allion granted the investor a warrant to purchase 40,000 shares of Allion common stock at an exercise price equal to the price per share of a successful IPO (the "Investor Warrant"), which as noted above turned out to be $13.00 per share. The Investor Warrant has never been exercised, and expires on May 15, 2010.

13. On May 18, 2005, Allion disclosed the issuance of the Investor Warrant in its Form 10-Q for the first quarter of 2005, and attached the warrant agreement as an exhibit to that filing. Allion also disclosed the issuance of the Director Warrant in the same Form 10-Q.

<u>Allion's June 22, 2005 IPO</u>

14. On June 22, 2005, Allion conducted its IPO, selling four million shares of common stock at $13 per share. Allion disclosed the issuance of the Director and Investor Warrants in its registration statements and prospectus for the IPO. Allion used proceeds from the offering to repay the bank line of credit and the $2 million note prior to June 30, 2005.

Allion Failed to Properly Record and Report the
<u>Director and Investor Warrants in its Second Quarter Form 10-Q</u>

15. GAAP provides that when a company grants warrants in connection with the issuance of debt, it should value the warrants and generally record a non-cash interest expense for these warrants over the life of the debt. Allion, however, failed to record any expense for the Director or Investor Warrants in its Form 10-Q for the second quarter of 2005.

16. Neither the Director Warrant nor the Investor Warrant was properly recorded in the company's books and records for the second quarter of 2005. At the time, Allion had no written procedures in place for recording equity-based transactions. As CFO, Spencer was responsible for ensuring that the warrants were properly recorded in Allion's financial statements, yet failed to do so. Spencer did not verify that the warrants were recorded in the company's accounting records, nor did he provide his valuation model to anyone else to enable them to properly record the

---

[4] Spencer's Black-Scholes models assumed the exercise price of the warrant equaled the market price of Allion's common stock, which Spencer's models assumed would be the IPO price per share.

expense. In addition, notwithstanding his lack of experience accounting for equity issued in connection with debt, Spencer did not consult with the company's auditor, other accountants, or any other specialist regarding how properly to value or record the Director or Investor Warrants.

17. Allion was scheduled to release its second quarter results and host an investor conference call after the market closed on August 11, 2005. Prior to that date and after reviewing the Investor Warrant disclosure in the company's draft Form 10-Q, Allion's auditor had asked Spencer whether an expense for the Investor Warrant had been recorded in the company's financial statements. On the morning of August 11, Spencer informed the auditor that the company had not recorded an expense for the Investor Warrant. One of the auditors responded by e-mail that "if there was no accounting for these warrants, which there should have been, we just need to know what was/should be the value attached to those warrants."

18. Spencer subsequently used the Black-Scholes model and valued the Investor Warrant at $60,000. He e-mailed the model to the auditor early in the afternoon on August 11. However, Spencer's calculation underestimated the fair value of the Investor Warrant by more than $150,000 because he incorrectly used an estimated term of exercise that was only half of the warrant's life, rather than the full term, and he used a stock price volatility that was too low because it did not reflect the increased volatility of Allion's stock price after the stock became publicly traded.

19. Later that day, Allion's auditor advised the chairman of the company's Audit Committee and Spencer that it was proposing an adjustment of $60,000 to the company's second quarter interest expense, an amount the auditor and the company collectively deemed to be immaterial to the second quarter results. Allion recorded the $60,000 interest expense in its third quarter financial statements.

20. Notwithstanding his multiple communications regarding the accounting for the Investor Warrant, Spencer did not alert Allion's auditor to the possibility that the company similarly might have failed to recognize an expense for the much larger Director Warrant grant.

21. Allion's second quarter Form 10-Q, which was certified by Spencer and filed on August 15, 2005, included financial statements that were materially incorrect because they did not reflect any interest expense for the Director Warrant or Investor Warrant.

Allion Failed to Properly Record and Report the Director or Investor Warrants in
Its Form 10-Q for the Third Quarter of 2005 and January 2006 Secondary Offering Documents

22. Allion's third quarter Form 10-Q, which was filed on November 14, 2005 and certified by Spencer, included financial statements that materially overstated Allion's net income and earnings per share for the first nine months of 2005 because they understated the interest expense for the Investor Warrant and did not reflect any interest expense for the Director Warrant.[5]

23. Allion conducted a follow-on offering of common stock on January 26, 2006. The company sold 1.8 million shares and selling stockholders sold an additional 2,636,454 shares at $12.83 per share. The company's registration statements and final prospectus for the offering included the company's financial results through the first nine months of 2005, and thus contained the same warrant-related inaccuracies as the third quarter Form 10-Q described above. These

[5] As noted above, Allion recorded $60,000 of interest expense for the Investor Warrant in its third quarter financial statements.

filings, however, did contain disclosures concerning the issuance of the Director Warrant and Investor Warrant.

Allion's March 2006 Restatement

24. Allion was scheduled to release its 2005 annual results and conduct an earnings call after the market closed on March 9, 2006. On March 8, Allion's auditor, after reviewing the disclosure regarding the Director Warrant grant in the draft Form 10-K, asked Spencer whether the company had recognized an expense for that warrant. After checking the company's accounting books and records, Spencer informed the auditor that Allion had not recorded an expense for the Director Warrant, and Spencer and the auditor agreed that the company needed to do so. Spencer then prepared a Black-Scholes model valuing the Director Warrant at approximately $150,000. Allion's auditor, however, independently prepared a Black-Scholes model that valued the Director Warrant at approximately $700,000 - $900,000.

25. The discrepancy prompted Allion's auditor to review Spencer's Black-Scholes calculation. Based on this review, the auditor determined that Spencer incorrectly had used an expected term of half of the Director Warrant's life, rather than the full life, and used a volatility factor that was too low.

26. Following the market close on March 9, Allion filed a Form 8-K and issued a related press release announcing its intention to restate results for the three and six months ended June 30, 2005 and the nine months ended September 30, 2005 to correct the failure to record a non-cash interest expense for the Director Warrant. The press release stated that Allion expected the non-cash interest expense to be approximately $700,000 - $900,000 recorded in the second quarter of 2005. Prior to issuing its press release, Allion self-reported the matter to the Commission staff.

27. The following day, Allion's auditor sent an e-mail to Spencer questioning whether the company had "the same issues" with respect to its accounting for the Investor Warrant. Spencer subsequently recalculated the fair value of both the Director and Investor Warrant. Based on advice from Allion's auditor and an independent valuation expert, Spencer used the full contractual term of the warrants as the expected term of exercise and a volatility factor of 40%, which was based on the closing prices of Allion's stock and other health care companies' stocks during the eight and a half months since Allion's June 2005 IPO. Using these revised inputs to the Black-Scholes model, Spencer valued the Director Warrant at $752,563 and the Investor Warrant at $213,747.

28. On March 15, Allion filed a Form 8-K disclosing its prior failure to record the correct non-cash interest expense for the Investor Warrant and stating that the total non-cash interest expense to be recorded in the second quarter of 2005 for both warrants would be restated to $966,000. The effect of the restatement is summarized in the charts below:

	THREE MONTHS ENDED JUNE 30, 2005		DOLLAR CHANGE	PERCENT CHANGE
	Original	Restated		
Interest income (expense)	($451,634)	($1,417,634)	($966,000)	214%
Net income (loss)	$70,431	($895,569)	($966,000)	1372%
Net income (loss) available to common shareholders	($1,267,616)	($2,233,616)	($966,000)	76%
Earnings (loss) per share	($0.31)	($0.55)	($0.24)	77%

	NINE MONTHS ENDED SEPT. 30, 2005		DOLLAR CHANGE	PERCENT CHANGE
	Original	Restated		
Interest income (expense)	($359,419)	($1,265,419)	($906,000)[6]	252%
Net income (loss)	$932,517	$26,517	($906,000)	97%
Net income (loss) available to common shareholders	($405,530)	($1,311,530)	($906,000)	223%
Earnings (loss) per share	($0.06)	($0.20)	($0.14)	233%

Allion Stated that a Material Weakness Existed in its Internal Controls

29. Allion's 2005 Form 10-K, filed on March 16, 2006, stated that, after consultation with its auditor, the company's management had concluded that a material weakness existed in the company's internal controls over financial reporting relating to its failure to properly record non-cash interest expense for the Director Warrant and Investor Warrant.

30. Allion has since taken steps to address this material weakness, including retaining an independent consultant to review and improve its internal procedures and controls relating to the recording of equity-based and related party transactions, adding two certified public accountants to its board of directors and audit committee, one of whom was appointed chairman of the audit committee and later became the company's CFO after Spencer voluntarily left Allion in July 2007. The company also sent its controller for additional training.

Spencer was Responsible for Allion's Improper Accounting and Internal Controls

31. Spencer, as CFO, was responsible for Allion's false financial statements and inadequate internal controls described above. Spencer knew that the Director Warrant had potentially significant value, and was aware of the potential "earnings hit" associated with the warrant. Nevertheless, he failed to ensure that the Director or Investor Warrants were recorded

[6] Allion's restated interest expense for the nine months ended September 30, 2005 was $60,000 less than its restated interest expense for the three months ended June 30, 2005 because the company recognized $60,000 of interest expense for the Investor Warrant in its Form 10-Q originally filed for the third quarter of 2005.

properly in the company's accounting records. He did not verify that the warrants were recorded, nor did he provide his valuation model to anyone else to enable them to properly record the expense. In addition, notwithstanding his lack of experience accounting for equity issued in connection with debt, Spencer did not consult with the company's auditor, other accountants, or any other specialist regarding how properly to value or record the Director or Investor Warrants. Instead, Spencer unreasonably relied upon Allion's auditor to detect and remedy the company's accounting errors. Even after the company's auditor inquired about the omission of the Investor Warrant from the company's financial statements shortly before Allion filed its second quarter Form 10-Q, Spencer failed to inquire whether the company's accounting for the Director Warrant raised a similar issue or raise the issue with the auditor.

Spencer Made Inaccurate Certifications Under Section 302 of the Sarbanes-Oxley Act

32. As Allion's CFO, Spencer signed certifications for Allion's Forms 10-Q for the second and third quarters of 2005 stating that, among other things, he had evaluated the effectiveness of the company's internal controls over financial reporting, and had disclosed to the company's auditor and audit committee all significant deficiencies and material weaknesses in the design or operation of these internal controls. Spencer should have known that the company's internal controls relating to the recording of warrant transactions were deficient, and that these certifications therefore were inaccurate.

Violations

33. Section 13(a) of the Exchange Act and Rule 13a-13 thereunder require issuers with securities registered under Section 12 of the Exchange Act to file quarterly reports with the Commission. Exchange Act Rule 12b-20 requires that an issuer's periodic reports contain such further material information as may be necessary to ensure that the required statements made in them are not misleading. It is implicit in these requirements that the information in the reports be accurate. *See SEC v. IMC International, Inc.*, 384 F. Supp. 889, 893 (N.D. Texas), *aff'd mem.*, 505 F.2d 733 (5th Cir. 1974), *cert. denied sub nom., Evans v. SEC*, 420 U.S. 930 (1975).

34. Section 13(b)(2)(A) of the Exchange Act requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Section 13(b)(2)(B) of the Exchange Act requires issuers to devise and maintain a system of internal 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.

35. Exchange Act Rule 13a-14 requires principal executive and financial officers to certify in quarterly Commission filings that, among other things, the certifying officers have reviewed the filing and, based on their most recent evaluation of the company's internal controls over financial reporting, have disclosed to the audit committee and auditors all significant deficiencies and material weaknesses in these internal controls.

36. As a result of the conduct described above, Allion violated Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder.

37. As a result of the conduct described above, Spencer was a cause of Allion's violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder, and violated Exchange Act Rule 13a-14.

Allion's Remedial Efforts

38. In determining to accept the Offers, the Commission considered remedial acts undertaken by Allion and cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the cease-and-desist order agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Allion cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder; and

B. Pursuant to Section 21C of the Exchange Act, Respondent Spencer cease and desist from causing any violations and any future violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20 and 13a-13 thereunder, and cease and desist from committing or causing any violation and any future violation of Exchange Act Rule 13a-14.

By the Commission.

Elizabeth M. Murphy
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. 59596 / March 18, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2952 / March 18, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13412

In the Matter of **William D. Shovers, CPA** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3) OF THE COMMISSION'S RULES OF PRACTICE**

I.

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

---

[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.

II.

The Commission finds that:

A. RESPONDENT

1. Shovers, age 54, is and has been a certified public accountant ("CPA"). He was first licensed as a CPA in Wisconsin in 1980; his license has been expired since 1995. He served as Chief Financial Officer of Hayes-Lemmerz International, Inc. ("Hayes") from approximately 1999 until October 2001. He also was Chief Accounting Officer at least during the period of October 2000 through October 2001. From October 2001 until mid-2003, Shovers remained an officer with Hayes Lemmerz.

B. CIVIL INJUNCTION

2. On December 18, 2008, the U.S. District Court for the Eastern District of Michigan entered a final judgment against Shovers. The Final Judgment followed a jury trial in which the jury found that Shovers had violated the following provisions of the securities laws and rules and regulations promulgated thereunder: (1) Section 10(b) of the Securities Exchange Act of 1934) ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 204.10b-5] thereunder; (2) Section 17(a)(3) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. § 77q(a)(3)]; and (3) Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)], and Rules 13b2-1 [17 C.F.R. § 240.13b2-1] and 13b2-2 [17 C.F.R. § 240.13b2-2] thereunder. The jury also found that he aided and abetted certain of Hayes' violations of the federal securities laws.

