SECURITIES AND EXCHANGE COMMISSION

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

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KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

45 documents

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60764 / October 1, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13443

In the Matter of

GLB TRADING, INC. and ROBERT A. LECHMAN,

Respondents.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934

I.

On April 14, 2009, the Securities and Exchange Commission ("Commission") issued an Order Instituting Administrative and Cease-And-Desist Proceedings Pursuant to Sections 15(b), and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against GLB Trading, Inc. and Robert A. Lechman ("Respondents").

II.

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

III.

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

Summary

These proceedings arise out of Respondents' aiding and abetting violations of the broker-dealer registration provisions of the federal securities laws. Respondents knowingly provided substantial assistance to Tuco Trading, LLC ("Tuco"), an unregistered day-trading firm. Tuco opened "master accounts" at Respondent GLB Trading, Inc. ("GLB Trading") in Tuco's name. Tuco then created a "sub-account" for each of its customers. Each Tuco customer then contributed funds to Tuco's master accounts and day-traded securities using the equity in those accounts. Even though Tuco effected its customers' securities transactions and received commissions on such trading, it was not registered as a broker-dealer in violation of Section 15(a) of the Exchange Act. Respondents knew of Tuco's activities and provided it with substantial assistance by allowing Tuco to operate through GLB Trading, helping Tuco solicit new customers, structuring Tuco's operations, and loaning funds so that Tuco could meet day-trading calls in its master accounts.

Respondents

1. GLB Trading, Inc. ("GLB Trading") has been registered with the Commission as a broker-dealer (File No. 008-65790) since 2003. GLB Trading was headquartered in Irvine, California until December 2008, when the firm moved to Chicago, Illinois.

2. Robert A. Lechman ("Lechman") founded GLB Trading and was its president, CEO, chief compliance officer, and branch manager of the firm's Irvine, California office from December 2002 until his retirement in December 2008. Lechman continues to own GLB Trading through his family trust. Lechman, 58 years old, is a resident of Carlsbad, California.

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

Other Relevant Entities and Persons

3. Tuco Trading, LLC ("Tuco") was a Nevada limited liability company that provided day-trading capabilities to its customers. It was not registered with the Commission in any capacity. In March 2008, Tuco by consent was permanently enjoined from future antifraud and broker-dealer registration violations and ordered to pay disgorgement with prejudgment interest and a civil penalty in amounts to be determined. *SEC v. Tuco Trading, LLC, et al.*, Civil Case No. CV-08-400-DMS (S.D. Cal.) (Mar. 17, 2008). Tuco maintained three accounts at GLB Trading.

4. Douglas G. Frederick ("Frederick") formed Tuco in August 2006 and was its sole managing member. On March 18, 2008, Frederick by consent was permanently enjoined from future antifraud and broker-dealer registration violations and ordered to pay disgorgement with prejudgment interest and a civil penalty in amounts to be determined. *SEC v. Tuco Trading, LLC, et al.*, Civil Case No. CV-08-400-DMS (S.D. Cal.) (Mar. 17, 2008). Frederick was barred in a follow-on administrative proceeding from future association with any broker or dealer. *In re Frederick*, Rel. No. 34-58751 (Oct. 8, 2008). Frederick, age 38, resides in San Diego, California.

Facts

5. In early 2006, Frederick approached GLB Trading seeking to obtain better clearing rates for a day-trading firm, the "predecessor firm" to Tuco, than he had at another broker-dealer. Lechman knew of the predecessor firm and that it engaged in day-trading. Lechman encouraged Frederick to join GLB Trading as a broker and offered to let Frederick operate his day-trading firm from GLB Trading's offices rent-free. In April 2006, Frederick became a registered representative of GLB Trading and opened an account in the name of Tuco's predecessor to continue his day-trading firm activities.

6. Also in July 2006, Frederick completed three outside activity forms that Frederick, as a registered representative, was required to submit to GLB Trading and FINRA. In those forms, Frederick disclosed, among other things, that: (1) he headed the predecessor firm and that it engaged in the business of "trading" that "traders trade in;" (2) he spent thirty hours per week working for that firm; (3) the firm had been operating since January 2006; (4) the firm facilitated clearing and provided trading software for its traders; (5) he received commissions from the traders as compensation; and (6) in August 2006, the firm would change its name to Tuco. Lechman read and reviewed each of Frederick's outside activity forms at or near the time they were created, and was familiar with Frederick's statements contained therein. In addition, GLB Trading provided clearance to Frederick to engage in those outside business activities.

7. In August 2006, Frederick opened three "master" accounts in Tuco's name at GLB Trading and was the registered representative for each account. Customers of the predecessor firm then became customers of Tuco.

8. Tuco described itself on its website as a "private equity trading firm" that provided "trading solutions for the active trader." To trade through Tuco, a customer had to contribute funds to Tuco and sign an operating agreement, which, among other things, deemed the customer to be a member of Tuco. Tuco pooled customer funds into the "master accounts" and used its own back office system to create "sub-accounts" within the master accounts for each customer to day-trade securities. Tuco provided customers access to software to place and route securities trades.

9. By February 2008, Tuco was providing day-trading capabilities to 259 customers who conducted substantial amounts of trading, including those of public companies. Frederick controlled Tuco and determined how much of Tuco's equity, or buying power, each customer could use to trade. Tuco charged its customers commissions on their securities trades and deducted the commission for each trade from the customer's sub-account. The commissions were collected at GLB Trading's clearing firm. The clearing firm and GLB Trading then subtracted certain expenses from the commissions. GLB Trading received from Frederick a monthly fee of $15,000. Respondents received about $210,000 in fees from Tuco's broker-dealer activities. GLB Trading paid the net commission amount to Frederick.

10. From 2006 to March 2008, Respondents knowingly and actively participated in and facilitated Tuco's broker-dealer activities. Respondents allowed Tuco to trade through GLB Trading. Respondents also helped Tuco solicit new customers in person and by preparing advertisements with Frederick seeking new customers for Tuco. Additionally, Respondents created a structure by which GLB Trading and Frederick would operate Tuco. Furthermore, Lechman loaned Tuco funds to meet day-trading calls in Tuco's master accounts sixteen times. The loan amounts ranged from $100,000 to $780,000, and Lechman charged interest each time for a total of $6,507.

11. GLB Trading and Lechman helped Tuco solicit new customers by arranging for spam e-mails to promote Tuco, posting ads on day-trading websites, and making "pitches" to potential new customers. In August 2006, just two weeks after Frederick opened the master accounts, Lechman suggested that Tuco send a spam e-mail ad to solicit new customers. He also reviewed the ad.

12. In September 2006, Lechman suggested that another spam e-mail be sent for "GLB/Tuco," which Lechman again reviewed. The ad, without identifying GLB Trading or Tuco, stated that they were looking for new traders, that the positions were not salaried, that traders would have to make an initial contribution to their account, and that the firm offered top flight software at competitive rates. The ads closely tracked the statements on Tuco's website and described many features offered by Tuco but not GLB Trading. Lechman sent the responses GLB Trading received to Frederick, but if Frederick was unavailable, Lechman would solicit the potential new Tuco customers himself.

13. On or about September 27, 2006, Lechman informed Frederick about the solicitation efforts and predicted that, in 2007, Tuco would be bigger than another established day-trading firm.

14. Lechman created a structure and allocation of responsibilities by which GLB Trading and Frederick would operate Tuco. On or about October 1, 2006, Lechman informed Frederick of a proposal for Tuco's organizational structure, stating that he no longer wanted to "pitch" potential new Tuco customers. He proposed that going forward Frederick would take charge of all of Tuco's sales, marketing, and advertising and set the commission rates for Tuco's customers. Lechman offered to handle the accounting and issues with GLB Trading's clearing broker. He further stated that GLB Trading's operations principal would handle credit and margin issues. Frederick replied that he looked forward to discussing Lechman's proposal further. Subsequently, Tuco's operations followed Lechman's model.

15. Lechman loaned Tuco funds to meet day-trading calls in Tuco's master accounts sixteen times. The loan amounts ranged from $100,000 to $780,000, and Lechman charged interest each time for a total of about $6,507. Lechman loaned the funds through a limited liability company he controlled, which was also a Tuco customer. Lechman's loans to Tuco violated NASD Conduct Rule 2370, which prohibits associated persons, such as Lechman, from setting up borrowing or lending arrangements with a customer.

Violations

16. As a result of the conduct described above, Respondents willfully aided and abetted and caused Tuco's violations of Section 15(a) of the Exchange Act, which requires brokers and dealers who effect securities transactions through interstate commerce to be registered with the Commission.

IV.

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

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

A. Respondents shall cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.

B. GLB Trading is censured.

C. GLB Trading's registration with the Commission as a broker-dealer (File No. 008-65790) is revoked.

D. Lechman is barred from association with any broker or dealer, with the right to reapply for association after three (3) years from the date of the Order to the appropriate self-regulatory organization, or if there is none, to the Commission.

E. Lechman understands that by settling to a bar with the right to reapply as specified in the Commission's Order, Respondent will be able to make an application to reapply after the specified time period. This application, however, does not guarantee reentry. Rather, Respondent's application will be subject to the applicable law governing the reentry process and Respondent's reentry will be subject to the discretion of the Commission. An application made to a self-regulatory organization will be reviewed by the self-regulatory organization and the Commission pursuant to Rule 19h-1 [17 C.F.R. 240.19h.1] and applicable rules of the self-regulatory organization. An application made directly to the Commission will be reviewed under the processes specified in Rule 193 of the Commission's Rules of Practice [17 C.F.R. 201.193], or as specified in the order in this proceeding. To the extent a state licensing authority may require reapplication for a state license, state law may apply.

F. Any reapplication for association by Lechman 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.

G. Respondents shall, within 10 days of the entry of this Order, pay disgorgement of $216,507.00 and prejudgment interest of $ 4,163.00, for a total of $220,670.00, to the Securities and Exchange Commission. GLB Trading and Robert Lechman shall be jointly and severally liable for the payment of this disgorgement amount. Respondents represent that prior to signing their Offers, the disgorgement amount of $222,607.00 has been deposited into an attorney-client trust account, controlled by Clausen Miller, P.C., 10 South LaSalle Street, Chicago, Illinois, 60603-1098. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. 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 Robert Lechman as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew Petillon, Associate Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Floor, Los Angeles, CA 90036.

H. Lechman shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $75,000.00 to the Securities and Exchange Commission. Lechman represents that prior to signing his Offer, the civil penalty amount of $75,000.00 has been deposited into an attorney-client trust account, controlled by Clausen Miller, P.C., 10 South LaSalle Street, Chicago, Illinois, 60603-1098. 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 Robert A. Lechman as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew Petillon, Associate Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., 11th Floor, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary

Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT of 1934
Rel. No. 60772 / October 2, 2009

In the Matter of	)
FANNIE MAE SECURITIES LITIGATION, Civ. Action No. 04-01639 (D.D.C.)	)

ORDER DENYING PETITION FOR REVIEW

Pursuant to Rule 431(b)(2) of the Rules of Practice,[1] it is ORDERED that the Petition for Review filed by Ohio Public Employees Retirement System and State Teachers Retirement System of Ohio (collectively, "lead plaintiffs"), received by the Secretary on August 31, 2009, is hereby denied.

BACKGROUND

On June 24, 2008, lead plaintiffs in the *Fannie Mae Securities Litigation*, Civ. Action No. 04-01639 (D.D.C.), to which the Commission is not a party, served a deposition subpoena on former Commission Chief Accountant Donald Nicolaisen. On July 10, 2008, consistent with the Commission's regulations applicable to subpoenas issued to present or former Commission employees in cases in which the Commission is not a party,[2] Commission staff wrote to lead plaintiffs' counsel apprising them of those regulations and requesting further information to clarify the intended scope of the deposition and the anticipated relevance of the testimony to the litigation.

Lead plaintiffs' counsel did not respond to staff's letter until June 22, 2009. In that response, counsel explained their reason for requesting Mr. Nicolaisen's testimony as follows:

[1] 17 CFR 201.431(b)(2).
[2] See 17 C.F.R. 200.735-3(b)(7). These regulations, which are comparable to those of other federal agencies, were adopted in light of the Supreme Court's decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462, 467-69 (1951), and thus are referred to as Touhy regulations.

> [T]he SEC, through its Office of the Chief Accountant, determined that Fannie Mae's accounting practices did not comply in material respects with the accounting requirements of Financial Accounting Standards Board Statements 91 and 133. The complaint further alleges that Mr. Nicolaisen . . . . testified before Congress on February 9, 2005, that Fannie Mae's practices with respect to FAS 133 accounting was not "even on the page" of compliance, was outside professional accounting standards and this conclusion was not "just a matter of interpretive judgment where two people could've come to varying conclusions." Mr. Nicolaisen further testified that the rules relating to FAS 133 "are not overly complex. I think those rules are clear." He also testified that he believes that other companies were complying with Statements 91 and 133.
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> . . . Mr. Nicolaisen's **public statements** and the GAAP violations found by the SEC . . . are squarely relevant to the central claims and defenses in this case.

On August 14, 2009, acting pursuant to delegated authority, the Commission's Associate General Counsel ("AGC") for Litigation and Administrative Practice issued a decision denying authorization for Mr. Nicolaisen to provide the requested deposition testimony. The AGC stated that in making this decision he considered the "desirability in the public interest" of the proposed testimony, "including whether it would invade the Commission's privileges and whether it would impose undue harm, burden, or expense on the witness or the Commission. See Federal Rule of Civil Procedure 45(c)." The AGC first focused upon the burden that would befall the Commission if Mr. Nicolaisen were to testify. He cited the extensive case law that government agencies should ordinarily be protected from the burden of producing employees for testimony in private actions so that the agencies can focus their resources on their statutory duties. See, e.g., Watts v. SEC, 482 F.3d 501, 509-10 (D.C.Cir. 2007) (recognizing that discovery must accommodate "the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations."). He stated that counsel has not materially distinguished this case from the many others in which litigants would like Commission staff to testify.

Then, responding directly to lead plaintiffs' reason for requesting the testimony, the AGC stated:

> [B]ecause you have Mr. Nicolaisen's statement to Fannie Mae and his Congressional testimony, you have significant information about Mr. Nicolaisen's views. It is not clear how further details about those views or how they were reached is relevant to your case as Mr. Nicolaisen's after-the-fact assessment does not and cannot take the place of the litigation process in which you are involved. Mr. Nicolaisen's views and opinions do not appear to qualify as evidence, and it is not clear how they could lead to the discovery of admissible evidence. . . . This is especially true as

> Mr. Nicolaisen did not have access to all the documents and information gathered and obtained in the litigation and, in fact, had only a relatively limited universe of documents and information provided by Fannie Mae and OFHEO. Moreover, staff views, such as Mr. Nicolaisen's, do not reveal any SEC positions or practices. *See* 17 C.F.R. 202.1(d).[3]

The AGC further stated that Mr. Nicolaisen's status as a former employee does not remove the burden upon the Commission, as "resources still have to be used to prepare and represent him. Given the broad scope of opinion testimony you seek to elicit from Mr. Nicolaisen, the privilege issues, and the passage of time since he issued his statement and testified before Congress, this would require the Commission to devote a substantial amount of its resources to your private action as opposed to the Commission's work."

In addition to the burden upon the Commission from the testimony sought from Mr. Nicolaisen, the AGC in reaching his decision also relied upon the likelihood that the testimony would invade the Commission's privileges. He focused in particular upon the Commission's deliberative process privilege, and observed: "Testimony regarding the bases for Mr. Nicolaisen's conclusions as to Fannie Mae's accounting practices and policies with respect to SFAS 91 and 133, the scope and nature of the documents he reviewed and relied upon in reaching his conclusions, and any communications he had with other federal government regulators before he issued his December 15, 2004 statement would be protected because his testimony would reflect the deliberations that led to his statement."

Finally, with respect to lead plaintiffs' assertion that Mr. Nicolaisen's testimony would be in the public interest given the size and scope of the litigation, the AGC noted that the Commission previously obtained and paid out in a fair fund distribution a $350 million civil penalty from Fannie Mae. He also stated that the large scope of the case should assure that plaintiffs have the resources to retain their own experts.

THE PETITION FOR REVIEW

Lead plaintiffs advance four arguments why we should reverse the AGC's decision and authorize Mr. Nicolaisen's testimony.

First, lead plaintiffs proclaim that "this is a case of unparalleled public interest." While acknowledging that Fannie Mae already has paid significant fines, and victims have received fair fund distributions, lead plaintiffs declare "that amount represents only a small portion of the billions of dollars of damages suffered by investors."

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[3] The AGC noted that qualifying Mr. Nicolaisen as an expert witness appears to be the only way his testimony could be admissible, but it would be inappropriate for lead plaintiffs to compel Mr. Nicolaisen to opine as an expert instead of retaining their own expert.

Second, lead plaintiffs state that Mr. Nicolaisen's testimony is sought as a fact witness, not to provide opinion or expert testimony. They state that the testimony is sought "for the purpose of better understanding the review process and factual basis for why the Chief Accountant of the SEC would believe that Fannie Mae's accounting was not 'even on the page' of compliance, which in turn is highly relevant to the level of scienter the defendants had of such non-compliance." They also declare that Mr. Nicolaisen "or other SEC officials . . . participated in *numerous* meetings and communications *with Fannie Mae* where Fannie Mae's accounting practices were discussed."

Third, lead plaintiffs contend the burden on the Commission from Mr. Nicolaisen's deposition would be modest, in that he is a former, not a present, Commission employee and a discovery protocol governs depositions in the case.

Fourth, lead plaintiffs argue that Mr. Nicolaisen's testimony would not be privileged and, even if it were, the Commission's assertion of the deliberative process privilege could be overcome by a showing of need, which lead plaintiffs contend could be made in this situation.

ANALYSIS

Under our Rules of Practice, the Commission has discretion to decline to review lead plaintiffs' Petition for Review. See 17 C.F.R. 201.431(b)(2).[4] We exercise our discretion to review the Petition, and deny it.

In that this case arises within the District of Columbia Circuit, and in light of the decision of the Court of Appeals in Watts v. SEC, supra, 480 F.3d 501, 508-10, we analyze lead plaintiffs' Petition in accordance with the standards embodied in Rule 45(c) of the Federal Rules of Civil Procedure.[5] Specifically, we look primarily to whether

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[4] In determining whether to grant review, the Commission considers whether a prejudicial error was committed in the conduct of a proceeding, or a reviewable decision embodies a finding or conclusion of material fact that is clearly erroneous, or an erroneous conclusion of law, or an exercise of discretion or important decision of law or policy that the Commission should review. 17 C.F.R. 201.411(b)(2).

[5] There appears to be a split among the circuits concerning whether judicial review of a federal agency's decision to decline to authorize testimony pursuant to its Touhy regulations is governed by the Administrative Procedure Act or the Federal Rules of Civil Procedure. Several courts have held that the Administrative Procedure Act's arbitrary and capricious standard should apply to judicial review of agency decisions regarding testimony subpoenas. See In re SEC ex rel. Glotzer, 374 F.3d 184 (2d Cir. 2004); COMSAT Corp. v. Nat'l Science Found., 190 F.3d 269, 274 (4th Cir. 1999); Edwards v. United States Dep't of Justice, 43 F.3d 312, 314 (7th Cir. 1994); Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1198 (11th Cir. 1991); Davis Enterprises v. EPA, 877 F.2d 1181, 1186 (3d Cir. 1989). In a footnote in Watts, 482 F.3d at 508 n.*, the District of Columbia Circuit stated that the APA standard does not apply to review of an agency's

authorizing Mr. Nicolaisen's deposition would cause undue burden to the Commission, whether that testimony likely would invade the Commission's privileges, and whether the testimony would consist of expert opinion, rather than fact testimony.[6] We take into consideration the AGC's decision, and his reasoning, but accord it no deference, and engage in de novo review.

In sum, we are unpersuaded by lead plaintiffs' arguments and conclude that the testimony they seek to obtain from Mr. Nicolaisen as a fact witness would constitute, in large part, expert opinion testimony and, to any extent not so, would be largely protected by the Commission's deliberative process privilege. Under the circumstances present here, authorization of Mr. Nicolaisen's testimony would unduly burden the Commission.

At the outset, we address lead plaintiffs' first argument -- that Mr. Nicolaisen's testimony would serve the public interest. In support of this position, lead plaintiffs state that "over 30 million retired public service employees were harmed by the fraud alleged in the Complaint" and the penalty already paid by Fannie Mae "represents only a small portion of the billions of dollars of damages suffered by investors." The Commission, the agency principally responsible for the administration and enforcement of the federal securities laws, has long expressed the view that legitimate private actions under those laws serve an important role. They work to compensate investors who have been harmed by securities law violations and, as the Supreme Court has repeatedly recognized, they "provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" Bateman, Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985), quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); see Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

At the same time, however, we agree with the AGC that:

> The burden on the Commission that would result if it allowed current or former staff to be deposed whenever a litigant in private litigation sought a Commission witness to testify would be significant. The federal securities laws and accounting principles are at issue in countless private actions and, in many of those, one or more of the parties would be interested in obtaining testimony from current or former Commission staff regarding views staff may have expressed regarding compliance with the federal

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decision not to authorize staff to testify in response to a subpoena served in a federal case to which the Commission is not a party. See also Exxon Shipping Co. v. U.S. Dep't of Interior, 34 F.3d 774, 778-79 (9th Cir. 1994)(declining to hold that federal courts cannot compel federal officers to give factual testimony).

[6] Fed.R.Civ.P. 45(c)(1) requires a "party or an attorney responsible for the issuance and service of a subpoena [to] . . .take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." A court may quash or modify the subpoena if it, inter alia, "subjects a person to undue burden" or "requires disclosure of privileged or other protected matter and no exception or waiver applies."

securities laws or with accounting principles. Every attorney in the Commission's Division of Corporation Finance who issues a comment letter and every accountant in the Commission's Office of Chief Accountant who provides staff accounting guidance is a potential witness.

Ordinarily, the Commission should be shielded from this burden so that it can focus its limited resources on its statutory duties. See COMSAT Corp. v. National Science Found., 190 F.3d 269, 277-78 (4th Cir. 1999) ("As an agency official must, NSF's counsel also considered whether the public interest and the agency's taxpayer-funded mission would be furthered by compliance."); Johnson v. Bryco Arms, 226 F.R.D. 441 (E.D.N.Y. 2005) (quashing deposition subpoenas to ATF personnel where ATF was not a party to the case and had provided documents from an investigation conducted by ATF that were relevant to case); Moran v. Pfizer, No. 99 civ 9969, 2000 WL 1099884, at * 3 (S.D.N.Y. Aug. 4, 2000) ("Courts have regularly held that the public interest in insuring that agency employees spend their time doing the agency's work is a valid reason to decline to comply with a subpoena."); Moore v. Armour Pharmaceutical Co., 129 F.R.D. 551, 556 (N.D. Ga. 1990) (noting that courts routinely consider "the policy of preserving the resources of governmental agencies from the flood of private litigation" in reviewing decisions not to authorize depositions); Alex v. Jasper Wyman & Son, 115 F.R.D. 156, 158-59 (D. Me. 1986) (noting "important public policy favoring the conservation of government resources and the protection of orderly government operations" in explaining why undue burden analysis allowed court to prohibit taking of deposition altogether). Accordingly, in evaluating whether this is a special case that justifies authorizing Mr. Nicolaisen to testify, we must consider more than the size and scope of the litigation and evaluate his connection, if any, to the potentially relevant facts and circumstances and the nature of the testimony that lead plaintiffs seek to obtain from him.