3. The Final Judgment permanently enjoined Shovers from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 204.10b-5] thereunder; Section 17(a)(3) of the Securities Act [15 U.S.C. § 77q(a)(3)]; Section 13(b)(5) of the Exchange Act [15 U.S.C. § 78m(b)(5)], and Rules 13b2-1 [17 C.F.R. § 240.13b2-1] and 13b2-2 [17 C.F.R. § 240.13b2-2] thereunder; and from aiding and abetting violations of Section 13(a), Section 13(b)(2)(A), and Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. §78m(a), §78m(b)(2)(A), and §78m(b)(2)(B)], and Rules 12b-20, 13a-1, and 13a-13 [17 CFR §240.12b-20, 17 CFR § 240.13a-1, and 17 CFR § 240.13a-13] thereunder. The Final Judgment also barred Shovers, for a period of five (5) years, from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)], and ordered him to pay a civil money penalty of $50,000.

4. The Commission's complaint in this matter alleged that, from fiscal year 1999 through the first quarter of 2001, senior officers and employees of Hayes engaged in a fraudulent scheme to achieve corporate earnings targets and mask declining operating results. The complaint alleged that Hayes personnel used several mechanisms to increase income and revenue fraudulently, including: (1) inappropriately deferring operating expenses to balance sheet accounts, (2) failing to process vendor invoices, (3) understating employee fringe benefits

and (4) improperly recording certain customer discounts to balance sheet accounts. As a result, the complaint alleged, Hayes made materially false filings with the Commission in fiscal years 1999 and 2000 and for the first quarter of 2001, including the company's annual report on Form 10-K for the fiscal year ending January 31, 2001, and the quarterly reports on Forms 10-Q for the quarterly periods ended April 30, 2000, July 31, 2000, October 31, 2000 and April 30, 2001.

5. The complaint alleged that after Shovers learned about the ongoing financial fraud at the company, he made affirmative misrepresentations to the company's outside independent auditor about Hayes' financial statements and caused Hayes to make Commission filings containing material misrepresentations. The complaint also alleged that Shovers took affirmative steps to conceal information about the improper accounting practices from Hayes' outside independent auditor and Hayes' Audit Committee and Board of Directors.

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has permanently enjoined Shovers, a CPA, from violating the Federal securities laws within the meaning of Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice. In view of these findings, the Commission deems it appropriate and in the public interest that Shovers be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Shovers be, and hereby is, temporarily suspended from appearing or practicing before the Commission. This Order shall be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Shovers may within thirty days after service of this Order file a petition with the Commission to lift the temporary suspension. If the Commission within thirty days after service of the Order receives no petition, the suspension shall become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission shall, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Shovers personally or by certified mail at his last known address.

By the Commission.

Elizabeth M. Murphy
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. 59604 / March 19, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2854 / March 19, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-13413

In the Matter of

JEANNE M. ROWZEE,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND 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 pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 102(e)(3)(i) of the Commission's Rules of Practice against Jeanne M. Rowzee ("Respondent" or "Rowzee").[1]

II.

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

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

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 and 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. Rowzee, age 49, resides in Irvine, California. She is a licensed California attorney who maintained a solo practice. Rowzee held herself out as a securities "expert," and purported to screen purported PIPE ("private investment in public equity") investments and then advised investors on the value of the PIPE investments and their purchase. As compensation for this service, Rowzee received 25% of the purported returns paid to investors. Rowzee provided advice to investors about PIPEs on a regular basis for approximately three years. In addition, Rowzee represented a witness in connection with at least one Commission investigation.

2. On September 15, 2008, the Commission filed a complaint against Rowzee in SEC v. Jeanne M. Rowzee, et al. (Civil Action No. SACV 08-1025 DOC (ANx)). On December 31, 2008, the court entered an order permanently enjoining Rowzee, by consent, from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act.

3. The Commission's complaint alleged, among other things, that, in connection with the fraudulent offer and sale of $52.7 million of securities to approximately 150 investors, Rowzee falsely promised investors that she would invest in purported PIPE investments, and promised returns of 19% to 54% within 12 to 16 weeks. The complaint also alleged that Rowzee defrauded investment adviser clients and misappropriated investor funds. The complaint further alleged that Rowzee sold unregistered securities.

IV.

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

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

A. Rowzee is suspended from appearing or practicing before the Commission as an attorney.

B. Pursuant to Section 203(f) of the Advisers Act, Respondent Rowzee 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.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

Commissioner Walter and Commissioner Paredes not participating

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC - 28652; 812-13645]

UBS AG, et al.; Notice of Application and Temporary Order

March 19, 2009

Agency: Securities and Exchange Commission ("Commission").

Action: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 ("Act").

Summary of Application: Applicants have received a temporary order exempting them from section 9(a) of the Act, with respect to an injunction entered against UBS AG on March 19, 2009 by the United States District Court for the District of Columbia ("Injunction") until the Commission takes final action on an application for a permanent order. Applicants also have applied for a permanent order.

Applicants: UBS AG; UBS Financial Services Inc. ("UBSFS"); UBS Fund Advisor, L.L.C. ("UBSFA"); UBS Willow Management, L.L.C. ("UBS Willow"), UBS Eucalyptus Management, L.L.C., UBS Tamarack Management, L.L.C., UBS Juniper Management, L.L.C., and UBS Enso Management, L.L.C. (collectively, "UBSFA Advisers"); UBS Global Asset Management (Americas) Inc. ("UBS Global AM Americas"); UBS Global Asset Management (US) Inc. ("UBS Global AM US"); and UBS IB Co-Investment 2001 GP Limited ("ESC GP") (collectively, "Applicants").[1]

Filing Dates: The application was filed on March 19, 2009. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

[1] Applicants request that any relief granted pursuant to the application also apply to any other company of which UBS AG is or may become an affiliated person (together with the Applicants, the "Covered Persons").

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 13, 2009, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants: UBS AG and ESC GP, c/o UBS Investment Bank, 677 Washington Boulevard, Stamford, CT 06901; UBSFS, 1200 Harbor Boulevard, Weehawken, NJ 07086; UBSFA and UBSFA Advisers, 51 West 52nd Street, 23rd Floor, New York, NY 10019; UBS Global AM US, 51 West 52nd Street, 16th Floor, New York, NY 10019; UBS Global AM Americas, One North Wacker Drive, Chicago, IL 60606.

For Further Information Contact: John Yoder, Senior Counsel, at 202-551-6878, or Marilyn Mann, Branch Chief, at 202-551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a temporary order and summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Room, 100 F Street NE, Washington DC 20549-1520 (tel. 202-551-5850).

Applicants' Representations:

1. UBS AG is a company established under the laws of Switzerland that directly or through its subsidiaries provides global wealth management, securities and retail and commercial

banking services. Each of the Applicants is either directly or indirectly controlled by UBS AG. UBS AG and ESC GP provide investment advisory services to employees' securities companies ("ESCs"), as defined in section 2(a)(13) of the Act, which provide investment opportunities for highly compensated key employees, officers, directors and current consultants of UBS AG and its affiliates. UBSFS, UBSFA, UBSFA Advisers and UBS Global AM Americas are registered as investment advisers under the Investment Advisers Act of 1940 ("Advisers Act") and currently serve as investment advisers to registered management investment companies ("Funds"). UBSFS is registered as a broker-dealer under the Securities Exchange Act of 1934 ("Exchange Act") and acts as depositor and principal underwriter to various registered unit investment trusts ("UITs"). UBS Global AM US is registered as a broker-dealer under the Exchange Act and as an investment adviser under the Advisers Act and serves as principal underwriter to various open-end Funds.

2. On March 19, 2009, the United States District Court for the District of Columbia entered a judgment, which included the Injunction, against UBS AG ("Judgment") in a matter brought by the Commission.[2] The Commission alleged in the complaint ("Complaint") that UBS AG violated section 15(a) of the Exchange Act and section 203(a) of the Advisers Act by acting as an unregistered broker-dealer and investment adviser. The Complaint alleged that UBS AG, largely through individuals known as client advisers, used United States jurisdictional means to provide cross-border brokerage and investment advisory services to thousands of United States clients. The Complaint further alleged that this cross-border business was serviced primarily from Switzerland. The Complaint further alleged that at all times UBS AG was aware that it could provide these services to United States cross-border clients only through an entity

[2] Securities and Exchange Commission v. UBS AG, Judgment as to UBS AG, 1:09-CV-00316 (D.D.C.) (entered March 19, 2009).

registered with the Commission as a broker-dealer or investment adviser. Without admitting or denying any of the allegations in the Complaint, except as to jurisdiction, UBS AG consented to the entry of the Injunction, the payment of disgorgement and certain undertakings to take various remedial actions.

Applicants' Legal Analysis:

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security, or in connection with activities as an underwriter, broker or dealer, from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust, or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include, among others, any person directly or indirectly controlling, controlled by, or under common control, with the other person. Applicants state that UBS AG is an affiliated person of each of the other Applicants within the meaning of section 2(a)(3). Applicants state that, as a result of the Injunction, they would be subject to the prohibitions of section 9(a).

2. Section 9(c) of the Act provides that the Commission shall grant an application for exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to Applicants, are unduly or disproportionately severe or that the conduct of the Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption. Applicants have filed an application pursuant to

section 9(c) seeking a temporary and permanent order exempting the Applicants and the other Covered Persons from the disqualification provisions of section 9(a).

3. Applicants believe that they meet the standards for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the requested exemption from section 9(a).

4. Applicants state that the alleged conduct giving rise to the Injunction did not involve any of the Applicants acting in the capacity of investment adviser, sub-adviser or depositor to any registered investment company or ESC, or in the capacity of principal underwriter for any open-end Fund or UIT ("Fund Service Activities"). Applicants note that none of the current or former directors, officers, or employees of the Applicants (other than UBS AG) had any knowledge of, or had any involvement in, the conduct alleged in the Complaint. Applicants further state that the personnel at UBS AG who were involved in the violations alleged in the Complaint have had no and will not have any future involvement in Fund Service Activities.

5. Applicants state that the inability of the Applicants to engage in Fund Service Activities would result in potentially severe financial hardships for the registered investment companies they serve and the registered investment companies' shareholders or unitholders. Applicants state that they will distribute written materials, including an offer to meet in person to discuss the materials, to the boards of directors of the Funds (the "Boards"), including the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of the Funds, and their independent legal counsel as defined in rule 0-1(a)(6) under the Act, if any,

regarding the Injunction, any impact on the Funds, and the application. Applicants state that they will provide the Boards with all information concerning the Injunction and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicants also state that, if they were barred from providing Fund Service Activities to registered investment companies and ESCs, the effect on their businesses and employees would be severe. Applicants state that they have committed substantial resources to establishing an expertise in providing Fund Service Activities. Applicants further state that prohibiting them from providing Fund Service Activities would not only adversely affect their businesses, but would also adversely affect over 425 employees that are involved in those activities. Applicants also state that disqualifying UBS AG and ESC GP from continuing to provide investment advisory services to ESCs is not in the public interest or in furtherance of the protection of investors. Because the ESCs have been formed for the benefit of key employees, officers, directors and current consultants of UBS AG and its affiliates, it would not be consistent with the purposes of the ESC provisions of the Act to require another entity not affiliated with UBS AG to manage the ESCs. In addition, participants in the ESCs have subscribed for interests in the ESCs with the expectation that the ESCs would be managed by an affiliate of UBS AG.

7. Applicants state that UBS AG and certain other Applicants have previously received orders under section 9(c), as described in greater detail in the application.

Applicants' Condition:

Applicants agree that any order granting the requested relief will be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

Temporary Order:

The Commission has considered the matter and finds that the Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

IT IS HEREBY ORDERED, pursuant to section 9(c) of the Act, that Applicants and any other Covered Persons are granted a temporary exemption from the provisions of section 9(a), solely with respect to the Injunction, subject to the condition in the application, from March 19, 2009, until the Commission takes final action on their application for a permanent order.

By the Commission.

Elizabeth M. Murphy
Secretary

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Commissioner Walter and Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT of 1933
Release No. 9019 / March 20, 2009

In the Matter of **UBS AG,** **Defendant.**	**ORDER UNDER RULE 602(e) UNDER THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(b)(4) and 602(c)(2) DISQUALIFICATION PROVISIONS**

I.

UBS AG ("UBS") has submitted a letter, dated February 18, 2009, requesting a waiver of the Rule 602(b)(4) and 602(c)(2) disqualifications from the exemption from registration under Regulation E arising from UBS' settlement of an injunctive action commenced by the Commission.

II.

On February 18, 2009, the Commission filed a civil injunctive action in the United States District Court for the District of Columbia charging UBS, a provider of financial services, with violating Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(a) of the Investment Advisers Act of 1940 ("Advisers Act"). In its complaint, the Commission alleged that between 2001 and 2007, UBS had as many as 20,000 accounts held by wealthy U.S. clients whom UBS solicited and for whom UBS provided broker-dealer and investment advisory services. UBS' cross-border business was highly profitable, bringing UBS approximately $150 to 200 million in revenues per year. Although UBS knew that providing these services required it to register with the Securities and Exchange Commission, it did not register and instead took steps to avoid detection by the U.S. authorities. By providing the broker-dealer and investment advisory services without registering with the Commission, UBS was able to evade the Commission's oversight and record-keeping requirements, thus enabling its U.S. clients to maintain secret accounts and thereby avoid paying U.S. taxes on the income in those accounts. On March 19, 2009, pursuant to UBS' consent, the Court entered a Final Judgment permanently enjoining UBS from violating Section 15(a) of the Exchange Act and Section 203(a) of the Advisers Act and ordering UBS to: 1) disgorge $200 million, approximately the amount of the revenues that it received from the business of acting as an unregistered broker-dealer and investment adviser; 2) terminate the business that gave rise to the violations; and 3) retain and pay for an independent auditor to audit and to report on UBS' termination of that business.