This analysis requires consideration of lead plaintiffs' second argument -- that they intend Mr. Nicolaisen only to testify as a fact witness, and not to provide opinion or expert testimony. It seems fair to conclude that lead plaintiffs' position on this subject has shifted somewhat. We note that lead plaintiffs waited almost a year to respond to staff's request for information about the questions that would be asked at the deposition and, when lead plaintiffs eventually did respond, they did not set forth any of the proposed questions as staff had requested they do. Instead, lead plaintiffs indicated that they were seeking to discover the basis for statements of Mr. Nicolaisen that Fannie Mae's accounting was not consistent with FASB Standards 91 and 133. On that subject, we agree with the AGC not only that lead plaintiffs already have Mr. Nicolaisen's statement to Fannie Mae and his congressional testimony about the accounting standards, but also that any further details Mr. Nicolaisen might be able to provide about his after-the-fact accounting assessment cannot take the place of the litigation process, especially as Mr. Nicolaisen has stated that his opinion was based upon a limited universe of documents.

Moreover, any views expressed by Mr. Nicolaisen about Fannie Mae's accounting cannot be attributed to the Commission. Mr. Nicolaisen emphasized this point in his

congressional testimony: "The views I express today . . . are my personal views and my testimony has not been reviewed or approved by the Commission." Testimony of Donald T. Nicolaisen, House Committee on Financial Services, Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises (Feb. 9, 2005)(available at http://financialservices.house.gov/archive/hearings.asp@formmode=detail&hearing=346.html). Under the Commission's regulations, staff opinions "do not constitute an official expression of the [Commission's] views." 17 C.F.R. 202.1(d). Statements of Commission staff are not statements of the Commission, which acts through its Chairman and Commissioners. See, e.g., SEC v. National Student Mktg. Corp., 68 F.R.D. 157, 160 (D.D.C. 1975); Pennzoil Corp. v. DOE, 680 F.2d 156, 161-62 (Temp. Emer. Ct. App. 1982). The Commission expresses policy through issuance of rules and regulations. 17 C.F.R. 202.1. Staff views do not reveal or constitute Commission positions or practices.

Further, we are hardpressed to understand how any testimony Mr. Nicolaisen might provide about his personal views concerning the accounting standards and Fannie Mae's compliance, or lack thereof, with them would constitute anything other than his opinion, which ordinarily would not be admissible unless he were to be qualified as an expert. Since lead plaintiffs aver they do not seek expert testimony from Mr. Nicolaisen, and the Commission has not been asked to authorize such testimony, it appears his views would not be evidentiary, as the AGC noted (citing Fed. R. Evid. 701). Moreover, as lead plaintiffs already have the benefit of Mr. Nicolaisen's views in the form of his congressional testimony and statement to Fannie Mae, there is no reasonable likelihood that his deposition concerning those views would lead to the discovery of admissible evidence.

Lead plaintiffs further aver that they need Mr. Nicolaisen's testimony because he, "or other SEC officials," participated in meetings where Fannie Mae's accounting practices were discussed. This appears to be a new argument, as it was not set forth in lead plaintiffs' June 22, 2009 letter to Commission staff, and thus was not addressed in the AGC's decision. We note that, as a basis for this argument, lead plaintiffs have included as Attachment 3 to their Petition documents referring to a total of four meetings or conversations. From these documents, it appears Mr. Nicolaisen may have been present on only one of these occasions and, in that instance, he was one of some 45 persons to sign in for a meeting that did not include any personnel from Fannie Mae. All four of the meetings/conversations referenced by lead plaintiffs appear to have occurred in the last quarter of 2004, after the events underlying Fannie Mae's accounting errors. The documents included in Attachment 3 do not indicate the subject of any of the meetings/conversations. On the evidence before us, we cannot conclude there is any particular need for Mr. Nicolaisen to testify to his recollection, if any, about these meetings/conversations, especially as persons outside the Commission having greater involvement in the private litigation should be available to testify about these events and there is no indication in the documents that Fannie Mae personnel participated in them.

Lead plaintiffs' third argument is that the burden on the Commission were Mr. Nicolaisen to testify would not be substantial, because he is not a current Commission employee. Lead plaintiffs appear to overlook the need for Commission counsel to

represent Mr. Nicolaisen, to prepare him for potential testimony about views he expressed and events that happened several years ago before he left the public sector, and to protect the Commission's privileges. Moreover, it is entirely possible that, in representing Mr. Nicolaisen, Commission counsel would have to draw upon other Commission resources, including current staff in the Office of the Chief Accountant. Further, if Mr. Nicolaisen were to testify, that could lead to additional requests in the private litigation by plaintiffs or other parties for other Commission personnel, both current and former, to testify about the accounting issues and meetings referenced by lead plaintiffs.

In assessing burden, as with lead plaintiffs' public interest argument, we recognize the importance of Commission employees performing their statutorily mandated duties rather than participating in private litigation. As the Court of Appeals stated in Watts, "discovery under F. R. Civ. P. 26 and 45 must properly accommodate 'the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.'" 482 F.3d at 509-10 (quoting *Exxon Shipping Co. v. Dep't of Interior*, 34 F.3d 774, at 779 (9th Cir. 1994)); *see also Davis Enterprises v. EPA,* 877 F.2d 1181, 1187 (3d Cir. 1989) (agency had "legitimate concern with the potential cumulative effect" and "proliferation of testimony by its employees" that compliance with individual subpoena would entail). We conclude that the burden on the Commission here likely would be significant.

Lead plaintiffs' final argument is that Mr. Nicolaisen's testimony would not be protected by the Commission's privileges. However, we share the concern expressed by the AGC that much of any testimony Mr. Nicolaisen might offer would be protected by the Commission's privileges, in particular the deliberative process privilege: "Testimony regarding the bases for Mr. Nicolaisen's conclusions as to Fannie Mae's accounting practices and policies with respect to SFAS 91 and 133, the scope and nature of the documents he reviewed and relied upon in reaching his conclusions, and any communications he had with other federal government regulators before he issued his December 15, 2004 statement would be protected because his testimony would reflect the deliberations that led to his statement." See DOI v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001); NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975); Mead Data Central v. United States, 566 F.2d 242 (D.C. Cir. 1977).

More specifically, internal staff deliberations within the Office of the Chief Accountant or discussions with other Commission divisions or offices would be protected if they influenced Mr. Nicolaisen's views, as would be any testimony he might provide about any documents upon which he relied. See Montrose Chemical v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974); see also Schele v. DHS, 843 F.2d 933, 942 (6th Cir. 1988) ("It is the free flow of advice, rather than the value of any particular piece of information" that the privilege protects). The same would be true for any non-public meetings and conversations with, or documents shared by, representatives of OFHEO or other federal agencies if he relied upon them in formulating his conclusions. Testimony by Mr. Nicolaisen even about non-privileged documents may reflect his judgment process of

sifting through a series of documents to identify those that are the most relevant, and that may be part of the deliberative process. See California Native Plant Society v. EPA, 251 F.R.D. 408, 412 (N.D.Cal. 2008)(deliberative process privilege "protects the decision making process at large, and a document need not lead to a specific decision, let alone a final decision, in order to be protected").

Although we recognize that the deliberative process privilege can be overcome by a showing of particularized need, lead plaintiffs have not made such a showing. Instead, they conclusorily state that Mr. Nicolaisen's personal views are "highly relevant" to defendants' scienter, declare that he "possesses information unavailable elsewhere" (which, as noted above, seems unlikely), and reemphasize the scope and significance of their case. We do not believe that suffices as a showing to overcome the Commission's strong interest in protecting its deliberative process from discovery, especially when considered against what we fear would be the substantial chilling effect upon future Commission deliberations if the internal decision-making process of the Commission and its staff is not protected. See Casad v. Dep't. of HHS, 301 F.3d 1247, 1251 (10th Cir. 2002)(underpinning the privilege is "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the government"); Hunton & Williams, LLP v. Dep't of Justice, 2008 WL 906783, *8 (E.D.Va. 2008)(deliberative process privilege is intended to insulate government employees from the likely chilling effect if internal agency deliberations are made public).

CONCLUSION

For the reasons stated above, and in accordance with Rules 411(b)(2) and 431(b)(2) of the Rules of Practice, the Petition for Review is denied.

By the Commission.

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. 60786 / October 5, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13638

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

Respondent

1. **Energy Source, Inc.** is a Nevada shell corporation based in Edmond, Oklahoma. Energy Source's common stock is quoted under the ticker symbol "BCIT" on the Pink Sheets operated by Pink OTC Markets, Inc., but PinkSheets.com reports no trades since December 21, 2007. The Commission approved a ten-day temporary trading suspension of Respondent's (then known as Bancorp International Group, Inc.) common stock on August 30, 2005.

Delinquent Filings

2. Energy Source has failed to file its last six required periodic reports and is over one year delinquent in its periodic filing obligations. Specifically, the Company has failed to file the following reports: the Forms 10-Q for the quarters ended June 30, 2009, March 31, 2009, September 30, 2008, June 30, 2008, and March 31, 2008 as well as the Form 10-K for the year ended December 31, 2008. Moreover, Energy Source is a habitual delinquent filer. Over the past ten years, Respondent has filed on time just two of 42 required periodic filings. A chart detailing Energy Source's filing history is attached as an Appendix.

Violations

3. As a result of the conduct described above, Energy Source 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, which require issuers with classes of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file timely annual reports (Forms 10-K or 10-KSB). Rule 13a-13 requires issuers to file timely quarterly reports (Forms 10-Q or 10-QSB).

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate for the protection of investors to institute proceedings to determine:

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

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

IV.

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

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within ten (10) days after service of this Order, as provided by Rule 220(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 mail.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

APPENDIX

Chart of Delinquent Filings
Energy Source, Inc.
f/k/a Bancorp International Group, Inc.
(in Reverse Chronological Order)

Months delinquent counted from September 28, 2009.

Form	Period Ended	Due Date	Date Received	Months Delinquent (Rounded Up)
10-Q	6/30/2009	8/17/2009	Not Received	2
10-Q	3/31/2009	5/15/2009	Not Received	5
10-K	12/31/2008	3/31/2009	Not Received	7
10-Q	9/30/2008	11/14/2008	Not Received	11
10-Q	6/30/2008	8/14/2008	Not Received	14
10-Q	3/31/2008	5/15/2008	Not Received	17
10-KSB	12/31/2007	3/30/2008	4/03/2008	1
10-QSB	9/30/2007	11/14/2007	12/13/2007	1
10-QSB	6/30/2007	8/14/2007	12/7/2007	4
10-QSB	3/31/2007	5/15/2007	12/7/2007	7
10-KSB	12/31/2006	4/2/2007	5/1/2007	1
10-QSB	9/30/2006	1/14/2006	1/13/2006	Timely
10-QSB	6/30/2006	8/14/2006	8/17/2006	1
10-QSB	3/31/2006	5/15/2006	7/7/2006	2
10-KSB	12/31/2005	3/31/2006	6/21/2006	3
10-QSB	9/30/2005	11/14/2005	Not Received	47
10-QSB	6/30/2005	8/14/2005	Not Received	50
10-QSB	3/31/2005	5/15/2005	Not Received	53
10-KSB	12/31/2004	3/31/2005	6/21/2006	15
10-QSB	9/30/2004	11/14/2004	Not Received	59
10-QSB	6/30/2004	8/14/2004	Not Received	62
10-QSB	3/31/2004	5/15/2004	Not Received	65
10-KSB	12/31/2003	3/30/2004	6/21/2006	27
10-QSB	9/30/2003	11/14/2003	Not Received	71
10-QSB	6/30/2003	8/14/2003	Not Received	74
10-QSB	3/31/2003	5/15/2003	Not Received	77
10-KSB	12/31/2002	3/31/2003	6/21/2006	39
10-QSB	9/30/2002	11/14/2002	Not Received	83
10-QSB	6/30/2002	8/14/2002	Not Received	86
10-QSB	3/31/2002	5/15/2002	Not Received	89
10-KSB	12/31/2001	4/1/2002	5/3/2006	50
10-QSB	9/30/2001	11/14/2001	1/13/2006	50
10-QSB	6/30/2001	8/14/2001	1/13/2006	53

Form	Period Ended	Due Date	Date Received	Months Delinquent (Rounded Up)
10-QSB	3/31/2001	5/15/2001	1/13/2006	56
10-KSB	12/31/2000	3/31/2001	Not Received	103
10-QSB	9/30/2000	11/14/2000	12/23/2005	62
10-QSB	6/30/2000	8/14/2000	11/16/2000	4
10-QSB	3/31/2000	5/15/2000	6/7/2000	1
10-KSB	12/31/1999	3/31/2000	4/17/2000	1
10-QSB	9/30/1999	11/14/1999	12/13/1999	1
10-QSB	6/30/1999	8/14/1999	7/22/1999	Timely
10-QSB	3/31/1999	5/15/1999	6/2/1999	1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

October 5, 2009

IN THE MATTER OF SPONGETECH DELIVERY SYSTEMS, 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 SpongeTech Delivery Systems, Inc. ("SpongeTech") because questions have arisen regarding the accuracy of assertions in press releases to investors and in periodic reports filed with the Commission concerning, among other things: (1) the amount of sales and customer orders received by the company; (2) the company's investment agreements; and (3) the company's revenues as reported in its financial statements. In addition, SpongeTech has not filed any periodic reports with the Commission since the period ended February 28, 2009.

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 October 5, 2009 through 11:59 p.m. EDT, on October 16, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 230, 239, 240, 242, 249, 270 and 275

[Release Nos. 33-9069; 34-60790; IA-2932; IC-28940; File Nos. S7-17-08, S7-18-08, S7-19-08]

RIN 3235-AK17, 3235-AK18, 3235-AK19

References to Ratings of Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Proposed rule; re-opening of comment period; request for additional comments.

SUMMARY: The Securities and Exchange Commission is re-opening the comment period on certain of the proposed rule amendments to remove references to ratings of Nationally Recognized Statistical Rating Organizations proposed in Release Nos. 33-8940 [73 FR 40106 (July 11, 2008)], 34-58070 [73 FR 40088 (July 11, 2008)], and IC-28327 [73 FR 40124 (July 11, 2008)] "Proposing Releases"). Today, in a companion release, the Commission is taking action on some of the amendments in the Proposing Releases. In view of the continuing public interest in the Proposing Releases and the Commission's desire to receive additional comment, we believe that it is appropriate to re-open the comment period before we take further action on certain proposals made in the Proposing Releases.

DATES: Comments should be received on or before [insert date 60 days after publication in the Federal Register].

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-17-08, S7-18-08, and/or S7-19-08 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-17-08, S7-18-08, and/or S7-19-08. The file number(s) should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 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 publicly available.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, Thomas K. McGowan, Deputy Associate Director, Randall W. Roy, Assistant Director, Joseph I. Levinson, Special Counsel (Net Capital Requirements and Customer Protection) at (202) 551-5510; Paula Jenson, Deputy Chief Counsel, Ignacio Sandoval, Special Counsel (Confirmation of Transactions) at (202) 551-5550; Josephine J. Tao, Assistant Director, Elizabeth A. Sandoe, Branch Chief, and Bradley Gude, Special Counsel (Regulation M) at (202) 551-5720; Marlon Quintanilla Paz, Senior Counsel to the Director at (202) 551-5756, in the Division of

Trading and Markets; Hunter Jones, Assistant Director, Penelope W. Saltzman, Assistant Director, or Daniel K. Chang, Attorney at (202) 551-6792, in the Division of Investment Management; or Katherine Hsu, Special Counsel (Asset-Backed Securities), Blair Petrillo, Special Counsel at (202) 551-3430, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

On July 1, 2008, the Commission proposed to eliminate references to ratings issued by nationally recognized statistical rating organizations ("NRSROs") in certain rules and forms under the Securities Exchange Act of 1934 ("Exchange Act"), the Investment Company Act of 1940 ("Investment Company Act"), the Investment Advisers Act of 1940 ("Investment Advisers Act"), and the Securities Act of 1933 ("Securities Act").[1] The Commission proposed these amendments, among other reasons, to address the risk that the reference to and use of NRSRO ratings in Commission rules could be interpreted by investors as an endorsement of the quality of the credit ratings issued by NRSROs, and may encourage investors to place undue reliance on NRSRO ratings.[2] The comment period for the Proposing Releases ended on September 5, 2008. Today, in a companion release, the Commission is adopting proposed amendments to remove

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[1] See References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 58070 (July 1, 2008) [73 FR 40088 (July 11, 2008)] (proposing amendments to rules and forms under the Securities Exchange Act) ("Exchange Act Proposing Release"); References to Ratings of Nationally Recognized Statistical Ratings Organizations, Investment Company Act Release No. 28327 (July 1, 2008) [73 FR 40124 (July 11, 2008)] (proposing amendments to rules under the Investment Company Act and the Investment Advisers Act) ("Investment Company Act Proposing Release"); Security Ratings, Securities Act Release No. 8940 (July 1, 2008) [73 FR 40106 (July 11, 2008)] (proposing amendments to rules and forms under the Securities Act and the Securities Exchange Act) ("Securities Act Proposing Release").

[2] See Exchange Act Proposing Release, supra note 1, at Section I; Investment Company Act Proposing Release, supra note 1, at Section I; and Securities Act Proposing Release, supra note 1.

references to ratings issued by NRSROs in certain rules.[3] Given regulatory developments,[4] comments received on the proposals, and the continuing public interest in the Proposing Releases, particularly in light of recent economic events, the Commission is requesting additional public comment on certain proposed rule changes relating to the use of references to ratings issued by NRSROs, as detailed below.

II. References to Ratings of NRSROs in Exchange Act Rules

As discussed below, the Commission is deferring consideration of action and soliciting comment on certain of its proposals relating to the use of NRSRO credit ratings in the rules and forms proposed in the Exchange Act Proposing Release.[5] The Commission is seeking additional comment on specific issues as well as general comments on the proposals.

A. Regulation M

Regulation M is intended to preclude manipulative conduct by persons with an interest in the outcome of an offering. It governs the activities of underwriters, issuers, selling security holders, and others in connection with offerings of securities. In particular, Rules 101 and 102 of Regulation M prohibit, in connection with a distribution of securities, issuers, selling shareholders, distribution participants, or any affiliated persons of such persons from directly or indirectly bidding for, purchasing, or attempting to induce a person to bid for or purchase a covered security during certain defined periods. Certain securities are excepted from Rules 101

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3 See References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34-60789 (October 5, 2009) ("NRSRO References Adopting Release").

4 See, e.g., Money Market Fund Reform, Investment Company Act Release No. 28807 (June 30, 2009) [74 FR 32688 (July 8, 2009)] ("Money Market Fund Proposing Release") (proposing amendments designed to improve the regulatory framework governing money market funds and requesting comment on, among other things, whether the Commission should eliminate Rule 2a-7's use of ratings by NRSROs, or whether the Commission should adopt other alternatives to encourage more independent credit risk analysis, including whether the Commission should reformulate the rule's use of ratings by requiring the fund's directors to designate specific NRSROs that the board of directors determines issue credit ratings that are sufficiently reliable.).

5 For a detailed discussion of each of these proposals, see Exchange Act Proposing Release, supra note 1.

and 102, including investment grade non-convertible debt securities, investment grade non-convertible preferred securities, and investment grade asset-backed securities.

In the Exchange Act Proposing Release, the Commission proposed to change the exceptions in Rules 101(c)(2) and 102(d)(2) of Regulation M for investment-grade non-convertible debt securities, investment grade non-convertible preferred securities, and investment grade asset-backed securities ("Regulation M Proposals").[6] The Regulation M Proposals would have removed references to NRSRO ratings from the determination of whether such securities would be eligible for the exceptions, and instead would have excepted non-convertible debt securities and non-convertible preferred securities based on the "well-known seasoned issuer" ("WKSI") concept of Securities Act Rule 405.[7] The Regulation M Proposals would have also excepted asset-backed securities that are registered on Form S-3.[8]

Commenters that specifically addressed the Regulation M Proposals expressed uniform opposition.[9] Many of these commenters stated their view that the proposal would fail to address

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6 See Exchange Act Proposing Release, supra note 1.

7 Id.

8 Id.

9 We received five comment letters that specifically addressed the Regulation M proposals and each opposed the proposals. Letter from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association ("ABA"), to Florence E. Harmon, Acting Secretary, dated October 10, 2008 ("ABA Letter 1"); Letter from Robert Dobilas, CEO and President, Realpoint LLC, to Secretary, dated September 8, 2008; Letter from Jeremy Reifsnyder and Richard Johns, Co-chairs, ASF Credit Rating Agency Task Force, to Florence E. Harmon, Acting Secretary, dated September 5, 2008 ("ASF Letter"); Letter from Deborah A. Cunningham and Boyce I. Greer, Co-chairs, SIFMA Credit Rating Agency Task Force, to Florence E. Harmon, Acting Secretary, dated September 4, 2008 ("SIFMA Letter"); and Letter from Mayer Brown LLP, to Florence E. Harmon, Acting Secretary, dated September 4, 2008 ("Mayer Brown Letter"). There were comment letters supportive of the Commission's effort to minimize undue reliance on NRSRO ratings by market participants, however, these commenters did not discuss Regulation M. See, e.g., Letter from Suzanne C. Hutchinson, Executive Vice President, Mortgage Insurance Companies of America, to Florence E. Harmon, Acting Secretary, dated September 5, 2008.

the issue of investors' undue reliance on NRSRO ratings.[10] Commenters that specifically addressed the Regulation M Proposal also stated that, because the Regulation M Proposals would have altered the scope of the exception for investment-grade non-convertible debt securities, investment-grade non-convertible preferred securities, and asset-backed securities, the Regulation M Proposals would have placed new burdens on issuers and underwriters by imposing the restrictions of Regulation M on currently excepted investment-grade securities.[11] Additionally, commenters that specifically addressed the Regulation M Proposal expressed the view that certain issuers of high yield securities that are currently subject to Regulation M, but are arguably more vulnerable to manipulation than securities currently excepted from Regulation M, would have been excepted from Rules 101 and 102 of Regulation M by the Regulation M Proposals.[12] These commenters suggested retaining the NRSRO references in Regulation M and did not generally suggest alternatives to the Regulation M Proposals that would achieve our goals while addressing these concerns.[13]

The Commission is deferring consideration of action on the Regulation M Proposals. In light of the uniform opposition in the comment letters and the Commission's remaining concern regarding the undue influence of NRSRO ratings, the Commission is seeking additional comment. The Commission is continuing to consider its proposed amendments as well as other changes to Rules 101(c)(2) and 102(d)(2) of Regulation M to address concerns with regard to

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10 See, e.g., SIFMA Letter ("Regulation M is primarily directed at the actions of the issuers of securities and the investment banks who underwrite them; in contrast, the investors that the Commission is concerned with are not users of Regulation M").