III.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if the issuer or any of its affiliates is subject to any order, judgment, or decree of a court "temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security." *See* Rule 602(b)(4) under the Securities Act of 1933 ("Securities Act"). The Regulation E exemption is also not available for the securities of an issuer if a director, officer, principal security holder, investment adviser or underwriter of the securities to be offered, or any partner, director or officer of such investment adviser or underwriter, is temporarily or permanently restrained or enjoined by any court from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser. *See* Rule 602(c)(2). Rule 602(e) 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."

IV.

Based upon the representations set forth in UBS' 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 Final Judgment.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provisions of Rule 602(b)(4) and 602(c)(2) under the Securities Act resulting from the entry of the Final Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

J Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISER ACT
Release No. 2855 / March 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13199

In the Matter of

CORNERSTONE CAPITAL MANAGEMENT, INC., and LAURA JEAN KENT,

Respondents.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE AND DESIST ORDER PURSUANT TO SECTIONS 203(e), 203(f), AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940

I.

On September 16, 2008, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Cornerstone Capital Management, Inc. ("Cornerstone Capital") and Laura Jean Kent ("Kent") (together, "Respondents")..

II.

In response to these proceedings, Respondents have submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 ("Order"), as set forth below.

III.

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

Summary

1. From 1997 to 2004, Respondent Laura Kent and her investment advisory firm, Respondent Cornerstone Capital, invested approximately $15 million of client funds in five investments. Over time, Respondents became aware of substantial evidence demonstrating that the value of each of the investments was severely impaired.

2. Despite this knowledge, Respondents have continued to issue periodic client account statements in which they list the "market price" and "total market value" of these investments as remaining unchanged from their original cost. Respondents also have made numerous material misrepresentations and omissions about the status of the investments, including the fact that some of the promoters were subsequently convicted of fraud. Respondents knew, or were reckless or negligent in not knowing, that the values of the investments had been impaired, yet they continued to charge a 1%-assets-under-management fee based on the initial cost of the investments, collecting hundreds of thousands of dollars more than they would have had the investments been properly valued.

3. By failing to properly value impaired investments, and by misrepresenting and failing to disclose material facts about the investments, Respondents have willfully violated Sections 206(1) and 206(2) of the Advisers Act.

Respondents

4. Cornerstone Capital is a California corporation providing investment advisory services to individual clients and three pooled investment vehicles. Cornerstone Capital registered with the Commission on July 3, 1996 and with California on July 10, 1996. Cornerstone Capital withdrew its Commission registration on July 18, 1997, and re-registered on May 31, 2006, after its purported assets under management surpassed $25 million. Today, Cornerstone Capital claims to have nearly $34 million in assets under management. It provides direct, personal advice to clients, who are invested in a combination of domestic and foreign stocks, bonds, and mutual funds, REITs, futures, commodities, and cash, as well as the pooled investment vehicles managed by Kent and Cornerstone Capital described below.

5. Kent, 59, owns and is president of Cornerstone Capital. She resides in Redwood City, California. Kent graduated from Michigan State University with a major in Economics, received a Masters in Economics from Wayne State University, and obtained an MBA from Stanford University. She holds Series 3, 7, 24, 63, and 65 securities licenses. From 1983 to 1994, she was a registered representative with the broker-dealer Kidder, Peabody & Co.

Between 1994 and 1996, she was a registered representative of Cornerstone Investments, a branch of a Bay Area-based broker-dealer, Investment Architects, Inc. She founded Cornerstone Capital in 1996. In 2000, Washington state securities regulators sued Kent and Cornerstone Capital, alleging they misrepresented themselves as a Commission-registered investment adviser and defrauded clients by offering and selling fictitious securities. In 2004, without admitting or denying the allegations, Kent and the firm settled the Washington state proceeding, agreeing to cease and desist from violating state antifraud provisions and acting as an unregistered securities broker.

Other Relevant Entities

6. Cornerstone Investment Circle, LLC ("CIC") is a Wyoming limited liability company formed by Kent in August 1996. Respondents use CIC as a vehicle for Cornerstone Capital clients to invest in certain alternative private investments. Since 2004, CIC has been invested in two private placement programs described in detail below – the Precious Metals and Mining Program and the Promissory Note Program.

7. Cornerstone Investment Circle I & II, L.P. ("the Partnerships") are Delaware limited partnerships formed in April 2004. They began operations in July 2004 as vehicles for Cornerstone Capital clients to invest in certain alternative private investments. The Partnerships are invested in a number of programs described below, including the Costa Rican Currency Exchange Program, the Indemnity Bond Bridge Program, and the Cogeneration Project Financing Program.

8. Cornerstone Management Company, LLC ("Cornerstone Management") is a Delaware limited liability company controlled by Kent and is the general partner of the Partnerships. Cornerstone Management formed in July 2004 with Cornerstone Capital as the managing member.

Background

9. In 1996, Kent formed Cornerstone Capital and registered it as an investment adviser in California. Soon afterwards, she established a limited liability company, CIC, for the purpose of investing clients in alternative private investments. Only Cornerstone Capital clients were eligible to become members of CIC. Thus, Cornerstone Capital has a direct client relationship with all investors in CIC.

10. The Investment Advisory Agreement between Cornerstone Capital and each client states that "[f]ees for Investment Management are computed as a percentage of assets under management at the rate of 1% annualized, subject to the minimum fee." Each Cornerstone Capital client receives a quarterly account statement that summarizes the performance of that client's portfolio for that quarter, lists the client's total assets under management, identifies the "market price" and "total market value" of each investment, and calculates a rate of return from

the initial investment. In the quarterly account statements, Cornerstone Capital provides "market price" and "total market value" for all investments, regardless of whether the investment is a publicly traded stock or bond or an illiquid security, such as interests in CIC and the Partnerships.

11. Around June 30, 2004, Respondents reorganized CIC. Respondents formed the Partnerships and transferred to the Partnerships all investments but the Promissory Note Program and the Precious Metals and Mining Program, both of which remained as portfolio investments in CIC. Only Cornerstone Capital clients were eligible to become limited partners of the Partnerships. Thus, as with CIC members, Cornerstone Capital has a direct client relationship with all Partnership investors.

Respondents Failed to Properly Value Investments That Had Been Impaired.

12. As described above, from 1997 to 2004 Respondents placed more than \$15 million in client funds into five investments, the values of which have become impaired. Respondents knew, or were reckless or negligent in not knowing, that the value of the investments had been impaired. Despite this, Respondents continued to issue client account statements that listed the market value of these investments at the original cost, and misrepresented and omitted other material information about the status of the investments. Through this misconduct, Respondents collected hundreds of thousands of dollars more in management fees than they would have had the investment programs been properly valued. The five impaired investment programs are described below.

The Costa Rican Currency Exchange Program.

13. In 1999, CIC, on Respondents' advice, started the Costa Rican Currency Exchange Program. The program consisted of debt and equity investments in the foreign currency exchange business. Debt investors were to receive monthly interest payments, while equity investors were to have their monthly returns reinvested in the program. The investments allegedly provided working capital for the currency exchange and other related businesses. By mid-2002, Respondents had invested nearly \$7.8 million in funds from a total of 70 clients in the program.

14. In July 2002, Costa Rican authorities raided the currency exchange business, seized all of its assets, and froze its bank accounts totaling \$7 million (out of an estimated total of \$88 million invested by numerous investors, including CIC) while investigating a deposit in the currency exchange program allegedly made by a Canadian drug cartel. Within six months of the raid, one of the two promoters of the currency exchange program was arrested and charged by

Costa Rican authorities with financial fraud. The other promoter fled. In May 2007, one promoter was found guilty of fraud, while the other promoter remains missing.

15. By at least December 2002, Respondents had clear indications that the value of their clients' investment in the currency exchange program was impaired. In October 2002, the currency exchange ceased operation and one month later stopped making or accruing interest payments, and has made no payments to investors since that time. The Respondents learned in December 2002 that one of the promoters had been arrested and charged with fraud and the other forced into hiding and facing a warrant for his arrest. At about the same time, Respondents learned of reports from reputable news agencies that described the currency exchange investment as a classic Ponzi scheme, including a December 13, 2002 *Wall Street Journal* article that Kent read at or near the time of publication.

16. Despite their knowledge of these problems, from December 2002 to the present, Respondents have continued to send their clients account statements showing the value of the currency exchange investment at its original cost plus accrued interest. For example, in four quarterly account statements to clients in 2007, Kent and Cornerstone Capital stated that the "market price" of the Costa Rican Currency Exchange Program had remained the same (and was the same "market price" as it was in 2002). Since January 2003, Cornerstone Capital has collected at least $213,981 in investment management fees based on this impaired investment.

The Promissory Note Program and Precious Metals and Mining Program.

17. Between 1997 and 1999, Cornerstone Capital clients, through CIC, invested a total of $6.6 million in two programs referred to as the Promissory Note Program and the Precious Metals and Mining Program. Funds invested in these programs were loaned to a private company that had three separate divisions: a European bank financing group, a California-based technology group, and a group that owned mineral rights in New Mexico. The loans were evidenced by promissory notes issued by the company, which were secured by the company's technology and mineral rights, and were guaranteed by the company's promoters. Under both programs, the company was required to make monthly interest payments to Cornerstone Capital clients.

18. In 2000, the company defaulted on the loans and declared bankruptcy soon thereafter. In April 2001, the company's two promoters pled guilty to charges they had defrauded investors in other unrelated investments through prime bank and Ponzi schemes. On August 14, 2002, the promoters were sentenced to 18 months in federal prison for the fraud.

19. Respondents learned of the promoters' guilty pleas in 2001. In early 2002, Respondents started foreclosure proceedings to secure the company's mineral rights. On February 4, 2003, Respondents filed a lawsuit against the company and the promoters alleging that the promoters defrauded Respondents in their investment dealings. Respondents obtained summary and default judgments against the promoters in October and November 2004 and foreclosed on the company's New Mexico mineral rights in September 2004. However, to date, Respondents have been unable to collect on the judgments or to develop, sell or otherwise realize any value from the foreclosed property.

20. In May 2002, Respondents disclosed to their clients that they had started foreclosure proceedings on the mineral rights. Respondents, however, waited until August 2004 to disclose to clients the promoters' guilty plea, when Respondents wrote to clients that the principals "entered into a plea bargain with Federal authorities regarding a suit filed by a different investor group." Additionally, Respondents did not disclose the lawsuit against the company and the promoters until February 2006, and then stated that Respondents "obtained a Summary Judgment against the two managers." Respondents have never disclosed that they alleged fraud in the legal action against the company and the promoters.

21. By at least February 2003, when they filed a fraud action against the company's promoters, Respondents had substantial information indicating that the value of client investments in the Promissory Note Program and the Precious Metals and Mining Program was impaired. Despite this information, Respondents have continued to value the investments in the Promissory Note Program and the Precious Metals and Mining Program at their original cost in client account statements. Since February 2003, Cornerstone Capital has collected at least $111,797 in investment management fees based on these impaired investments.

The Indemnity Bond Bridge Program.

22. In June 2004, Cornerstone Capital clients, at the direction of the Respondents, invested $500,000 in CIC's Indemnity Bond Bridge Program. A majority of these clients invested in the program by redeeming certificates of deposit issued by a large, FDIC-insured bank. Under the program, CIC loaned money to two start-up companies through a promoter. The two start-up companies had applied for lines of credit with the promoter of the program, who in turn had purportedly secured bank loans to fund the lines of credit. The $500,000 was to be used to purchase insurance policies from unnamed insurance companies guaranteeing that the bank loans would be repaid and allowing the banks to release funds for the lines of credit.

23. Unbeknownst to Cornerstone Capital clients, CIC used $250,000 of the $500,000 investment in an effort to obtain a $2,500,000 line of credit for CIC's own benefit. Respondents intended to use the proceeds from the line of credit in connection with another ailing investment program. Respondents did not disclose to clients before they invested that Respondents intended to use client funds to help CIC obtain a line of credit for its own benefit.

24. Respondents wired the $500,000 in client funds to a lawyer for the promoter on June 10 and 15, 2004. On or about June 30, 2004, Respondents created a disclosure document regarding the Indemnity Bond Bridge Program that materially misrepresented a key aspect of the investment. Respondents claimed that a respected 150-person California law firm served as escrow agent for the funds CIC was investing and was "authorized to release those funds upon issuance of [an] insurance binder representing the commitment of the insurance company to issue the bond." In truth, the law firm was not involved in the transaction and had no role in determining whether any insurance policy was properly issued.

25. Although CIC was to be repaid the full amount of client funds invested (i.e. $500,000) plus interest by August 2004, by December 2005 it still had received no payments, and Respondents' inquiries to the promoters throughout 2004 and 2005 met with vague excuses.

26. In December 2005, Federal Bureau of Investigation ("FBI") agents informed Respondents that the promoters had been indicted for fraud and questioned Kent about CIC's investment in the Indemnity Bond Bridge Program. Prosecutors subsequently amended the indictment in August 2006 to name CIC as a defrauded investor. On June 22, 2007 Kent testified at the criminal trial of the promoters, who were convicted one month later. They were both sentenced to lengthy prison terms of 7 and 13 years.

27. To this day, Respondents have not informed clients about the information regarding the CIC investment revealed to Respondents in the FBI interview or the indictments. Instead, Respondents continually represent to clients that the investment will pay off soon.

28. From at least December 2005, Respondents have had substantial evidence that the value of their clients' investment in the Indemnity Bond Bridge Program is impaired. Respondents, however, continue to value the investment at its original cost (the initial investment amount) on account statements to clients. Respondents have collected at least $6,796 in fees on this investment since January 2006.

The Cogeneration Project Financing (Grain Mill) Program.

29. Between May and August 2003, Cornerstone Capital, on Respondents' advice and through CIC, provided $235,000 in client funds to two small California energy companies for the installation and operation of a power cogeneration unit at a grain mill in Central California. The

investment consisted of a promissory note to be paid back in seven years with 12% interest. Under the terms of the note, payment was to begin upon the installation and operation of the power generator.