11 ABA Letter 1, SIFMA Letter.

12 ABA Letter 1, SIFMA Letter.

13 The ABA did, however, suggest that should the Commission insist on using the WKSI standard for investment-grade non-convertible debt and investment-grade non-convertible preferred securities, it do so only as an alternative to the current exceptions at Rules 101(c)(2) and 102(d)(2). ABA Letter 1. However, the ABA expressed its "strong[] belie[f] that the Commission should retain the current exceptions." Id.

references to NRSRO ratings, and it continues to invite comments suggesting alternative proposals to achieve the Commission's goals, as well as comments on the Regulation M Proposals generally.[14] In assessing the Commission's proposals and alternatives to these proposals, the Commission would consider a number of factors, including:[15]

- Is the alternative comparable in scope to the existing exceptions? Does the alternative except roughly the same type and quantity of securities as the current exceptions for non-convertible debt, non-convertible preferred, and asset-backed securities?
- Does the alternative capture securities that are traded on basis of their yields, are largely fungible and less likely to be subject to manipulation? Are there factors in addition to yield and fungible nature that effect the trading of nonconvertible and asset backed securities?
- What effect(s) of the alternative, if any, would you anticipate in the investment-grade debt market and high-yield debt market?
- To the extent the alternative excepts non-convertible debt, non-convertible preferred, and asset-backed securities that are not currently excepted, how are those newly excepted securities less likely to be subject to manipulation?
- Will the alternative remove the exception for certain non-convertible debt, non-convertible preferred, and asset-backed securities that fall within the current exceptions?

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[14] The Commission specifically invited commenters to suggest alternatives to the Regulation M Proposals in the Proposing Release, see Exchange Act Proposing Release, supra note 1, at 40096, but none were received at that time.

[15] While the Commission asked similar questions in the Exchange Act Proposing Release relating to the specific Regulation M Proposals, the Commission will consider these factors in connection with any alternative proposal suggested by commenters.

- Does the alternative provide an equally bright-line demarcation that is not unduly reliant on NRSRO ratings?
- Is the alternative easy for all persons subject to Rules 101 and 102 of Regulation M to determine (i.e., can it be determined by publicly available sources of information)?

Please provide empirical data, when possible, and cite to economic studies to support alternative approaches. Please suggest additional factors that you believe should be considered in assessing alternatives. Please discuss whether and to what extent investors rely upon the current Rule 101 and 102 exceptions for investment-grade non-convertible and asset-backed securities when making a decision to invest in such securities. Please also discuss whether, given that Rules 101 and 102 of Regulation M are directed at distribution participants, issuers and selling security holders, Rules 101 and 102 of Regulation M pose any danger of undue reliance on NRSRO ratings by investors.

B. Rule 10b-10

Exchange Act Rule 10b-10,[16] the Commission's transaction confirmation rule for broker-dealers, generally requires broker-dealers that effect transactions for customers in securities, other than U.S. savings bonds or municipal securities,[17] to provide those customers with written notification, at or before completion of a securities transaction, disclosing certain information about the terms of the transaction. Specifically, Rule 10b-10 requires the disclosure of the date, time, identity, and number of securities bought or sold; the capacity in which the broker-dealer acted (e.g., as agent or principal); yields on debt securities; and under specified circumstances, the amount of compensation the broker-dealer will receive from the customer and any other

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[16] 17 CFR 240.10b-10.

[17] Municipal securities are covered by Municipal Securities Rulemaking Board rule G-15, which applies to all municipal securities brokers and dealers.

parties. In doing so, the rule serves a basic investor protection function by conveying information that: (1) allows customers to verify the terms of their transactions; (2) alerts customers to potential conflicts of interest; (3) acts as a safeguard against fraud; and (4) allows customers a means of evaluating the costs of their transactions and the quality of the broker-dealer's execution and order-handling.

Paragraph (a)(8) of Rule 10b-10, which the Commission adopted in 1994, requires a broker-dealer to inform the customer in the transaction confirmation if a debt security, other than a government security, is unrated by an NRSRO.[18] While paragraph (a)(8) was intended to alert customers to the potential need to obtain more information about a security from a broker-dealer, it was not intended to suggest that an unrated security is inherently riskier than a rated security.[19] The Commission proposed to delete paragraph (a)(8) of the Rule in light of present concerns regarding undue reliance on NRSRO ratings and confusion about the significance of those ratings.[20] The Commission also stated that, in the absence of this requirement, broker-dealers could voluntarily include this information in confirmations they send to customers.[21]

Four commenters expressed views regarding the proposed deletion of paragraph (a)(8) from Rule 10b-10.[22] One commenter maintained that deleting the requirement could be

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[18] See Exchange Act Release No. 34962 (November 10, 1994) [59 FR 59612 (November 17, 1994)] (File No. S7-6-94) ("1994 Adopting Release").

[19] Id. The Commission stated in the 1994 Adopting Release that "[i]n most cases, this disclosure should verify information that was disclosed to the investor prior to the transaction. If a customer was not previously informed of the security's unrated status, the confirmation disclosure may prompt a dialogue between the customer and the broker-dealer."

[20] Exchange Act Proposing Release, supra note 1, 73 FR at 40092.

[21] Id.

[22] See Realpoint Letter; SIFMA Letter; Letter from Cate Long, Multiple-Markets to Secretary, Securities and Exchange Commission, dated September 5, 2008 ("Multiple-Markets Letter"); Tom McNerney, Managing Director, Data and Analytics and Marcus Schuler, Managing Director, Regulatory Affairs, Markit to Securities and Exchange Commission, dated September 5, 2008 ("Markit Letter").

confusing and misleading to customers, who might presume that the security was rated because the non-rated status would no longer appear on the confirmation.[23] This commenter also noted that customers could be confused by a lack of uniformity in confirmations, if some broker-dealers chose to continue including the non-rated status on confirmations while others did not.[24] Another commenter stated that investors benefit from, and broker-dealers are not materially burdened by, the disclosure requirement in paragraph (a)(8).[25] One commenter expressed the view that deleting paragraph (a)(8) would be appropriate, and noted that a proposed FINRA rule would, among other things, require brokers-dealers to provide investors with the lowest credit rating on a security.[26] Finally, one commenter suggested that if paragraph (a)(8) were deleted, it could be replaced with the use of a credit spread as a credit risk measure.[27]

After considering the comments, the Commission has determined to seek further comment on this proposal before considering action. The Commission is continuing to consider the relative benefits of retaining this information in the transaction confirmation against the benefits of removing the reference to whether a security is unrated. The Commission notes in this regard that the current requirement to disclose when a debt security is unrated by an NRSRO provides investors with an item of factual information that is conveyed together with additional

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23 See SIFMA Letter.

24 Id.

25 See Realpoint Letter. This commenter also urged the Commission to "at a minimum, retain the existing requirement ... [and] strongly consider requiring that the confirmation disclose whether the security is rated by an NRSRO who was not and is not being compensated" directly or indirectly by the issuer. Id.

26 See Multiple-Markets Letter. This commenter stated that a proposed FINRA rule "serves to protect investors but could be enhanced by the addition of an alternative method of showing credit quality" by requiring broker-dealers to "provide the investor with the 'average' rating across NRSROs." Id. The Commission is considering the FINRA proposed rule change separately. See Exchange Act Release No. 56661 (October 15, 2007) [72 FR 59321 (October 19, 2007)] (File No. SR-NASD-2005-100).

27 See Markit Letter. "The usage of credit spreads for this purpose would be much more accurate, and would be capable of revealing that many unrated securities are actually less risky than rated ones." Id.

factual information about the terms of the trade. Moreover, we are still evaluating the impact that eliminating this disclosure requirement would have against the possibility of permitting broker-dealers to continue providing, on a voluntary basis, information on the confirmation that a debt security is not rated. In addition, we are concerned that customers may potentially be confused by the lack of a disclosure that they may be accustomed to receiving.

At the same time, the Commission remains concerned that customers may place undue reliance on NRSRO ratings and that there may continue to be confusion about the significance of those ratings. Therefore, the Commission will continue to consider whether to delete paragraph (a)(8) of Rule 10b-10, particularly in light of comments received to date, and invites further comment on the proposed deletion of Rule 10b-10(a)(8), including comments that suggest alternative proposals to achieve the Commission's stated goals. In continuing to assess these issues, the Commission requests comments on the following:

- Would the investor protection function of Rule 10b-10 be, in any way, undercut by deleting paragraph (a)(8) from the Rule? Are there any other alternatives for providing customers with this information?
- What types of securities would typically be unrated by an NRSRO? What types of issuers would typically not have their securities rated by an NRSRO?
- Could the disclosure that a security is unrated be removed from the confirmation without creating customer confusion? If so, given the historical use and investor expectations related to this disclosure, could it be removed without implying that a security is in fact rated? Would the suggested approach vary if certain broker-dealers continued to voluntarily disclose that securities were unrated? Should broker-dealers be required to

alert customers that the unrated status of a security is no longer being disclosed? If so, for how long?

- The preliminary note to Rule 10b-10 provides: "This section requires broker-dealers to disclose specified information in writing to customers at or before completion of a transaction. The requirements under this section that particular information be disclosed is not determinative of a broker-dealer's obligation under the general antifraud provisions of the federal securities laws to disclose additional information to a customer at the time of the customer's investment decision." If paragraph (a)(8) were deleted, would the preliminary note to Rule 10b-10 affect a broker-dealer's decision to nonetheless continue to voluntarily disclose whether a security is unrated?
- One approach for addressing possible customer confusion if some broker-dealers continue to disclose that a security is unrated, while others do not, could be to prohibit broker-dealers from making this disclosure on the confirmation. Such an approach, however, could be viewed as inconsistent with broker-dealers' obligations under the general antifraud provisions of the federal securities laws, as highlighted in the preliminary note to Rule 10b-10, to disclose material information to their customers. We invite comment on this approach, and particularly on how a broker-dealer, if it considered the fact that a security was unrated to be material, could disclose this information to customers other than on the confirmation.
- If paragraph (a)(8) were deleted, is there a disclosure that should be required in the confirmation on a transitional or permanent basis that would help prevent customer confusion? For example, should the Commission require broker-dealers, either permanently or temporarily for a transition period, to disclose that broker-dealers are no

longer required to include on the confirmation the fact that a security is unrated? Should such a disclosure be made on the confirmation, the account statement, or in a separate document accompanying the confirmation or account statement? What are the costs associated with providing this disclosure on the confirmation, the account statement or in a separate document?

- If the requirement to disclose that a security is unrated were deleted from Rule 10b-10, would broker-dealers nevertheless feel compelled to include the disclosure in order to satisfy their suitability or other sales practice obligations?
- Should the requirement to disclose that a security is unrated be replaced by a requirement to provide a general statement regarding the importance of considering an issuer's creditworthiness?
- If the requirement to disclose that a security is unrated were deleted from the rule, are there alternative external or objective measures of credit risk that could be substituted for ratings by an NRSRO? Is it practicable to replace it with a requirement to disclose specific information regarding an issuer's creditworthiness? If so, what specific information should the Commission consider including?
- Are credit spreads[28] a viable method of addressing an issuer's creditworthiness? For example, is there a consistent, reliable, and generally agreed upon method for determining credit spread? How could information about credit spread be presented so that it could be readily understood by customers, particularly retail customers?

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[28] "Credit spread" has been defined to mean the "differences in yield resulting from different levels of credit risk." See Oxford Dictionary of Finance and Banking 100 (3rd ed. 2005). See also Barron's Dictionary of Finance and Investment Terms 152 (6th ed. 2003) (defining "credit spread" as the "difference in value of two options, when the value of the one sold exceeds the value of the one bought. The opposite of a debt spread.").