30. From its inception, this program ran into delays and difficulties. After a year with no payments from the principals of the energy companies, Respondents renegotiated the contract, affording the principals more time to repay the loan. Under the terms of the new contract, the principals were to begin payment in October 2004 and continue with monthly payments through September 2011. In this contract, the promoter stated that the power generator had been installed and was fully operational. However, Respondents learned in early 2005 from a third party that the promoters' statements in the contract were false and that the generator had not been installed and was not operational. Since entering the renegotiated contract, Respondents have received only two interest payments, in December 2004 and May 2005, and one payment of principal of $32,500 in June 2005.

31. From at least June 2005, Respondents faced clear indications that the value of their clients' investment in this program was impaired. Despite this, until June 2007, Respondents valued the investment at its original cost in client account statements. From June 2005 to June 2007 (when Respondents reduced the value of the investment to 50% of cost), Respondents collected at least $3,724 in fees based on this investment.

Violations

32. As a result of the conduct described above, Respondents willfully violated Sections 206(1) and 206(2) of the Advisers Act, which make it "unlawful to employ any device, scheme, or artifice to defraud any client or prospective client; and to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."

Disgorgement and Civil Penalties

33. Respondents have submitted a sworn Statement of Financial Condition dated October 30, 2008 and November 6, 2008 and other evidence and have asserted their inability to pay prejudgment interest and a civil penalty.

Undertakings

34. Respondents undertake:

a. To hire, at the expense of Cornerstone Capital, an Independent Consultant not unacceptable to the Commission's staff to review and establish the valuations of any

Cornerstone Capital alternative private investments for the next twelve quarters from the date of this Order and make a report on the valuations on a quarterly basis to the San Francisco Regional Office of the United States Securities and Exchange Commission;

b. To submit all contemplated future valuation changes regarding any Cornerstone Capital alternative private investment to an Independent Consultant in advance for a period of three years;

c. To refrain from making any valuation changes of any Cornerstone Capital alternative private investment until after the investment or valuation changes have been approved by the Independent Consultant for a period of three years;

d. To require the Independent Consultant to enter into an agreement that provides that for the period of the engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in the performance of his/her duties under this Order shall not, without prior written consent of the San Francisco Regional Office of the United States Securities and Exchange Commission, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement;

e. To mail a copy of this Order to each existing investment advisory client and to investors in pooled investment vehicles within 30 days following the entry of this Order. This Order shall be sent by certified mail, along with a cover letter in a form not unacceptable to the staff of the Commission. Respondents shall notify Marc J. Fagel, Regional Director of the San Francisco Regional Office when this undertaking is completed;

f. To provide, from the effective date of this Order until the expiration of 12 months, a copy of this Order to all prospective investment advisory clients not less than 48 hours prior to entering into any written or oral investment advisory contract (or no later than the time of entering into such contract, if the client has the right to terminate the contract without penalty within five business days after entering into the contract). Within one month after expiration of the 12-month period, Respondents shall notify the staff of the Commission by mail directed to Marc J. Fagel, Regional Director of the San Francisco Regional Office, when this undertaking is completed; and

g. To provide, from the effective date of this Order, a hyperlink from the website www.cornerstonecap.com and any other websites maintained by Respondents for the purpose of soliciting and communicating with investment advisory clients to the Commission website's posting of this Order.

35. In addition, Respondents undertake, pursuant to Rule 1101 of the Commission's Rules on Fair Fund and Disgorgement Plans [17 C.F.R. 201.1101], and in consultation with the staff of the Commission, to develop a plan to distribute the disgorgement ordered herein as provided for in the distribution plan ("Distribution Plan"), which shall be submitted to the Commission within 60 days of the entry of this Order for notice in accordance with Rule 1103 [17 C.F.R. 201.1103]. Following a Commission order approving the Distribution Plan, as provided in Rule 1104 [17 C.F.R. 201.1104], Respondents shall take all necessary and appropriate steps to assist the Commission-appointed Administrator in carrying out the final Distribution Plan.

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. Respondents shall cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act;

B. Respondents are censured;

C. Respondents shall comply with the undertakings enumerated in Section III Paragraphs 34(a) through (g) and 35, above;

D. Respondents shall pay disgorgement of $335,758.00 and prejudgment interest of $80,000.00, for a total of $415,758.00, but payment of such amount except for $335,758 .00 is waived based upon Respondents' sworn representations in their Statements of Financial Condition dated October 30, 2008 and November 6, 2008 and other documents submitted to the Commission. The payment required by this Order shall be made in the following installments:

Payment Date	**Amount**
Within 30 days from the entry of the Offer	$40,000.00
June 30, 2009	$20,000.00
September 30, 2009	$20,000.00
December 31, 2009	$20,000.00
March 31, 2010	$23,000.00
June 30, 2010	$23,000.00

September 30, 2010	$23,000.00
December 31, 2010	$23,000.00
March 31, 2011	$26,000.00
June 30, 2011	$26,000.00
September 30, 2011	$26,000.00
December 31, 2011	$26,000.00
March 31, 2012	$39,758.00
TOTAL	**$335,758.00**

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of disgorgement, prejudgment interest, and any additional interest accrued pursuant to SEC Rule of Practice 600, shall be due and payable immediately, without further application. 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 Laura Kent and Cornerstone Capital Management, Inc. 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 Marc Fagel, Regional Director, San Francisco Regional Office, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104;

D. Based upon Respondents' sworn representations in their Statements of Financial Condition dated October 30 and November 6, 2008 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondents; and

E. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondents provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondents was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondents may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of a penalty should not be ordered; (3) contest the imposition of the maximum penalty allowable under the law; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Ch. II

[Release Nos. 33-9020, 34-59634, IA-2858, IC-28679, File No. S7-07-09]

Regulatory Flexibility Agenda

AGENCY: Securities and Exchange Commission.

ACTION: Semiannual regulatory agenda.

SUMMARY: The Securities and Exchange Commission approved the publication of an agenda of its rulemaking actions pursuant to the Regulatory Flexibility Act. The agenda, which is not a part of or attached to this document, was submitted by the Commission to the Regulatory Information Service Center for inclusion in the Unified Agenda of Federal Regulatory and Deregulatory Actions, which is scheduled for publication in its entirety on www.reginfo.gov in April 2009. The version of the Unified Agenda to be published in the Federal Register will include only those rules for which the agency has indicated that preparation of an analysis under the Regulatory Flexibility Act is required. Information in the Commission's agenda was accurate on March 26, 2009, the date on which the Commission's staff completed compilation of the data. To the extent possible, rulemaking actions by the Commission after that date will be reflected in the agenda. The Commission invites questions and public comment on the agenda and on the individual agenda entries.

DATES: Comments should be received on or before July 31, 2009.

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/other.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-07-09 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 Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-07-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/other.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M Murphy
Secretary

Dated: March 26, 2009

Commissioner Walter
not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59637 / March 27, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2954 / March 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13416

In the Matter of **JUDITH KUDLA (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 Judith Kudla ("Respondent" or "Kudla") 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

---

[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.

Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.3. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Judith Kudla, age 50, is and has been a certified public accountant licensed to practice in the State of Michigan since approximately 1984. Kudla served as Director of Finance in Delphi Corporation's ("Delphi") information technology ("IT") department from June 1999 to April 2002, when she was separated by the company. In that position, Kudla was consulted for Generally Accepted Accounting Principles ("GAAP") accounting guidance concerning IT department transactions.

2. Delphi was, at all relevant times, an auto parts supplier headquartered in Troy, Michigan. It was incorporated in Delaware in 1998. At all relevant times, Delphi's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and was listed on the New York Stock Exchange ("NYSE") under the symbol "DPH."

3. On October 30, 2006, the Commission filed a complaint against Kudla and others in SEC v. Delphi Corporation and Judith Kudla, et al. (Civil Action No. 2:06-cv-14891-AC-SDP). On March 26, 2009, the court entered an order permanently enjoining Kudla, by consent, from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5 and 13b2-1 thereunder, and aiding and abetting violations of Sections 10(b), 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 10b-5, 12b-20, and13a-1 thereunder. Kudla was also ordered to pay a $30,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Kudla engaged in a fraudulent scheme which resulted in Delphi filing materially false and misleading financial statements in the company's annual report on Form 10-K for the fiscal year ended December 31, 2001, which were incorporated by reference into offering documents filed by Delphi in connection with its 2003 notes and preferred securities offerings. Specifically, the Complaint alleged that Delphi improperly recorded a $20 million payment from an IT company in December 2001, made in connection with a new IT contract between the IT company and Delphi, as a reduction in expense, although the payment was in substance a loan which Delphi was required to repay with interest. The Complaint alleged that, when the IT contract was signed, Delphi agreed to repay the $20 million over 5 years with interest, through an intentionally opaque scheme involving accelerated payments on other IT company service invoices, and using a supplier finance program; because the $20 million was refundable, it contravened GAAP to record the $20 million as an immediate reduction of IT expense instead of a Delphi liability to the IT company. In connection

with the payment, Delphi allegedly entered into a false side letter with the IT company which was intended to mislead Delphi's auditors as to the correct accounting treatment for the transaction. The Complaint alleged that Kudla actively participated in meetings and discussions leading to the signing of the relevant contract and a false $20 million payment side letter and then was involved in drafting and approving the false work orders through which the repayment was accomplished.

IV.

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

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

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

B. After three (3) years from the date of this order, Respondent may request that the Commission consider her reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in her practice before the Commission will be reviewed either by the independent audit committee of the public company for which she works or in some other acceptable manner, as long as she practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Chairman Schapiro and Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59639 / March 27, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2860 / March 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13417

In the Matter of

MICHAEL L. SILVER,

Respondent.

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Michael L. Silver ("Silver" 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 and III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Silver was an employee of Prudential Securities, Inc., a broker-dealer and investment adviser registered with the Commission, and Prudential Equity Group, LLC, a broker-dealer registered with the Commission.[1] From May 1993 through August 2006, Silver was also a registered representative associated with broker-dealers registered with the Commission. Silver, 37 years old, is a resident of Woodcliff Lake, NJ.

2. On February 24, 2009, a final judgment was entered by consent against Silver, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Frederick J. O'Meally, et al., Civil Action Number 06 Civ. 6483 (LTS), in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that, from at least January 2001 until September 2003, Silver defrauded mutual fund companies and the funds' shareholders in order to engage in "market timing" trades on behalf of four hedge fund customers through the use of multiple customer account numbers and financial adviser numbers.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Silver be, and hereby is barred from association with any broker, dealer, or investment adviser, with the right to reapply for association after three years to the appropriate self-regulatory organization, or if there is none, to the Commission;

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

---

[1] On August 25, 2004, the Commission issued a settled order finding that Prudential Equity Group, LLC, formerly known as Prudential Securities, Inc., violated the antifraud and other provisions of the federal securities laws in connection with a fraudulent market timing scheme that involved the use of deceptive practices to evade mutual funds' limitations on market timing. *See Prudential Equity Group,* Rel. No. 34-54371.

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.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter and
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59644 / March 27, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2862 / March 27, 2009

INVESTMENT COMPANY ACT OF 1940
Release No. 28682 / March 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13419

In the Matter of Jason G. Burks, Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER, PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Jason G. Burks ("Burks" 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 Administrative and Cease-and-

Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

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

Respondent

1. Jason G. Burks, age 35, was a registered representative at Southwest Securities, Inc. ("Southwest") from September 2002 until October 2003 (the "Relevant Period"), when the firm terminated his employment. During the Relevant Period, Southwest was dually registered as a broker-dealer and investment adviser. Burks previously held the following NASD licenses: General Securities Representative (Series 7), Futures Managed Funds (Series 31), Uniform Securities Agent State Law (Series 63), and Registered Investment Adviser (Series 65). Burks is currently employed by Enterprise Rent-a-Car Company in a non-securities-related position. Burks has no known disciplinary history.

Background

2. In the Fall of 2002, Southwest hired Burks to be a registered representative in its downtown Dallas branch. Before joining Southwest, Burks worked at Mutuals.com, Inc., where he placed market timing trades and late trades on behalf of several hedge fund adviser clients, including Veras Investment Partners, LLC ("Veras"), a Houston, Texas-based investment advisor to Veras-affiliated hedge funds.[1] Upon joining Southwest, Burks opened five accounts for two Veras-affiliated entities, and began placing market timing trades for Veras on October 1, 2002. During Burks 13-month tenure at Southwest, Veras was his only client, and Veras' primary trading strategy was market timing. Burks executed for Veras approximately 3,000 market timing trades, with an aggregate value of about $1.7 billion, in at least 132 mutual fund families (490 total mutual funds). Southwest earned $1,515,981 in fees from Veras' accounts, of which Burks received $704,235. Soon after joining Southwest, Burks became one of Southwest's top producing registered representatives, and regularly appeared on the firm's "Top Ten Producers" list.

3. Many of the mutual funds in which Burks placed Veras's market timing trades either prohibited market timing, or strictly limited the frequency of trades in order to prevent market timing. During the Relevant Period, at least 35 mutual fund families, representing hundreds of individual mutual funds, detected Burks timing activity. Those fund families typically blocked the client account (one of the accounts managed by Burks) from future trades

---

[1] The Commission previously instituted settled administrative and cease-and-desist orders against Mutuals.com and Veras. *See In re Mutuals.com, Inc., et al.*, Admin. No. 3-12837 (Sept. 26, 2007); *In re Veras Capital Master Fund, et al.*, Admin. No. 3-12133 (Dec. 22, 2005).

in the fund ("Block Notices"). By policing Burks' market timing activity in this manner, the mutual funds hampered his continuing execution of Veras' market timing trades and, thereby, jeopardized his status as one of the firm's top producers. Burks therefore had a significant incentive to circumvent the policing activities of the mutual funds, and he engaged in a number of strategies, including the use of multiple accounts and legal entities that appeared to be unrelated to Veras, to get transactions executed in mutual funds that imposed trading restrictions on his client.

4. During the Relevant Period, Burks regularly used multiple accounts, with multiple client-affiliated entities as account holders, in an effort to circumvent trading restrictions that the mutual funds imposed. By rotating trades in multiple accounts, Burks disguised Veras' market timing trading and gained access to funds that had previously restricted Veras' market timing activities. Burks also used the multiple Veras accounts to divide timing trades into dollar amounts that would more likely evade detection by the mutual fund companies.

5. During the Relevant Period, Southwest, through Burks, engaged in late trading in mutual fund shares. Southwest's back-office systems permitted registered representatives to enter mutual fund trades until 6:30 p.m. EST, and all trades entered by that time, including trades received after the close of the U.S. equity markets (typically 4:00 p.m. EST), were processed at that day's net asset value ("NAV"). The firm, therefore, did not have procedures to ensure that trades received after the close of the U.S. equity markets would be processed at the next day's NAV, as required by Rule 22c-1 under the Investment Company Act.[2]

6. Burks regularly executed late trades (after 4:00 p.m. EST) on Veras' behalf. Southwest received as many as 90% (over 2500) of all Veras's orders after 4:00 p.m. EST, yet Veras received that day's NAV for the trades.

Violations

7. As a result of the conduct described above, Burks willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that he, in connection with the purchase or sale of securities, directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, employed devices, schemes or artifices to defraud; made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit, as described above. Further, Burks knowingly or recklessly provided substantial assistance to, and thus willfully aided and abetted the violations of Section 10(b) of the Exchange Act and Rule 10b-5 committed by his clients in connection with the market timing and late trading transactions alleged above.

---

[2] During the relevant period, Southwest had dealer agreements with numerous mutual funds. By virtue of these dealer agreements, Southwest was a "dealer" within the meaning of Rule 22c-1 under the Investment Company Act. As a general rule, these dealer agreements, directly or by reference to the prospectus, prohibited late trading.

8. Southwest cleared transactions in fund shares through various clearing firms. Southwest, by engaging in the conduct described above, sold, redeemed or repurchased the shares of registered investment companies at prices not based upon the current NAV of such securities as next computed after receipt of the orders to sell, redeem, or repurchase the shares of such registered investment companies. By engaging in the conduct described above, Burks willfully aided and abetted and caused Southwest's violations of Rule 22c-1 promulgated under Section 22(c) of the Investment Company Act.

<u>Disgorgement and Civil Penalties</u>

9. Respondent Burks has submitted a sworn Statement of Financial Condition dated March 14, 2008, and other evidence and has asserted his inability to pay disgorgement, plus prejudgment interest, and a civil penalty.

<u>Cooperation</u>

10. In determining to accept the Offer, the Commission considered the cooperation afforded by Respondent to the Commission staff.

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 agreed to in the Respondent's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, Section 203(f) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

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

B. Respondent shall cease and desist from committing or causing any violations and any future violations of Rule 22c-1 under the Investment Company Act;

C. Respondent Burks be, and hereby is barred from association with any broker, dealer or investment adviser, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with a right to reapply to the Commission to serve or act in any such capacities after five years from the date of this Order;

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

E. Respondent Burks shall pay disgorgement of $704,235, plus prejudgment interest of $232,329.33, but that payment of such amount is waived based upon Respondent's sworn representations in his Statement of Financial Condition dated March 14, 2008, and other documents submitted to the Commission; and

F. The Division of Enforcement may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Respondent provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement and pre-judgment interest. No other issue shall be considered in connection with such a petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement and interest should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; or (4) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary

J. Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

Chairman Schapiro and Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59640 / March 27, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2861 / March 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13418

In the Matter of **BRIAN P. CORBETT,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Brian P. Corbett ("Corbett" 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 and III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Corbett was an employee of Prudential Securities, Inc., a broker-dealer and investment adviser registered with the Commission, and Prudential Equity Group, LLC, a broker-dealer registered with the Commission. From January 1995 through August 2006, Corbett was also a registered representative associated with broker-dealers registered with the Commission. Corbett, 36 years old, is a resident of Timonium, MD.

2. On February 24, 2009, a final judgment was entered by consent against Corbett, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Frederick J. O'Meally, et al., Civil Action Number 06 Civ. 6483 (LTS), in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged that, from at least January 2001 until September 2003, Corbett directed the day-to-day activities of a team of brokers and assistants who spent most of their time on market timing transactions that defrauded mutual fund companies and the funds' shareholders on behalf of five hedge fund customers through the use of multiple customer account numbers and financial adviser numbers.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act, that Respondent Corbett be, and hereby is barred from association with any broker, dealer, or investment adviser, with the right to reapply for association after three years to the appropriate self-regulatory organization, or if there is none, to the Commission;

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

customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 30, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13420

In the Matter of **Global Matrechs, 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 public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondent Global Matrechs, Inc. ("Respondent" or "Global").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Global Matrechs, Inc. (CIK No. 1021226) is a Delaware corporation with its principal place of business in Ridgefield, Connecticut. Its business purportedly consists of providing safety and storage solutions for the nuclear, environmental, and chemical industries and also serving the nuclear waste, green, and homeland security sectors. Global has a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. The Company is nearly two years delinquent in its periodic filings with the Commission. The company's Form 10-K for the period ended December 31, 2006, reported a net loss of approximately $1.7 million for the prior nine months and an accumulated deficit of over $38 million. A "going concern" opinion was included in the independent auditor's report in the Form 10-KSB for the fiscal year ended December 31, 2006, and management also disclosed "substantial doubt about the Company's ability to continue as a going concern" in its Form 10-QSB for the quarter ended September 30, 2006. According to Commission records, Global has filed notifications of inability to timely file an annual or quarterly report for the period ended December 31, 2006 and for the period ended March 31, 2007. Global filed its Form 10-K

for the period ended December 31, 2006 on January 20, 2009. Its securities are currently quoted on Pink Sheets OTC Markets, Inc. ("Pink Sheets") under the symbol "GBMR."

B. DELINQUENT PERIODIC FILINGS

2. Respondent is nearly two years delinquent in its periodic filings with the Commission (*see* Chart of Delinquent Filings, attached hereto as Appendix 1).

3. Global received a delinquency letter from the Division of Corporation Finance requesting compliance with its periodic filing obligations. Global responded to the letter stating that it would cure its delinquent filings. On January 20, 2009, Global filed its Form 10-K for the period ended December 31, 2006 and has failed to file its seven periodic reports, including one annual report and six quarterly reports after being sent the delinquency letter.

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

5. Based on the foregoing, Respondent has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder.

III.

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

A. Whether the allegations contained in Section II 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 or appropriate for the protection of investors, to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities of the Respondent registered pursuant to Section 12 of the Exchange Act.

IV.

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

This Order shall be served forthwith upon Respondent personally or by certified, registered, or Express Mail, or 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.

Elizabeth M. Murphy
Secretary

Jill M Peterson

By: Jill M. Peterson
Assistant Secretary

Attachment

Appendix 1

Chart of Delinquent Filings for Global Matrechs, Inc.

Form Type	Period Ended	Due Date	Months Delinquent (rounded up)
10-QSB	6/30/07	8/14/07	16
10-QSB	9/30/07	11/14/07	13
10-KSB	12/31/07	3/31/08	9
10-QSB	3/31/08	5/15/08	7
10-QSB	6/30/08	8/14/08	4
10-QSB	9/30/08	11/14/08	1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

March 30, 2009

IN THE MATTER OF	:	
Global Matrechs, Inc.,	:	**ORDER OF SUSPENSION OF TRADING**
File No. 500-1	:	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Global Matrechs, Inc. ("Global") because it is nearly two years delinquent in its required periodic reports. Global is quoted on the Pink Sheets OTC Markets, Inc. under the ticker symbol GBMR.

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 the above-listed company is suspended for the period from 9:30 a.m. EDT on March 30, 2009, through 11:59 p.m. EDT on April 13, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59648 / March 30, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2958 / March 30, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13421

In the Matter of **DENNIS KAVELMAN, C.A. and ARCANGELO LOBERTO, C.A.,** **Respondents.**	**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 Dennis Kavelman, C.A. ("Kavelman") and Arcangelo Loberto, C.A. (commonly known as Angelo Loberto) ("Loberto") (collectively "Respondents") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the "Offers") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these

[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.

proceedings, and the findings contained in Section III.4 below, which are admitted, Respondents consent 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 (the "Order"), as set forth below.

III.

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

1. Kavelman, age 38, is a chartered accountant and worked as an auditor at KPMG in Canada before joining Research in Motion Limited ("RIM" or the "Company"). He was RIM's Vice President of Finance from 1995 through 1997 and its Chief Financial Officer ("CFO") from 1997 through March 2007. Kavelman also was RIM's Corporate Secretary since 2004. He currently serves as RIM's Chief Operating Officer, Administration and Operations.

2. Loberto, age 37, is a chartered accountant and worked as an auditor at KPMG in Canada before joining RIM in 1997. He was RIM's Director of Finance from 1997 until 2001, when he was given the title of Vice President of Finance. He was Vice President of Finance until March 2007. He currently serves as RIM's Vice President, Corporate Operations.

3. Research in Motion Limited was, at all relevant times, an Ontario, Canada corporation headquartered in Waterloo, Ontario, Canada, and the designer, manufacturer, and marketer of the BlackBerry and other wireless handheld devices sold worldwide. RIM's stock is traded on the NASDAQ National Market under the symbol "RIMM" and the Toronto Stock Exchange under the symbol "RIM." Before July 31, 2006, RIM's common shares were registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78l(g)]. Since then, RIM's common shares have been registered with the Commission pursuant to Section 12(b) of the Exchange Act [15 U.S.C. § 78l(b)].

4. On March 25, 2009, a final judgment was entered against Kavelman and Loberto, permanently enjoining them from future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 13(b)(5) of the Exchange Act and Rules 10b-5, 13a-14 (Kavelman only), 13b2-1, and 13b2-2 thereunder, and from aiding and abetting any violation of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-16 thereunder, in the civil action entitled Securities and Exchange Commission v. Research in Motion Limited, Civil Action No. 09-00301, in the United States District Court for the District of Columbia. Kavelman and Loberto were ordered to pay disgorgement of their ill-gotten gains plus prejudgment interest, which was deemed satisfied based on the prior payments to the Company made by Kavelman ($141,146.54, which included $132,914.60 in disgorgement plus $8,231.94 in prejudgment interest) and Loberto ($52,638.56, which included $47,950.56 in disgorgement plus $4,688 in prejudgment interest). In addition, Kavelman was ordered to pay a $500,000 civil money penalty and Loberto was ordered to pay a $425,000 civil money penalty. Kavelman and Loberto each were prohibited from acting as an officer or director for five years.

5. The Commission's Complaint alleged, among other things, that RIM, Kavelman, Loberto and RIM's two co-Chief Executive Officers illegally granted undisclosed, in-the-money

options to RIM executives and employees by backdating approximately 1,400 stock option grants, of nearly seven million shares, to coincide with historically low closing prices for the Company's stock. The Complaint alleged that Kavelman and Loberto received numerous documents explaining that the Company was required to record compensation expenses for in-the-money options, but ignored the information they received and failed to record compensation expenses for the millions of backdated in-the-money options RIM granted. The Complaint alleged that from fiscal year 1999 to the first quarter of fiscal year 2007, RIM: (i) falsely disclosed in its periodic reports, management information circulars, and registration statements that RIM's options were granted at exercise prices equal to the fair market value of RIM's common stock at the date of the grants; and (ii) filed materially false and misleading financial statements that understated RIM's compensation expenses and overstated its quarterly and annual net income or understated its net losses. The Complaint alleged that Kavelman and Loberto knew, or were reckless in not knowing, that the options disclosures and financial statements in RIM's filings, which Kavelman and Loberto prepared, reviewed and/or signed and Kavelman certified, were materially false and misleading. The Complaint alleged that Kavelman made false representations in letters to RIM's independent auditors and that both men took steps to hide the backdating from the Company's auditors, U.S. and Canadian regulators and RIM's outside lawyer. The Complaint further alleged that at RIM's July 2006 annual general meeting, Kavelman denied that RIM was backdating options. The Complaint alleged that Kavelman and Loberto circumvented internal accounting controls and falsified books and records with regard to the backdated option grants. Finally, the Complaint alleged that as a result of the Company's internal review, Kavelman and Loberto stepped down from their positions in RIM's finance department.

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, it is hereby ORDERED, effective immediately, that:

A. Kavelman and Loberto are suspended from appearing or practicing before the Commission as accountants.

B. After five years from the date of this Order, Kavelman and/or Loberto each may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

By: J. Lynn Taylor
Assistant Secretary

Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 59649 / March 30, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13242

In the Matter of **Arthur S. Redler,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

On September 26, 2008, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Arthur S. Redler ("Respondent" or "Redler").

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, and the findings contained in Section III.4. 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.

III.

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

1. Redler, age 57, is a resident of Coral Springs, Florida. From October 2004 through September 2006, Redler was a registered representative of Newbridge Securities Corp., a registered broker-dealer headquartered in Fort Lauderdale, Florida.

2. At all relevant times, Millennium National Events, Inc. ("Millennium") was a Florida corporation purportedly headquartered in Delray Beach, Florida. Millennium's common stock was publicly traded in the Pink Sheets published by the National Quotations Bureau, Inc.