C. Net Capital Rule

The Commission proposed to remove, with limited exceptions, all references to NRSROs from the net capital rule for broker-dealers, Rule 15c3–1 under the Exchange Act (''Net Capital Rule'').[29] Under the Net Capital Rule, broker-dealers are required to maintain, at all times, a minimum amount of net capital, generally defined as a broker-dealer's net worth (assets minus liabilities), plus certain subordinated liabilities, less certain assets that are not readily convertible into cash (e.g., fixed assets), and less a percentage of certain other liquid assets (e.g., securities). When calculating net capital, broker-dealers are permitted to take a lower capital charge, called a "haircut," for certain types of securities that are rated investment grade by an NRSRO.

As the Commission stated in proposing to remove references to NRSROs from the Net Capital Rule, broker-dealers are sophisticated market participants regulated by at least one self-regulatory organization. Accordingly, the Commission expressed its preliminary belief that broker-dealers would be able to assess the creditworthiness of the securities they own without undue hardship.[30] In lieu of the references to NRSROs in the Net Capital Rule, the Commission proposed substituting two subjective standards for credit risk and liquidity risk. For the purposes of determining haircuts on commercial paper, the Commission proposed to replace the current NRSRO ratings-based criterion with a requirement that the instrument be subject to a minimal amount of credit risk and have sufficient liquidity such that it can be sold at or near its carrying value almost immediately.[31] For the purposes of determining haircuts on nonconvertible debt securities as well as on preferred stock, the Commission proposed to replace the current NRSRO ratings-based criterion with a requirement that the instrument be subject to no greater than

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[29] 17 CFR 240.15c3-1; see Exchange Act Proposing Release, supra note 1, 73 FR at 40092.

[30] See Exchange Act Proposing Release, supra note 1, 73 FR at 40092.

[31] Id.

moderate credit risk and have sufficient liquidity such that it can be sold at or near its carrying value within a reasonably short period of time.[32] The proposed standards were intended to advance the purpose the NRSRO ratings-based standards were designed to advance, which is to enable broker-dealers to make net capital computations that reflect the market risk inherent in the positioning of those particular types of securities. Notwithstanding the Commission's belief that broker-dealers have the financial sophistication and resources to make these determinations,[33] the Commission stated that it would be appropriate, as one means of complying with the proposed amendments, for broker-dealers that wished to continue to rely on credit ratings of NRSROs to do so.[34]

The majority of the commenters to the Commission's proposal to remove references to NRSROs from the Net Capital Rule were opposed to the change.[35] Generally, commenters stated that they preferred the existing rule because it is a bright line objective test that is relatively inexpensive to utilize.[36] Commenters asserted that the new subjective standards that rely on the discretion of an interested decision-maker (i.e., the broker-dealer itself) would increase uncertainty, decrease transparency, and decrease market confidence in the financial

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32 Id.

33 See Exchange Act Proposing Release, supra note 1, 73 FR at 40093.

34 See Exchange Act Proposing Release, supra note 1, 73 FR at 40092.

35 See, e.g., SIFMA Letter; Markit Letter; Letter from Jeffrey T. Brown, Senior Vice President, Charles Schwab Co., Inc., Washington, District of Columbia to Florence E. Harmon, Acting Secretary, Commission dated September 5, 2008 ("Schwab Letter"); Letter from Kent Wideman, Group Managing Director, Policy and Rating Committee, DBRS and Mary Keogh, Managing Director, Policy and Regulatory Affairs, DBRS dated September 8, 2008; Letter from Robert Dobilas, CEO and President, Realpoint LLC dated Sept. 8, 2008; Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association to Nancy M. Morris, Secretary, Commission dated September 5, 2008.

36 See, e.g., SIFMA Letter.

strength of broker-dealers.[37] Commenters expressed their belief that the direct conflict of interest that would exist for broker-dealers to overestimate the creditworthiness of a security to minimize the amount of required net capital would lead broker-dealers to maintain too little net capital and would have the effect of increasing systemic risk.[38] Commenters also stated that the proposed changes would require increased oversight by Commission staff to enforce the use of internal processes in capital charge calculations.[39] In this regard, commenters noted that Commission staff would need to review procedures at each broker-dealer, and each review would need to include the algorithms of broker-dealer internal processes, requiring intensive scrutiny at both large and small broker-dealers.[40] Further, commenters argued that not all broker-dealers are "sophisticated" and have sufficient resources or expertise to develop their own internal processes for rating securities.[41] A minority of commenters supported the proposal to remove references to NRSROs from the net capital rule.[42] One commenter argued that NRSROs have too much influence on the "quality assessments of securities that the SEC's regulated financial institutions have been required to make."[43]

After considering these comments, the Commission has determined to solicit further comment before considering action on the proposed rule amendments to remove references to

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37 Letter from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, and Vicki O. Tucker, Chair, Committee on Securitization and Structured Finance, Business Law Section, American Bar Association to Florence E. Harmon, Acting Secretary, Commission dated September 12, 2008 ("ABA Letter 2"); SIFMA letter.

38 ABA Letter 2.

39 Schwab Letter.

40 Schwab Letter.

41 ABA Letter 2; Schwab Letter.

42 See Letter from Suzanne C. Hutchinson, Executive Vice President, Mortgage Insurance Companies of America; Letter from Lawrence J. White, Professor of Economics, Stern School of Business, New York University, New York, New York to Commission dated September 5, 2008 ("White Letter").

43 White Letter.

NRSROs from the Net Capital Rule. In evaluating whether to take action in the future, the Commission would consider, among other things, whether the haircut for the position would be appropriate given the risks inherent in the position. The relevant risks would include the price volatility, creditworthiness, and liquidity of the position. Additionally, in evaluating whether to adopt any amendments, the Commission would consider, among other things, the costs of an objective approach versus a subjective test; whether any alternative objective approaches exist; whether the proposed rule would create conflicts of interest that may result in undesirable consequences, such as increasing systemic risk; and whether broker-dealers have sufficient resources and expertise to implement the proposed rule.

The Commission generally requests comments on whether it should retain the NRSRO reference in the Net Capital Rule, as well as all aspects of the proposed rule and reiterates its request for comment in the Exchange Act Proposing Release. Further, the Commission seeks comments on the factors it would consider in determining whether to amend the requirements for determining haircuts for proprietary securities positions. The Commission also requests comments on the following specific questions:

- Are there factors other than creditworthiness and liquidity that should be required to be considered in determining the appropriate haircut for a proprietary securities position?
- What would be the cost to broker-dealers to develop, document, and enforce internal procedures to evaluating the creditworthiness and liquidity of proprietary securities positions?
- Do certain broker-dealers lack sufficient resources or expertise to independently assess the creditworthiness of securities?

- How could the concern that a broker-dealer would have an incentive to downplay the credit risk associated with a particular security to minimize capital charges be addressed? Would reviews of internal procedures by examiners be sufficient to address this concern? Are there other methods, such as reviews by internal or external auditors, that could effectively address this concern? Do other objective measures of credit risk exist, and could they be used in place of NRSRO ratings to address this concern?
- If the Commission decides to adopt the proposal to replace the current NRSRO ratings-based criterion with a requirement that the instrument be subject to a minimal amount of credit risk and have sufficient liquidity, and permits broker-dealers to continue to rely on credit ratings of NRSROs as one mean of complying with the proposed amendments, should the Commission nevertheless require that the standard that results in a higher determination of credit risk be used for each individual instrument?
- If the Commission replaces the current NRSRO ratings-based criterion with a requirement that the instrument be subject to a minimal amount of credit risk and have sufficient liquidity such that it can be sold at or near its carrying value within a reasonably short period of time, should the Commission also require that broker-dealers consult credit ratings of NRSROs for that instrument, comparing which method requires the higher capital charge, and require that the broker-dealer take the higher capital charge?
- Conversely, if broker-dealers continue to rely on credit ratings of NRSROs, either because the Commission does not remove the reference to NRSROs from the Net Capital Rule or as one means of complying with the proposed amendments, should the Commission require an analysis of the debt instrument that is independent of the NRSRO

credit rating (e.g., an internal risk assessment or one performed by a third-party vendor) to support the use of the credit rating of NRSROs, and if the analysis does not support the credit rating, require that the broker-dealer take the higher capital charge?

III. References to Ratings of NRSROs in Securities Act Rules

In the Securities Act Proposing release, the Commission proposed changes to certain eligibility criteria for issuers to conduct primary offerings "off the shelf" under Securities Act Rule 415[44] and Forms S-3 and F-3[45] and changes to other rules that refer to that eligibility.[46] In addition, the Commission proposed changes to Rule 436(g) under the Securities Act.[47] Today, in a companion release, the Commission is proposing amendments to our rules to require disclosure of information regarding credit ratings used by registrants in connection with a registered offering of securities so that investors will better understand the credit rating and its limitations and, in another companion release, the Commission is soliciting comment on whether it should propose rescinding Rule 436(g) under the Securities Act.[48] The Commission is deferring consideration of action at this time on the other proposals in the Securities Act Proposing Release. However, in view of the continuing public interest in the Proposing Releases and the Commission's desire to receive additional comment, the Commission is re-opening the comment period for the Securities Act Proposing Release. As the Commission continues to evaluate and consider the proposed rule revisions outlined in this section, the Commission will review

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44 17 CFR 230.415.

45 17 CFR 239.13 and 17 CFR 239.33.

46 For a more detailed discussion of each of these proposals, see Securities Act Proposing Release, supra note 1.

47 17 CFR 230.436(g).

48 See the releases considered by the Commission on September 17, 2009 regarding proposed amendments to require disclosure of information about credit ratings used by registrants in connection with registered offerings, and soliciting comment on whether the Commission should propose to rescind Rule 436(g) under the Securities Act.

whether there are appropriate alternatives to references to credit ratings by NRSROs in those rules and forms.

Under existing requirements, an issuer's ability to conduct shelf offerings of non-convertible debt or asset-backed securities (ABS) may depend on, among other things, the securities' credit ratings. In particular, a primary offering of non-convertible debt securities is eligible for registration on Form S-3 or Form F-3, regardless of the issuer's public float or reporting history, if the securities are investment grade rated.[49] Securities registered on Form S-3 or Form F-3 may be offered on a delayed, or "shelf," basis.[50] An offering of asset-backed securities is eligible for shelf registration on Form S-3 or Form F-3 if the securities are investment grade rated and the offering meets certain other conditions.[51] In addition, a subset of asset-backed securities, "mortgage-related securities," that, among other things, are rated in one of the two highest rating categories by an NRSRO,[52] may be offered on a delayed basis, regardless of the form on which the offering is registered.[53]

In the Securities Act Proposing Release, the Commission proposed to replace the shelf eligibility requirements that rely on investment grade ratings with alternate requirements.[54] For the registration of a non-convertible debt offering on Form S-3 or Form F-3, the Commission proposed to require that, instead of having investment grade rated securities, a registrant must have issued $1 billion of non-convertible securities in registered primary offerings over the prior

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49 See General Instruction I.B.2 of Form S-3 and General Instruction I.B.2 of Form F-3.