3. Redler participated in an offering of Millennium's stock, which is a penny stock.

4. On September 28, 2006, Redler pleaded guilty to one count of securities fraud in violation of Title 15 United States Code §§ 78j(b) and 78ff and 17 C.F.R. 240.10b-5, and aiding and abetting in violation of Title 18 United States Code § 2, before the United States District Court for the Southern District of New York, in United States v. Arthur Redler, Crim. Information No. 1:06-CR-878 (LBS).

5. The one-count criminal information to which Redler pleaded guilty alleged, inter alia, that from at least in or about October 2004 through at least in or about November 2005, Redler defrauded investors by artificially manipulating the market for Millennium's stock, and that in engaging in the foregoing conduct, Redler posted bids and conducted trades in Millennium's stock at artificially inflated prices to create the false appearance in the marketplace that there was actual market demand for Millennium's stock at those inflated prices, by the use of the means and instrumentalities of interstate commerce, the mails, and the facilities of national securities exchanges.

IV.

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

Accordingly, it is hereby ORDERED:

1. Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Redler 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.

2. Respondent Redler be, and hereby is, barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy
Secretary

J Lynn Taylor

By: J. Lynn Taylor
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59647; File No. 4-546)

March 30, 2009

Joint Industry Plan; Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.; Notice of Filing of Proposed Options Order Protection and Locked/Crossed Market Plan

I. Introduction

On September 13, 2007, and September 18, 2007, pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934 ("Act") ("Rule 608"),[1] the International Securities Exchange, LLC ("ISE") and NYSE Arca, Inc. ("NYSE Arca"), respectively, filed with the Securities and Exchange Commission ("Commission") the proposed Options Order Protection and Locked/Crossed Market Plan.[2] On December 11, 2007, ISE and NYSE Arca separately filed Amendment No. 1 to the Proposed Plan.[3] On April 24, 2008, and April 17, 2008, ISE and NYSE Arca, respectively, filed Amendment No. 2 to the Proposed Plan.[4] On November 10, 2008 and October 31, 2008, ISE and NYSE Arca, respectively, filed Amendment

---

1 17 CFR 242.608.

2 See letter from Michael J. Simon, General Counsel, ISE, to Nancy M. Morris, Secretary, Commission, dated September 12, 2007 ("ISE Letter 1"); and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Nancy M. Morris, Secretary, Commission, dated September 14, 2007 ("NYSE Arca Letter 1"). The proposed Options Order Protection and Locked/Crossed Market Plan, as amended, is defined herein as the "Proposed Plan."

3 See letter from Michael J. Simon, General Counsel, ISE, to Nancy M. Morris, Secretary, Commission, dated December 10, 2007; and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Nancy M. Morris, Secretary, Commission, dated December 10, 2007.

4 Amendment No. 2 superseded Amendment No. 1 and replaced it in its entirety. See letter from Michael J. Simon, General Counsel, ISE, to Nancy M. Morris, Secretary, Commission, dated April 16, 2008; and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Nancy M. Morris, Secretary, Commission, dated April 16, 2008.

No. 3 to the Proposed Plan.[5] On April 30, 2008, May 8, 2008, June 18, 2008, June 18, 2008, and July 9, 2008, respectively, Chicago Board Options Exchange, Incorporated ("CBOE"), The NASDAQ Stock Market LLC ("Nasdaq"), American Stock Exchange LLC ("Amex") (f/k/a NYSE Alternext US LLC, "NYSE Alternext," n/k/a NYSE Amex LLC, "NYSE Amex"), Philadelphia Stock Exchange, Incorporated (n/k/a NASDAQ OMX PHLX, Inc., "Phlx"), and Boston Stock Exchange, Inc. ("BSE") (n/k/a NASDAQ OMX BX, Inc., "BX" and together with ISE, NYSE Arca, CBOE, Nasdaq, NYSE Amex, and Phlx, the "Proposing Exchanges") filed with the Commission the Proposed Plan.[6] On November 25, 2008, November 26, 2008, December 2, 2008, December 4, 2008, and December 5, 2008, CBOE, NYSE Alternext, BSE, Phlx, and Nasdaq, respectively, filed Amendment No. 1 to the Proposed Plan.[7] Pursuant to Rule 608, the Commission is publishing this notice of, and soliciting comments on, the Proposed Plan.

---

5 See letter from Michael J. Simon, General Counsel, ISE, to Florence Harmon, Acting Secretary, Commission, dated November 7, 2008 ("ISE Letter 2"); and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Florence Harmon, Acting Secretary, Commission, dated October 30, 2008 ("NYSE Arca Letter 2").

6 In their respective filings of the Proposed Plan, Amex, BSE, CBOE, Nasdaq, and Phlx incorporated the changes made by ISE and NYSE Arca in Amendment No. 2. See letters from Jeffrey P. Burns, Vice President and Associate General Counsel, Amex, to Nancy M. Morris, Secretary, Commission, dated June 17, 2008 ("Amex Letter 1"); Bruce Goodhue, Chief Regulatory Officer, BSE, to Florence Harmon, Acting Secretary, Commission, dated July 8, 2008 ("BSE Letter 1"); Edward J. Joyce, President and Chief Operating Officer, CBOE, to Nancy M. Morris, Secretary, Commission, dated April 29, 2008 ("CBOE Letter 1"); Jeffrey S. Davis, Vice President and Deputy General Counsel, The NASDAQ OMX Group, Inc., to Nancy M. Morris, Secretary, Commission, dated May 7, 2008 ("Nasdaq Letter 1"); and Richard S. Rudolph, Vice President and Counsel, Phlx, to Nancy M. Morris, Secretary, Commission, dated June 17, 2008 ("Phlx Letter 1").

7 In their respective Amendment No. 1 to the Proposed Plan, BSE, CBOE, NYSE Alternext, Phlx, and Nasdaq made changes identical to those made by ISE and NYSE Arca in Amendment No. 3. See letters from Edward J. Joyce, President and Chief Operating Officer, CBOE, to Florence Harmon, Acting Secretary, Commission, dated November 25, 2008 ("CBOE Letter 2"); Jeffrey P. Burns, Managing Director, NYSE Alternext, to Florence Harmon, Acting Secretary, Commission, dated November 25, 2008 ("Amex Letter 2"); John Katovich, Vice President, BSE, to Florence Harmon,

II. Background

Currently, the Proposing Exchanges are signatories to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Current Plan").[8]

The Current Plan is a national market system plan linking its participants. In adopting the Securities Acts Amendments of 1975, Congress stated its finding that "linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders."[9] Consequently, Congress directed the Commission to oversee the development of a national market system. One of the principal purposes of the national market system is to assure "the practicability of brokers executing investors' orders in the best market."[10]

Prior to 1999, options were primarily traded on a single exchange. However, as the options exchanges increasingly began multiply listing and trading options classes previously listed on a single exchange, the need for measures to ensure that customer orders are executed in the best market became necessary.[11] For this reason, on October 19, 1999, the Commission

---

Acting Secretary, Commission, dated December 1, 2008 ("BSE Letter 2"); Richard S. Rudolph, Vice President and Counsel, Phlx, to Florence Harmon, Acting Secretary, Commission, dated December 3, 2008 ("Phlx Letter 2"); and Jeffrey S. Davis, Vice President and Deputy General Counsel, The NASDAQ OMX Group, Inc., to Florence Harmon, Acting Secretary, Commission, dated December 4, 2008 ("Nasdaq Letter 2").

8 On July 28, 2000, the Commission approved the Current Plan which was proposed by Amex, CBOE, and ISE. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000).

9 Section 11A(a)(1)(D) of the Act.

10 15 U.S.C. 78k-1(a)(1)(C)(iv).

11 See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023, 48024 (August 4, 2000).

ordered the options markets to submit a linkage plan within 90 days that, at a minimum, included uniform trade-through rules and expanded firm quote obligations to cover agency orders presented by competing exchanges.[12] In response, Amex, CBOE, and ISE submitted the Current Plan, and Pacific Exchange, Inc. ("PCX," n/k/a NYSE Arca) and Phlx each filed separate plans. The Commission published these plans for comment in the Federal Register and ultimately approved the Current Plan on July 28, 2000.[13] Subsequently, both PCX and Phlx submitted proposed amendments to the Current Plan to become participants to the Current Plan. Both of these proposed amendments were approved on November 16, 2000.[14] On February 5, 2004, BSE's proposed amendment to become a participant to the Current Plan became effective.[15] Further, Nasdaq's proposed amendment to become a participant to the Current Plan became effective on March 21, 2008.[16]

The Current Plan requires its participants to avoid, absent reasonable justification and during normal market conditions, trading at a price inferior to that displayed on another market ("trade-through").[17] The Current Plan provides for several exceptions to trade-through liability,

---

12 See Securities Exchange Act Release No. 42029 (October 19, 1999), 64 FR 57674, 57675-76 (October 26, 1999).

13 See supra note 8. The plans filed by PCX and Phlx could not be approved as national market system plans, pursuant to Rule 11Aa3-2 (n/k/a Rule 608) under the Act, because neither was filed by two or more sponsors, as required by the rule. 17 CFR 240.11Aa3-2 (n/k/a 17 CFR 242.608).

14 See Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000) and 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000).

15 See Securities Exchange Act Release No. 49198 (February 5, 2004), 69 FR 7029 (February 12, 2004).

16 See Securities Exchange Act Release No. 57545 (March 21, 2008), 73 FR 16394 (March 27, 2008).

17 Section 8(c) of the Current Plan.

including, among other things, systems malfunction, failure of the receiving market to respond to an incoming order within 30 seconds, failure of the market traded through to complain within the specified time period, complex trades, trading rotations, and non-firm quotations on the market that was traded through.[18] The Current Plan also provides a mechanism by which a member of a participating exchange could seek satisfaction if a customer order is traded through.[19]

In addition, under the Current Plan, its participants agree that the dissemination of "locked" or "crossed" markets should be avoided, and, if their members lock or cross a market, they should take remedial actions to unlock or uncross such market.[20] Further, the Current Plan contains provisions to address trade comparison, clearing, trading halts, non-firm quotations, and administration of the Current Plan.[21] Except with respect to the addition of new participants and the withdrawal of current participants, any proposed change to the Current Plan must be approved unanimously by its participants.[22]

The participating exchanges comply with the requirements of the Current Plan, including the prohibition against trade-throughs, by utilizing a stand alone system ("Linkage Hub") to send and receive specific order types. The Linkage Hub is a centralized data communications network that electronically links the options exchanges to one another. The Options Clearing Corporation ("OCC") operates the Linkage Hub.[23]

---

18 Section 8(c)(iii) of the Current Plan.

19 Section 8(c)(ii) of the Current Plan.

20 Section 7(a)(i)(C) of the Current Plan.

21 Sections 5, 9, and 10 of the Current Plan.

22 Section 5(c)(i) of the Current Plan.

23 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

There are three defined order types under the Current Plan that its participants could route through the Linkage Hub to limit trade-throughs: orders represented by eligible market makers on behalf of customers ("Principal Acting as Agent Orders" or "P/A Orders");[24] orders for the principal accounts of market makers and specialists ("Principal Orders");[25] and orders intended to satisfy trade-through liabilities ("Satisfaction Orders").[26] Non-market-maker broker-dealers do not have access to the Linkage Hub.

While acknowledging that the Current Plan largely has worked satisfactorily,[27] the Proposing Exchanges seek to withdraw from the Current Plan[28] and operate under an alternative linkage plan, the Proposed Plan. The Proposing Exchanges contend that the continuing growth in the volume of options traded since the Commission approved the Current Plan has strained market makers' ability to comply with the current Linkage Hub rules. They further note that the options markets have been moving towards quoting in pennies, and options quoted in pennies now represent a significant amount of the total industry volume. The Proposing Exchanges

---

24 Sections 2(16)(a) and 7(a)(ii)(B) of the Current Plan.

25 Sections 2(16)(b) and 8(b)(iii) of the Current Plan.

26 Sections 2(16)(c) and 7(a)(ii)(C) of the Current Plan.

27 See ISE Letter 1 and NYSE Arca Letter 1, supra note 2; see also Amex Letter 1, BSE Letter 1, CBOE Letter 1, Nasdaq Letter 1, and Phlx Letter 1, supra note 6.

28 Section 4(d) of the Current Plan states that a participant could withdraw from the Current Plan by giving notice, filing an amendment to the Current Plan, and paying any accrued costs for which it is responsible. Section 5(c)(iii) of the Current Plan further states that the amendment effecting the withdrawal must specify how such participant "plans to accomplish, by alternate means, the goals of the [Current Plan] regarding limiting Trade-Throughs of prices on other exchanges trading the same options classes." The Commission notes that, should the Proposing Exchanges choose to withdrawal from the Current Plan, they would be required to meet these requirements.

assert that quoting in pennies increases the number of price changes in an option, which in turn gives rise to a greater chance of missing the market.[29]

The Proposing Exchanges also state that the operating rules of the Current Plan are complex. They contend that there are restrictions on when market makers could send Principal Orders, and rules on the size of P/A Orders are complicated. Moreover, the Proposing Exchanges represent that, unlike the Current Plan, their proposed alternative linkage would eliminate the need for achieving unanimity to change even the most minor aspect of the linkage mechanism.[30]

The Proposing Exchanges propose an alternative, rules-based approach to intermarket options linkage. This rules-based approach would require neither a central linkage mechanism, nor a complex set of operating rules.

III. Description of the Proposed Plan

A brief summary of the Proposed Plan is provided below. The full text of the Proposed Plan submitted by the Proposing Exchanges, is available on the Commission's Web site at http://sec.gov/rules/sro/nms/nmsarchive/nms2007.shtml#4-546, at the each Proposing Exchange's principal office, and at the Commission's Public Reference Room.

A. Order Protection

1. Prevention of Trade-Throughs

---

29 See ISE Letter 1 and NYSE Arca Letter 1, supra note 2; see also Amex Letter 1, BSE Letter 1, CBOE Letter 1, Nasdaq Letter 1, and Phlx Letter 1, supra note 6.

30 See infra note 84 and accompanying text.

The Proposed Plan would require each Participant[31] to establish, maintain, and enforce written policies and procedures as approved by the Commission that are reasonably designed to prevent Trade-Throughs in Eligible Options Classes.[32] The Proposed Plan would define an "Eligible Options Class"[33] as all option series overlying a security or group of securities, which class is available for trading on two or more Eligible Exchanges. A "Trade-Through"[34] would be

---

31 The Proposed Plan defines "Participant" to mean an Eligible Exchange whose participation in the plan has become effective pursuant to Section 3(c) of the Proposed Plan. See Section 2(15) of the Proposed Plan. As with the Current Plan, the Proposed Plan defines "Eligible Exchange" to mean a national securities exchange registered with the Commission in accordance with Section 6(a) of the Act that is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws) and is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan). In addition, under the Proposed Plan, if a national securities exchange chooses not to become a party to the Proposed Plan, it would still be included in the definition of "Eligible Exchange" if it is a participant in another plan approved by the Commission providing for comparable Trade-Through and Locked and Crossed Market protection. See Section 2(6) of the Proposed Plan and Section 2(6) of the Current Plan. Thus, the Best Bids and Best Offers on exchanges that remain participants in the Current Plan would be protected against Trade-Throughs by Participants in the Proposed Plan. "OPRA Plan" means the plan filed by the Options Price Reporting Authority with the Commission pursuant to Section 11Aa(1)(C)(iii) of the Act and approved by the Commission and declared effective as of January 22, 1976, as from time to time amended. See Section 2(14) of the Proposed Plan. For the definitions of "Trade-Through," "Best Bid" or "Best Offer," "Locked Market," and "Crossed Market," see infra notes 34, 36, 78, and 79, respectively, and accompanying texts.

32 Section 5(a)(i) of the Proposed Plan.

33 Section 2(7) of the Proposed Plan. The Current Plan defines "Eligible Options Class" to mean all option series overlying a security or group of securities, including both put options and call options, which class is traded on two or more participants of the Current Plan. See Section 2(8) of the Current Plan.

34 Section 2(21) of the Proposed Plan. The Current Plan defines "Trade-Through" to mean a transaction in an options series at a price that is inferior to the national best bid and offer in an options series calculated by that plan's participant, but does not include a transaction that occurs at a price that is one minimum quoting increment inferior to the national best bid and offer provided a linkage order is contemporaneously sent to each of that plan' participant disseminating the national best bid and offer for the full size of the participant's bid (offer) that represents the national best bid and offer. See Section 2(29) of the Current Plan.

defined as a transaction in an option series, either as principal or agent, at a price that is lower than a Protected Bid or higher than a Protected Offer. A "Protected Bid" or a "Protected Offer"[35] would mean a bid or offer in an option series that is displayed by an Eligible Exchange, is disseminated pursuant to the OPRA Plan, and is the Best Bid or Best Offer of an Eligible Exchange. A "Best Bid" or "Best Offer"[36] would mean the highest bid price or the lowest offer price communicated by a member of an Eligible Exchange to any broker-dealer or to any customer[37] at which such member is willing to buy or sell, either as principal or agent. A Best Bid or Best Offer would not include indications of interest.

The Proposed Plan would also require each Participant to agree to conduct surveillance of its market on a regular basis to ascertain the effectiveness of the policies and procedures to prevent Trade-Throughs and to take prompt action to remedy any deficiencies in such policies and procedures.[38] In addition, the Commission notes that Rule 608(c) requires that each self-regulatory organization, absent reasonable justification or excuse, enforce compliance with any national market system plan by its members and persons associated with its members.[39]

2. Exceptions to Trade-Throughs

---

35 Section 2(17) of the Proposed Plan. Protected Bid and Protected Offer, together are referred to herein as "Protected Quotation." See Section 2(18) of the Proposed Plan.

36 Sections 2(1) and 2(2) of the Proposed Plan. Under the Current Plan, "best" as used with reference to bids (offers) means the bid (offer) that is highest (lowest). See Section 2(2) of the Current Plan.

37 A "customer" would be defined an individual or organization that is not a broker-dealer. See Section 2(5) of the Proposed Plan.

38 Section 5(a)(ii) of the Proposed Plan. The Current Plan states each of its participants shall establish procedures to conduct surveillance of its market to identify trades executed at prices inferior to the national best bid and offer. See Section 8(c)(i)(B) of the Current Plan.

39 17 CFR 242.608(c).

The Proposed Plan would provide exceptions for certain transactions from the prohibition against Trade-Throughs. The Proposed Plan would also provide that, if a Participant relies on an exception, it would be required to establish, maintain, and enforce written policies and procedures reasonably designed to assure compliance with the terms of the exception.[40] Below is a discussion of the proposed exceptions.

System Issues:[41] The Proposing Exchanges state that this exception corresponds to the system-failure exception in Regulation NMS for equity securities and would permit a Participant to trade through a Protected Quotation when the Eligible Exchange displaying such Protected Quotation is experiencing system problems.[42] The Participants would adopt "self-help" rules to implement this exception.[43]

Trading Rotations:[44] This exception would permit a Participant to trade through a Protected Quotation disseminated by an Eligible Exchange during a trading rotation. It carries forward a trade-through exception in the Current Plan[45] and is the options equivalent to the single price opening exception in Regulation NMS for equity securities.[46] Options exchanges use a trading rotation to open an option for trading or reopen an option after a trading halt. The

---

40 Section 5(a)(i) of the Proposed Plan.

41 Section 5(b)(1) of the Proposed Plan.

42 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7. See also Rule 611(b)(1) of Regulation NMS under the Act (17 CFR 242.611(b)(1)).

43 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7. Such proposed rules would be subject to notice, comment, and Commission review pursuant to Section 19(b) of the Act.

44 Section 5(b)(ii) of the Proposed Plan.

45 Section 8(c)(iii)(E) of the Current Plan.

46 See Rule 611(b)(3) of Regulations NMS under the Act (17 CFR 242.611(b)(3)).

rotation is effectively a single price auction to price the option,[47] and there are no practical means to include prices on other exchanges in that auction.[48]

Crossed Markets:[49] This exception would permit a Participant to trade through when markets are crossed and is identical to the crossed quote exception in Regulation NMS.[50] A Crossed Market is when a Protected Bid is higher than a Protected Offer. The Proposing Exchanges state that permitting transactions to be executed without regard to Trade-Throughs in a Crossed Market would allow the market quickly return to equilibrium.[51]

Intermarket Sweep Orders:[52] The Proposed Plan includes two exceptions from the prohibition against Trade-Throughs for certain transactions involving Intermarket Sweep Orders[53] (or "ISOs"). An ISO would be defined as a limit order for an options series that, when routed to an Eligible Exchange, is identified as an Intermarket Sweep Order and, simultaneously with the routing of the order, one or more additional orders, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any

---

47 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

48 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

49 Section 5(b)(iii) of the Proposed Plan. For the definition of a "Crossed Market," see infra note 79 and accompanying text.

50 See Rule 611(b)(4) of Regulation NMS under the Act (17 CFR 242.611(b)(4)).

51 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

52 Section 5(b)(iv) and (v) of the Proposed Plan.

53 Section 2(9) of the Proposed Plan. Moreover, the Proposed Plan would provide that each Participant would be required to take reasonable steps to establish that ISOs meet the requirements of the Proposed Plan. See Section 5(c) of the Proposed Plan.

Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the order. Such additional orders would also be marked as ISOs.[54]

The Proposed Plan would permit a Participant to execute orders marked as ISOs even when the Participant is not at the national best bid or offer ("NBBO"). A Participant would also be permitted to execute an order when it is not at the NBBO, provided the Participant simultaneously "sweeps" all Protected Quotations using an ISO.[55] The Proposing Exchanges state that these exceptions correspond to the ISO exceptions in Regulation NMS.[56]

Quote Flickering:[57] This exception would permit a Participant to trade through a Protected Quotation on an Eligible Exchange if within one second prior to the execution, such Eligible Exchange had displayed a price equal or inferior to the price of the transaction. The Proposing Exchanges state that this exception corresponds to the flickering quote exception in Regulation NMS.[58] The Proposing Exchanges state that options quotations change as rapidly, if not more rapidly, than cash-equity quotations. Options quotations track the price of the underlying instrument or index and thus generally change when the price of the underlying changes. This exception would provide a form of "safe harbor" to Participants to allow them to

---

54 A Participant could place any unexecuted, and uncancelled, portion of an ISO on its book.

55 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

56 Id. See also Rule 611(b)(5) and (6) of Regulation NMS under the Act (17 CFR 242.611(b)(5) and (6)).

57 Section 5(b)(vi) of the Proposed Plan.

58 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7. See also Rule 611(b)(8) of Regulation NMS under the Act (17 CFR 242.611(b)(8)).

trade through prices that have changed within a second of the transaction causing a nominal Trade-Through.[59]

Non-Firm Quotes:[60] This exception carries forward the current non-firm quote Trade-Through exception in the Current Plan[61] and would permit a Participant to trade through a Protected Quotation that was "Non-Firm."[62] The Proposing Exchanges state that an Eligible Exchange's quotations may not be firm for automatic execution during this trading state and thus should not be protected from Trade-Throughs, and, in effect, these quotations are akin to "manual quotations" under Regulation NMS.[63]

Complex Trades:[64] This exception carries forward the complex trade exception in the Current Plan[65] and would permit a Participant to trade through a Protected Quotation if the transaction was part of a "complex trade." The definition of "complex trade" would be implemented through rules adopted by the Participants, which would be subject to notice, comment, and Commission review pursuant to the Section 19(b) rule filing process. The

---

59 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

60 Section 5(b)(vii) of the Proposed Plan.

61 Section 8(c)(iii)(C) of the Current Plan.

62 "Non-Firm" would be defined to mean, with respect to Quotations in an Eligible Options Class, that members of a Participant are relieved of their obligations under that Participant's firm quote rule in that Eligible Options Class. See Section 2(11) of the Proposed Plan. The Commission notes that, when quotations in an Eligible Options Class are non-firm, exchange rules require the exchange to provide notice that its quotations are non-firm by appending an indicator to its quotations. See, e.g., CBOE Rule 43.14(b) and NYSE Arca Rule 6.86(d)(1)(C).

63 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

64 Section 5(b)(viii) of the Proposed Plan.

65 Section 8(c)(iii)(G) of the Current Plan.

Proposing Exchanges state that because complex trades are composed of multiple transactions ("legs") effected at a net price, it is not practical to price each leg at a price that does not constitute a Trade-Through. Narrowly-crafted implementing rules should ensure that this exception does not undercut Trade-Through protections.[66]

Customer Stopped Orders:[67] This exception would permit a Participant to trade through a Protected Quotation if the trade executed a "stopped order." The exception would require that the "stopped order" be for the account of a Customer; that the Customer agreed to the specified price on an order-by-order basis; and that the price of the Trade-Through was, for a stopped buy order, lower than the national Best Bid in the options series at the time of execution, or, for a stopped sell order, higher than the national Best Offer in the options series at the time of execution. The Proposing Exchanges[68] state that this exception corresponds to the customer stopped order exception in Regulation NMS.[69] The Proposing Exchanges state that this exception would permit broker-dealers to execute large Customer orders over time at a price agreed upon by a customer, even though the price of the option may change before the order is executed in its entirety.[70]

---

66 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

67 Section 5(b)(ix) of the Proposed Plan.

68 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

69 See Rule 611(b)(9) of Regulation NMS under the Act (17 CFR 242.611(b)(9)).

70 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7. For a further discussion on how this exemption operates, see the Regulation NMS Adopting Release, Securities Exchange Act Release No. 51808, June 9, 2005 at notes 322-325.

Stopped Orders and Price Improvement:[71] This exception would permit a Participant to trade through a Protected Quotation if the trade executes an order that is stopped at a price that did not constitute a Trade-Through at the time of the stop.[72] The Proposing Exchanges state that this exception would allow a Participant to seek price improvement for an order, even if the market moves in the interim, and the transaction ultimately is effected at a price that would trade through the then currently-displayed market.[73]

Benchmark Trades:[74] This exception would permit a Participant to trade through a Protected Quotation if the trade was executed at a price not tied to the price of an option at the time of execution and for which the material terms were not reasonably determinable at the time of the commitment to make the trade. An example would be a volume-weighted average price trade, or "VWAP." The Proposing Exchanges state that this exception corresponds to a Trade-Through exemption in Regulation NMS.[75] No Participant currently permits these types of

---

71 Section 5(b)(x) of the Proposed Plan.

72 The rules of several of the Proposing Exchanges currently contain provisions relating to price improvement mechanisms. See, e.g., ISE's Price Improvement Mechanism and ISE Rule 723. Under these price improvement mechanisms, certain exchange members are typically given the opportunity to offer price improvement to orders received by the exchange during a specified period of time ("auction"). During this auction period, the NBBO could move from where the NBBO was when the order was received. However, the exchange is not required to execute the order at a price at or better than this new NBBO, but instead must guarantee a price no worse than the NBBO at the time the order was received. Thus, following the auction, an execution could result in a Trade-Through if the NBBO improves from the time the order was received although, had the order been executed at the time of receipt, the execution would not have resulted in a Trade-Through.

73 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

74 Section 5(b)(xi) of the Proposed Plan.

75 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7. See also Rule 611(b)(7) of Regulation NMS under the Act (17 CFR 242.611(b)(7)).

options trades, and any transaction-type relying on this exemption would require the Participant to adopt rules, which would be subject to notice, comment, and Commission review pursuant to the Section 19(b) rule filing process.[76]

B. Locked and Crossed Markets

The Proposed Plan would also address Locked and Crossed Markets.[77] A "Locked Market"[78] would be defined as a quoted market in which a Protected Bid is equal to a Protected Offer in a series of an Eligible Options Class. A "Crossed Market"[79] would be defined as a quoted market in which a Protected Bid is higher than a Protected Offer in a series of an Eligible Options Class.