50 See 17 CFR 230.415(a)(1)(x).

51 See General Instruction I.B.5 of Form S-3.

52 The term "mortgage related securities" is defined by Section 3(a)(41) of the Exchange Act [15 U.S.C. 78c(a)(41)].

53 See 17 CFR 230.415(a)(1)(vii).

54 See Securities Act Proposing Release, supra note 1.

three years. For shelf eligibility of ABS offerings, including offerings of mortgage related securities, the Commission proposed to replace the investment grade ratings requirement with requirements that initial and subsequent resales of ABS offerings be made in minimum denominations of $250,000 and that initial sales of the securities be made only to "qualified institutional buyers," as that term is defined in Securities Act Rule 144A.[55] We also proposed revisions to related rules and form requirements. We received letters from 35 commenters on these proposals. Most commenters opposed the proposed amendments that would replace the investment grade ratings component of the shelf eligibility requirements.[56]

At this time, the Commission is deferring consideration of action on the proposals to amend the investment grade ratings component of the Form S-3 or Form F-3 eligibility requirements and, as noted above, we are soliciting further comment on the proposals. With respect to the ABS shelf eligibility requirements, the staff of the Division of Corporation Finance

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[55] 17 CFR 230.144A.

[56] See ABA Letter 1; ABA Letter 2; SIFMA Letter; Letter from Thomas G. Berkmeyer, Associate General Counsel, American Electric Power Service Corporation to Secretary, Commission dated September 4, 2008; ASF Letter; Letter from Shirley Baum, Senior Attorney, Pinnacle West Capital Corporation to Secretary, Commission dated September 5, 2008;Letter from Walter E. Skrowronski, President, Boeing Capital Corporation to Secretary, Commission dated September 26, 2998; Schwab Letter; Letter from Constance Curnow to Christopher Cox, Chairman, Commission dated August 28, 2008; Letter from Davis Polk & Wardwell to Florence E. Harmon, Acting Secretary, Commission dated September 4, 2008; Letter from Debevoise & Plimpton LLP to Florence E. Harmon, Acting Secretary, Commission dated September 3, 2008 ("Debevoise Letter"); Letter from Dewey & LeBoeuf LLP to Florence Harmon, Acting Secretary, Commission dated September 5, 2008; Letter from James P. Carney, Vice President and Assistant Treasurer, Dominion Resources, Inc. to Florence E. Harmon, Acting Secretary, Commission dated September 5, 2008; Letter from David K. Owens, Executive Vice President, Business Operations Group, Edison Electric Institute to Commission dated September 5, 2008; Letter from Joseph J. Novak, General Counsel, Incapital, LLC to Florence E. Harmon, Acting Secretary, Commission dated September 5, 2008; Letter from Richard A. Lococo, Senior Vice President & Deputy General Counsel, Manulife Financial Corporation to Commission dated September 5, 2008; Mayer Brown Letter; Letter from John A. Courson, Chief Operating Officer, Mortgage Bankers Association to Jill M. Peterson, Assistant Secretary, Commission dated September 5, 2008; Letter from Michael W. Rico, Assistant Treasurer, PNM Resources, Inc. to Office of the Secretary, Commission dated September 5, 2008; Letter from W. Paul Bowers, Executive Vice President and Chief Financial Officer, Southern Company to Florence Harmon, Acting Secretary, Commission dated September 5, 2008; Letter from Vincent L. Ammann, Jr., Vice President and Chief Financial Officer, WGL Holdings, Inc. and Washington Gas Light Company to Florence Harmon, Acting Secretary, Commission dated September 10, 2008; Letter from James C. Fleming, Wisconsin Energy Corporation to Secretary, Commission, dated September 5, 2008.

is currently engaged in a broad review of the Commission's regulation of asset-backed securities including disclosure, offering process, and reporting of asset-backed issuers. In connection with that review, the staff is evaluating alternatives to the investment grade rating requirements, including alternatives other than the type of purchaser or the denomination of the security. The Commission believes that any proposal for an alternative to investment grade ratings for the purpose of ABS shelf eligibility will be better considered together with other possible proposals to the regulations governing the offer and sale of asset-backed securities.

IV. References to Ratings of NRSROs in Investment Company Act and Investment Advisers Act Rules

In the Investment Company Act Proposing Release, the Commission proposed to amend four of the Commission's rules under the Investment Company Act[57] (Rules 2a-7, 3a-7, 5b-3, and 10f-3) and one rule under the Investment Advisers Act[58] (Rule 206(3)-3T) that refer to credit ratings by NRSROs.[59] These rules use the credit ratings issued by NRSROs in different contexts, and for different purposes, to distinguish among various grades of debt and other rated securities.

The Commission proposed to amend each rule to omit references to NRSRO ratings and, except with respect to one of the rules, substitute alternative provisions that were designed to achieve the same purpose as the ratings.[60] The Commission received 66 comment letters on the

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[57] 15 U.S.C. 80a. Unless otherwise noted, all references to rules under the Investment Company Act will be to Title 17, Part 270 of the Code of Federal Regulations [17 CFR 270].

[58] 15 U.S.C. 80b. Unless otherwise noted, all references to rules under the Investment Advisers Act will be to Title 17, Part 275 of the Code of Federal Regulations [17 CFR 275].

[59] Investment Company Act Proposing Release, supra note 1.

[60] See Investment Company Act Proposing Release, supra note 1, at Section III. As discussed in the Investment Company Act Proposing Release, we did not propose an alternative provision for one of the NRSRO references in Rule 3a-7, which excludes structured finance vehicles from the definition of "investment company" subject to certain conditions. We did not provide an alternative for the requirement that structured financings offered to

proposal, most of which opposed the proposals.[61] Commenters expressed a variety of concerns regarding the proposed amendments. For example, some commenters expressed concern that the proposed amendments would replace an objective standard of an NRSRO rating with a riskier, subjective determination by the board of directors, which would be difficult to apply and would increase the burden on the fund's board.[62] Several commenters also asserted it was premature for the Commission to consider eliminating NRSRO ratings from Commission rules given the Commission's ongoing initiatives to address issues such as improving the accuracy of NRSRO ratings and eliminating NRSRO conflicts of interest.[63]

In a companion release the Commission is issuing today, the Commission is adopting certain of the proposed amendments to Rules 5b-3 and 10f-3 under the Investment Company Act.[64] The Commission is deferring consideration of action on the remaining proposed amendments to Rules 2a-7, 3a-7, and 5b-3 under the Investment Company Act and Rule 206(3)-3T under the Investment Advisers Act in light of the comments received on the proposed amendments and further actions the Commission is considering in separate rulemakings.

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the general public have an investment grade rating because we believed that these offerings generally were not made to retail investors. See id. 73 FR at nn. 41-42 and accompanying and following text.

61 See, e.g., Letter from Ronald W. Forbes and Rodney D. Johnson, Independent Directors of the Blackrock money market funds to Florence Harmon, Acting Secretary, dated September 10, 2008; Letter from Robert G. Zack, Executive Vice President and General Counsel, OppenheimerFunds, Inc. to Florence Harmon, Acting Secretary, dated September 4, 2008. The comment letters are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm (File No. S7-19-08), and also are available on the Commission's Internet Web site (http://www.sec.gov/comments/s7-19-08/s71908.shtml).

62 See, e.g., Letter from David Oestreicher, Chief Legal Counsel, T. Rowe Price Associates, Inc. to Florence Harmon, Acting Secretary, dated September 5, 2008.

63 See, e.g., ABA Letter 2; SIFMA Letter. A few commenters also stated that removing the references may lead to a significant risk of unintended adverse consequences to capital markets, regulatory community and other industries that have regulatory requirements involving NRSRO ratings and may not address concerns about undue investor reliance on NRSRO ratings. See, e.g., SIFMA Letter; Debevoise Letter; Letter from Nathan Douglas, Secretariat, Institutional Money Market Funds Association to Florence Harmon, Acting Secretary, dated September 5, 2008).

64 See NRSRO References Adopting Release, supra note 3.

Rule 2a-7 under the Investment Company Act governs the operation of money market funds, which rely on the rule to use different valuation and pricing methods than other investment companies ("funds") are permitted to use, to help maintain a stable share price. The rule contains conditions that restrict money market funds' portfolio investments to securities that have received certain minimum credit ratings from NRSROs or comparable unrated securities.[65] This past June, the Commission proposed amendments to Rule 2a-7 and related rules designed to improve the regulatory framework governing money market funds.[66] In that release, the Commission requested further comment on whether we should eliminate the use of NRSRO ratings in Rule 2a-7, including whether we should consider establishing a roadmap for phasing in the eventual removal of NRSRO references from the rule. We also asked whether we should adopt other alternatives to encourage more independent credit risk analysis, including whether we should reformulate the rule's use of ratings by requiring a money market fund's directors to designate specific NRSROs that the board determines issue ratings that are sufficiently reliable.[67]

Rule 3a-7 under the Investment Company Act excludes structured finance vehicles from the Act's definition of "investment company" subject to certain conditions.[68] The conditions include the requirement that structured financings offered to the general public be rated by at

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65 For example, Rule 2a-7 limits a money market fund's portfolio investments to securities that have received credit ratings from at least one NRSRO in one of the two highest short-term rating categories or, if unrated, be of comparable quality. Rule 2a-7(a)(10) (definition of "Eligible Security").

66 See Money Market Fund Reform, Investment Company Act Release No. 28807 (June 30, 2009) [74 FR 32688 (July 8, 2009)].

67 See id. at Section II.A.2.a.

68 Structured financings meet the definition of investment company under Section 3(a) of the Act because they issue securities and invest in, own, hold, or trade securities. Almost none of the structured financings, however, are able to operate under the Act's requirements. See Exclusion from the Definition of Investment Company for Structured Financings, Investment Company Act Release No. 19105 (Nov. 19, 1992) [57 FR 56248 (Nov. 27, 1992)].

least one NRSRO in one of the four highest ratings categories, with certain exceptions.[69] As discussed above, Commission staff is developing proposals regarding the offer and sale of asset-backed securities, which may affect the exemptive relief provided by Rule 3a-7.[70] In considering those changes, the Commission may revisit the use of NRSRO ratings in the offer and sale of asset-backed securities.

Rule 5b-3 under the Investment Company Act permits a fund, subject to certain conditions, to treat a repurchase agreement as an acquisition of the securities collateralizing the repurchase agreement in determining whether the fund is in compliance with two provisions of the Act that may affect a fund's ability to invest in repurchase agreements.[71] The rule permits a fund to treat a repurchase agreement as an investment in the underlying collateral if the agreement is "collateralized fully," and some types of collateral must have received certain credit ratings in order to meet this standard.[72] This reference to credit ratings is used to determine credit risk and liquidity of collateral securities that the fund may look to in meeting the diversification requirements of the Investment Company Act.[73] Fourteen commenters opposed the proposed amendment to eliminate NRSRO ratings references from this definition because, among other reasons, it would replace an objective standard with a subjective standard that would be difficult to apply.

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69 Rule 3a-7(a)(2).

70 See supra Section III.

71 Section 5(b)(1) of the Act limits the amount that a fund that holds itself out as being a diversified investment company may invest in the securities of any one issuer (other than the U.S. Government). Section 12(d)(3) of the Investment Company Act generally prohibits a fund from acquiring an interest in a broker, dealer, or underwriter. Because a repurchase agreement may be considered to be the acquisition of an interest in the counterparty, Section 12(d)(3) may limit a fund's ability to enter into repurchase agreements with many of the firms that act as repurchase agreement counterparties.

72 See Rule 5b-3(c)(1)(iv).

73 See Rule 5b-3(c)(1)(iv)(C)-(D).

Rule 5b-3 includes a second reference to NRSRO ratings, in the definition of "refunded security."[74] The rule allows a fund for purposes of the Investment Company Act's diversification requirements to treat the acquisition of a refunded security as the acquisition of U.S. government securities that are pledged to make payments to investors if, among other conditions, an independent certified public accountant has certified to the escrow agent that the government securities will satisfy all scheduled payments on the refunded security.[75] Three commenters opposed eliminating this NRSRO reference on the grounds it could increase fund expenses and decrease liquidity if funds chose not to bid on refunded securities for which certifications are not available. As discussed in the NRSRO References Adopting Release, because we understand that bond indentures or resolutions authorizing the issuance of the refunded bonds typically require that the escrow agent receive the requisite certification, we do not share these commenters' concerns and are amending Rule 5b-3 to eliminate this reference to NRSRO ratings.[76]

Finally, Rule 206(3)-3T under the Investment Advisers Act establishes a temporary alternative means for investment advisers who are registered with the Commission as broker-dealers to meet the requirements of Section 206(3) of the Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients.[77] The rule contains a

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74 A "refunded security" is a debt security whose principal and interest are to be paid by U.S. government securities that have been irrevocably placed in an escrow account and pledged only to payment of the principal and interest on the debt security. See Rule 5b 3(c)(4)

75 See Rule 5b-3(c)(4)(iii) (requiring at the time the deposited securities are placed in the escrow account that an independent accountant has certified to the escrow agent that the deposited securities will satisfy all scheduled payments of principal, interest, and applicable premiums in the refunded securities).

76 See NRSRO References Adopting Release, supra note 3, at Section II.B.1.

77 Rule 206(3)-3T [17 CFR 275.206(3)-3T]. See also Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Investment Advisers Act Release No. 2653 (September 24, 2007) [72 FR 55022 (September 28, 2007)] ("Principal Trade Rule Release"). Section 206(3) of the Investment Advisers Act makes it unlawful for any investment adviser, directly or indirectly "acting as principal for his own account, knowingly to sell any

condition that excludes securities from coverage under the rule if the adviser or its close affiliate is the issuer or an underwriter of the security, unless it is an underwriter of non-convertible debt securities rated in one of the four highest rating categories of at least two NRSROs.[78] The Commission intends to consider taking separate, broader, action on Rule 206(3)-3T, which is set to expire at the end of this year.[79]

As previously mentioned, the Commission is deferring consideration of action on the proposals to remove NRSRO references from the rules described above under the Investment Company Act and Investment Advisers Act. Our broader consideration of each of these rules will afford us the opportunity to re-evaluate credit rating references in those rules.

The Commission generally requests further comment on the proposed amendments described above to Rules 3a-7 and 5b-3 under the Investment Company Act and Rule 206(3)-3T under the Investment Advisers Act. We also request specific comment on whether the rules should require, in place of existing references to credit ratings, alternate standards that would use (i) credit ratings as a minimum standard, and (ii) additional criteria that must be met with regard to evaluating the securities, such as determinations of credit quality, liquidity, or appropriateness of the security as an investment for the particular purchaser. This approach, if applied to Rules 3a-7 and 5b-3 under the Investment Company Act and Rule 206(3)-3T under the Investment Advisers Act, would be designed to help reduce undue reliance on ratings by requiring an additional evaluation of credit quality, while retaining the external or objective measure of the NRSRO rating. Under Rule 2a-7 in its current form, for example, a determination that a security

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security to or purchase any security from a client ..., without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction." 15 U.S.C. 80b-6(3).

78 Rule 206(3)-3T(c).

79 See Principal Trade Rule Release, supra note 77.

is an "eligible security" as a result of its NRSRO ratings is a necessary but not sufficient finding in order for a money market fund to acquire the security. The rule also currently requires a determination that the security presents minimal credit risks, and specifically requires that the determination "be based on factors pertaining to credit quality in addition to any ratings assigned to such securities by an NRSRO."[80] Although the Commission, as noted above, is continuing to consider whether to remove references to credit ratings from Rule 2a-7 altogether, we request comment on whether we should consider the two-step approach of existing Rule 2a-7 for the other rules (i.e., Rules 3a-7, 5b-3, and 206(3)-3T) that contain references to NRSRO credit ratings. Alternatively, are there other objective measures of credit risk, and should they be used in place of NRSRO ratings to address the concerns addressed by the rules?

V. Request for Comment

The Commission generally requests comment on the Proposing Releases as indicated above, including whether the Commission should remove references to credit ratings by NRSROs in Commission rules and the appropriate factors to consider in making this determination. The Commission asks that commenters provide specific reasons and information to support alternative recommendations. Please provide empirical data, when possible, and cite to economic studies, if any, to support alternative approaches.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: October 5, 2009

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[80] Rule 2a-7(c)(3)(i).

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, 249 and 270

Release Nos. 34-60789, IC-28939; File Nos. S7-17-08, S7-19-08

RIN 3235-AK17, 3235-AK19

References to Ratings of Nationally Recognized Statistical Rating Organizations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to certain of its rules and forms to remove references to securities credit ratings. The Commission is eliminating certain references to credit ratings issued by nationally recognized statistical rating organizations ("NRSROs") in rules and forms under the Securities Exchange Act of 1934 related to the regulation of self-regulatory organizations and alternative trading systems, and in rules under the Investment Company Act of 1940 that affect an investment company's ability to purchase refunded securities and securities in underwritings in which an affiliate is participating. The Commission believes that the references to credit ratings in these rules and forms are no longer warranted as serving their intended purposes. The amendments are designed to address concerns that references to NRSRO ratings in Commission rules may have contributed to an undue reliance on those ratings by market participants. In a companion release, the Commission is re-opening the comment period for certain other proposed rule and form amendments that would eliminate additional references to NRSRO ratings.

EFFECTIVE DATE: November 12, 2009.

FOR FURTHER INFORMATION CONTACT: For the rule and form amendments under the Securities Exchange Act of 1934, Michael Gaw, Assistant Director, at (202) 551-5602, Brian

Trackman, Special Counsel, at (202) 551-5616, and Sarah Albertson, Special Counsel, at (202) 551-5647, in the Division of Trading and Markets; for rules under the Investment Company Act of 1940, Penelope W. Saltzman, Assistant Director, and Daniel K. Chang, Attorney, at (202) 551-6792, in the Division of Investment Management, at the Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rule 3a1-1[1] under the Securities Exchange Act of 1934 (the "Exchange Act"),[2] Rules 300, 301(b)(5) and 301(b)(6) of Regulation ATS,[3] Form ATS-R[4] and Form PILOT.[5] The Commission also is adopting amendments to Rules 5b-3[6] and 10f-3[7] under the Investment Company Act of 1940 ("Investment Company Act").[8]

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1 17 CFR 240.3a1-1.

2 15 U.S.C. 78a. Unless otherwise noted, all references to rules under the Exchange Act will be to Title 17, Part 240 or Part 242 of the Code of Federal Regulations [17 CFR 240 or 17 CFR 242].

3 17 CFR 242.300, 242.301(b)(5), and 242.301(b)(6).

4 17 CFR 249.638.

5 17 CFR 249.821.

6 17 CFR 270.5b-3.

7 17 CFR 270.10f-3.

8 15 U.S.C. 80a. Unless otherwise noted, all references to rules under the Investment Company Act will be to Title 17, Part 270 of the Code of Federal Regulations [17 CFR 270].

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I. INTRODUCTION

Last year the Commission issued rulemaking initiatives in furtherance of the Credit Rating Agency Reform Act of 2006.[9] The Commission also proposed to eliminate from certain Commission rules and forms references to credit ratings.[10] The Commission proposed to amend

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[9] Pub. L. No. 109-291, 120 Stat. 1327 (2006). See, e.g., Proposed Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 57967 (June 16, 2008) [73 FR 36212 (June 25, 2008)].

[10] See References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 58070 (July 1, 2008) [73 FR 40088 (July 11, 2008 ("Exchange Act Proposing Release")] (proposing amendments to rules and forms under the Exchange Act); References to Ratings of Nationally Recognized Statistical Rating Organizations, Investment Company Act Release No. 28327 (July 1, 2008) [73 FR 40124 (July 11, 2008)] ("Investment Company Act

(footnote continued)

these rules and forms to address concerns that the inclusion of requirements relating to credit ratings could create the appearance that the Commission had, in effect, given its "official seal of approval" on ratings, which could adversely affect the quality of due diligence and investment analysis and lead to undue reliance on NRSRO ratings.[11]

Today the Commission is adopting several of the amendments that we proposed last year to rules and forms under the Exchange Act and rules under the Investment Company Act.[12] The Commission believes that the references to credit ratings in these rules are no longer warranted as serving their intended purposes. These amendments would reduce reliance on credit ratings in our rules under the Exchange Act and the Investment Company Act, consistent with the protection of investors.

Proposing Release") (proposing amendments to rules under the Investment Company Act and Investment Advisers Act of 1940 ("Investment Advisers Act")). See also Security Ratings, Securities Act Release No. 8940 (July 1, 2008) [73 FR 40106 (July 11, 2008)] (proposing amendments to rules and forms under the Securities Act of 1933 ("Securities Act") and the Exchange Act).

11 See Exchange Act Proposing Release, supra note 10, at Section I; Investment Company Act Proposing Release, supra note 10, at Section I. We note that the Department of Treasury similarly has expressed concern that investors were overly reliant on credit rating agencies, and that credit ratings often failed to accurately describe the risk of rated products. The Department of Treasury recommended that regulators reduce the use of credit ratings in regulations and supervisory practices wherever possible. See U.S. Department of the Treasury, Financial Regulatory Reform – A New Foundation: Rebuilding Financial Supervision and Regulation 6, 46 (July 2009).

12 The Commission is deferring consideration of action and reopening the comment period on other proposed amendments to remove NRSRO ratings references to rules under the Securities Act, Exchange Act, Investment Company Act, and Investment Advisers Act. See References to Ratings of Nationally Recognized Statistical Rating Organizations, Securities Act Release No. 9069, Exchange Act Release No. 60790, Investment Advisers Act Release No. 2932, Investment Company Act Release No. 28940 (Oct 5, 2009) ("NRSRO Comment Re-Opening Release").

II. DISCUSSION

A. Amendments to Rules under the Exchange Act

The Commission today is revising Rule 3a1-1 under the Exchange Act;[13] Rules 300, 301(b)(5) and 301(b)(6) of Regulation ATS;[14] Form ATS-R;[15] and Form PILOT[16] to remove references to NRSRO ratings. Each of these rules and forms was adopted in 1998 as part of the Commission's new framework for the regulation of exchanges and alternative trading systems ("ATSs").[17] That framework provides the operator of a securities market the choice whether to register as a national securities exchange or to register as a broker-dealer and comply with the requirements of Regulation ATS.

1. Rule 3a1-1

The amendments to Rule 3a1-1 are being adopted as proposed. Rule 3a1-1(a) provides an exemption from the Exchange Act definition of "exchange" – and thus the requirement to register as an exchange – for a trading system that, among other things, is in compliance with Regulation ATS.[18] Rule 3a1-1(b) contains an exception to the exemption from the exchange definition. Under this exception, the Commission may require a trading system that is a "substantial market" to register as a national securities exchange if it finds that such action is necessary or appropriate in the public interest or consistent with the protection of investors.[19]

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13 17 CFR 240.3a1-1.

14 17 CFR 242.300, 242.301(b)(5), and 242.301(b)(6).

15 17 CFR 249.638.

16 17 CFR 249.821.

17 See Exchange Act Release No. 40760 (Dec. 8, 1998) [63 FR 70844 (Dec. 22, 1998)] ("Regulation ATS Adopting Release").

18 See 17 CFR 240.3a1-1(a)(2).

19 See 17 CFR 240.3a1-1(b); Regulation ATS Adopting Release, 63 FR at 70857.

Thus, pursuant to Rule 3a1-1, the Commission may require a "dominant" ATS to register as an exchange.[20]

Prior to the amendments being adopted today, Rule 3a1-1 set forth eight classes of securities in any one of which an ATS might achieve "dominant" status: (1) equity securities; (2) listed options; (3) unlisted options; (4) municipal securities; (5) investment grade corporate debt securities; (6) non-investment grade corporate debt securities