Under the Current Plan, its participants agree that the dissemination of "locked" or "crossed" markets should be avoided. Further, the Current Plan requires its participants to have rules requiring that, if a member of a participating exchange locks or crosses a market, such member must take remedial actions to unlock or uncross such market. In addition, under the Current Plan, eligible market makers may direct a Principal Order through the Linkage to trade against the bid or offer that was locked or crossed.[80]

The Proposed Plan would require each Participant to establish, maintain, and enforce written rules that require their members reasonably to avoid displaying Locked and Crossed

---

76 See ISE Letter 2 and NYSE Arca Letter 2, supra note 5; see also Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, supra note 7.

77 Section 6 of the Proposed Plan.

78 Section 2(10) of the Proposed Plan.

79 Section 2(4) of the Proposed Plan.

80 Section 7(a)(i)(C) of the Current Plan.

Markets.[81] Participants would also be required to establish, maintain, and enforce written rules reasonably designed to assure the reconciliation of Locked and Crossed Markets.[82] Finally, the Proposed Plan would provide that Participants must establish, maintain, and enforce written rules that prohibit its members from engaging in a pattern or practice of displaying Locked and Crossed Markets, subject to exceptions as may be contained in the rules of a Participant, as approved by the Commission.[83]

C. Compliance with the Proposed Plan

1. Amendments to the Proposed Plan

Any proposed change in, addition to, or deletion from the Proposed Plan could be effected only by means of a written amendment to the Proposed Plan that is unanimously approved and executed by the Participants.[84] Any amendment would need to set forth the change, addition, or deletion and would not become effective until approved by the Commission or otherwise becomes effective pursuant to Section 11A of the Act and Rule 608 thereunder.[85]

2 Joining the Proposed Plan

---

81 Section 6(a) of the Proposed Plan. All such rules would be subject to notice, comment, and Commission review pursuant to Section 19(b) of the Act.

82 Section 6(b) of the Proposed Plan.

83 Section 6(c) of the Proposed Plan.

84 The Commission notes that the Proposing Exchanges believe that the Proposed Plan would eliminate the need for achieving unanimity to change even the most minor aspect of the linkage mechanism. See supra note 30 and accompanying text. Although, as with the Current Plan, any change to the Proposed Plan requires the unanimous approval by its Participants, unlike the Current Plan, the Proposed Plan does not prescribe order types or a method of routing such order types through a centralized linkage mechanism to prevent Trade-Throughs. See supra notes 23-26 and accompanying text. Thus, for example, a Participant in the Proposed Plan would not need to seek the approval of any other Participant to modify the method by which it routes orders to other Participants to comply with the requirements of the Proposed Plan.

85 Section 4(a) of the Proposed Plan.

Any national securities exchange would be eligible to become a Participant by executing a copy of the Proposed Plan and providing each Participant with a copy of such executed Proposed Plan[86] if it is: (1) registered with the Commission in accordance with Section 6(a) of the Act; (2) a Participant Exchange[87] in OCC; and (3) a party to the OPRA Plan.[88] Further, any such national securities exchange wishing to become a Participant would be required to file an amendment to the Proposed Plan by executing a copy of the Proposed Plan and submitting such executed Proposed Plan to the Commission.[89] Such amendment would be effective when the amendment is approved by the Commission or otherwise becomes effective pursuant to Section 11A of the Act and Rule 608 thereunder.[90]

3. Withdrawal from the Proposed Plan

---

86 Section 3(c) of the Proposed Plan. The Commission notes that Section 3(c) of the Proposed Plan actually states that an "Eligible Exchange" may become a Participant by executing a copy of the Proposed Plan and providing each Participant with a copy of the same. The definition of an "Eligible Exchange" includes the conditions listed above and also the condition that, if a national securities exchange who chooses not to become a party to the Proposed Plan, such exchange is a participant in another plan approved by the Commission providing for comparable Trade-Through and Locked and Crossed Market protection. See infra note 31. As this portion of the Eligible Exchange definition is not applicable to the instance of an exchange joining the Proposed Plan as a new Participant, it is not included in the discussion above.

87 For a definition of a "Participant Exchange," see Section VII of the OCC by-laws.

88 For more information on who is a party to the OPRA Plan, see Section I of the OPRA Plan.

89 Section 4(b) of the Proposed Plan.

90 Id. These requirements are identical to those contained in the Current Plan. See Sections 4(c)(i) and 5(c) of the Current Plan. The Current Plan also requires that an eligible exchange pay a fee to join the Current Plan. See Section 4(c)(i)(iv) of the Current Plan. The Proposed Plan does not require an Eligible Exchange to pay a fee to join the Proposed Plan.

Any Participant may withdraw from the Proposed Plan at any time by providing not less than 30 days' prior written notice to each of the other Participants of such intent to withdraw.[91] To withdraw, such Participant also would be required to effect an amendment to the Proposed Plan by submitting such amended Proposed Plan to the Commission for approval.[92] In submitting the amended Proposed Plan to the Commission, the Participant proposing to withdraw from the Proposed Plan would be required to state how the Participant plans to accomplish, by alternate means, the goal of the Proposed Plan regarding limiting Trade-Throughs of prices on other exchanges trading the same options classes.[93] Such withdrawal from the Proposed Plan would be effective when the amendment is approved by the Commission or otherwise becomes effective pursuant to Section 11A of the Act and Rule 608 thereunder. Upon the effectiveness of such withdrawal, the withdrawing Participant would have no further rights or obligations under the Proposed Plan.

D. Implementation

As noted above,[94] the Proposed Plan would permit a member of a Participant to trade at a price inferior to another market's disseminated quotation if the member sends an Intermarket Sweep Orders to such market for the full size of the disseminated quotation. Thus, unless each Eligible Exchange can accept and execute Intermarket Sweep Orders, a trade-through could occur because the Eligible Exchange would not have the ability to fill the better priced order. Therefore, unless the Commission otherwise authorizes, the Proposed Plan may not be

---

91 Section 3(d) of the Proposed Plan.

92 Section 4(c) of the Proposed Plan.

93 Id. These requirements are identical to those contained in the Current Plan. See Sections 4(d) and 5(c)(iii) of the Current Plan.

94 See supra notes 52-56 and accompanying text.

implemented unless all Eligible Exchanges either (1) have become parties to the Proposed Plan and the Commission has approved all necessary implementing rules[95] or (2) have developed the ability to accept and execute incoming ISOs. If either of these conditions has been met, the Proposed Plan would be implemented on a date upon which all Participants agree, but not later than February 27, 2009.[96]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Proposed Plan is consistent with the Act. The Commission generally invites comments on all aspects of the Proposed Plan, including whether the foregoing assures fair competition. In addition, the Commission seeks comment on the following issues:

1. The Commission requests comment on the relative merits of the Proposed Plan in comparison to the Current Plan. Should the Commission approve the Proposed Plan and permit exchanges to withdraw from the Current Plan? For example, have options volumes increased since the Commission's approval of the Current Plan such that that the option markets are constrained in their ability to comply with the current Linkage Hub rules, as the Proposing Exchanges contend? If so, is the Proposed Plan an appropriate alternative to the Current Plan? Further, under the Current Plan, does quoting in pennies give rise to a greater chance of missing the market by increasing the number of price changes in an option, as the Proposing Exchanges contend? If so, is the Proposed Plan more appropriate means to address this concern?

---

95 Section 7 of the Proposed Plan. As noted above, consideration of the exchanges' proposed rules to implement the Proposed Plan would be pursuant to Section 19(b) of the Act. See supra notes 43 and 81 and accompanying text.

96 Section 7 of the Proposed Plan.

2. Is the Proposed Plan's model for addressing Trade-Throughs and Locked and Crossed Markets, which is similar to that used in the equities markets, appropriate for use in the options markets? If not, please specify the aspects of the Proposed Plan that should be modified, how they should be modified, and why. Beyond modifications to the Proposed Plan, please specify if there any aspects of the Proposed Plan that should be eliminated and why.

3. The Commission requests comment as to whether, and if so, to what extent, the Proposed Plan's order protection provisions would have the desired effect of limiting Trade-Throughs.

4. Is the proposed requirement that each Participant establish, maintain, and enforce policies and procedures that are reasonably designed to prevent Trade-Throughs sufficient to protect investors who would no longer have an avenue under the Proposed Plan to obtain satisfaction when an order has been traded through and no exception applies? Are there any consequences for investors and other market participants if satisfaction for Trade-Throughs is no longer is available under the Proposed Plan? How often is satisfaction requested following a Trade-Through? How often are requests for satisfaction filled?

5. Commenters are also asked to comment on the proposed exceptions to the general Trade-Through prohibitions and whether these exceptions would permit adequate protection of customer orders. Are there proposed exceptions that should not be included or that should be adjusted in the Proposed Plan? Should the Commission consider adding additional exceptions? If so, what are they?

6. The Commission requests comment regarding the proposed use of Intermarket Sweep Orders in the options market. What types of identifiers should be required to help ensure

Participants know that they are receiving an Intermarket Sweep Order so that the receiving Participant would be able to execute the order without regard to whether a better price was displayed on another market center?

7. The Proposed Plan would require each Participant to take reasonable steps to establish that Intermarket Sweep Orders meet the requirement of the Proposed Plan. The Commission requests comment on what such reasonable steps should be. For example, because the Proposed Plan would permit members of a Participant to send ISOs, what rules, policies, and procedures should Participants have in place to ensure that such ISOs comply with the requirements of the Proposed Plan?

8. The Commission specifically requests comment on the appropriateness of the proposed Trade-Through exception relating to a systems or equipment failure, material delay, or malfunction. What are the types of situations in which this proposed exception would appropriately apply?

9. Are there any situations for which the exception relating to non-firm quotes would not be sufficient?

10. The proposed definition of "Bid" or "Offer" states that the terms shall mean the bid price or the offer price communicated by a member of an Eligible Exchange to any Broker/Dealer, or to any customer, at which it is willing to buy or sell, as either principal or agent, but shall not include indications of interest. Is this definition sufficiently clear? For example, when would a communication constitute an indication of interest, and thus not be considered a Bid or Offer under the Proposed Plan? Should this concept be defined in the Proposed Plan? If so, how should it be defined?

11. The Commission requests comment on the Proposed Plan's treatment of Locked and Crossed Markets. Are there aspects of the options market that call for different treatment of Locked Market from the equities market? Are there exceptions to Locked Markets that the Commission should consider? What are possible methods the Participants could adopt in their policies and procedures for a member to reconcile or clear Locked and Crossed Markets?

12. Amendments to the Proposed Plan would require the unanimous approval by the Participants. The Commission requests comment on whether a unanimous vote is appropriate.

13. The Commission requests comment on whether the Proposed Plan's February 27, 2009, implementation date is sufficient to allow market participants time to adapt to the new linkage system. If not, what would be an appropriate implementation date?

14. Unless the Commission otherwise authorizes, the Proposed Plan could not be implemented unless all Eligible Exchanges either have become parties to the Proposed Plan or have developed the ability to accept and execute incoming Intermarket Sweep Orders. The Commission requests comment on whether it is appropriate to delay implementation of the Proposed Plan until all Eligible Exchanges have met such requirements. In addition, the Commission requests comment on under what circumstances, if any, it would be appropriate for the Commission to authorize the implementation of the Proposed Plan, despite one or more Eligible Exchanges failing to satisfy such prerequisites.

15. The Commission requests comment, if it were to approve the Proposed Plan, on the nature and length of implementation periods that would be appropriate to allow market participants to prepare for the new linkage system in an efficient and orderly manner.

16. The proposed definition for "Eligible Options Class" is "all options series overlying a security (as that term is defined in Section 3(a)(10) of the Exchange Act) or group of securities, including both put options and call options, which class is available for trading on two or more Eligible Exchanges." Is this definition sufficient for the Proposed Plan? Is it too narrowly drafted? For example, should the definition include Foreign Currency Options, which are not currently covered by the proposed definition? Are there other products that are, or might be, multiply traded that should be included in the definition of Eligible Options Class?

17. As in Rule 611(a)(1) of Regulations NMS, Section 5(a)(i) of the Proposed Plan provides, in pertinent part, that each Participant agrees to establish, maintain and enforce written policies and procedures that are reasonably designed to prevent trade-throughs. Unlike Regulation NMS, however, the Proposed Plan requires that such policies and procedures be approved by the Commission. In addition, the Current Plan does not require the trade-through surveillance procedures of its Participants to be approved by the Commission.[97] While national securities exchanges must file proposed rule changes pursuant to Section 19(b) of the Act and the rules thereunder, the Commission notes that it generally does not approve, pursuant to Section 19(b), policies and procedures, though they may be reviewed by the Commission, for example, pursuant to inspections and examinations. The Commission requests comment on whether the Proposed Plan should require that

---

97 See Section 8(c)(i)(B) of the Current Plan.

such policies and procedures be approved by the Commission, or whether such a requirement should be deleted.

18. The Proposed Plan requires participants to establish, maintain, and enforce policies and procedures that are reasonably designed to prevent Trade-Throughs in Eligible Options Classes. The Commission requests comment on the impact that fees charged by exchanges to trade with their best displayed prices would have on the ability of participants to comply with this requirement under the Proposed Plan. Should there be a maximum amount that an exchange is permitted to charge for trading with its displayed prices? If so, what should this maximum amount be?

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-546 on the subject line.

Paper comments:

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

All submissions should refer to File Number 4-546. 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 respective principal office of BX, CBOE, ISE, Nasdaq, Phlx, NYSE Amex, and NYSE Arca. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4-546 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary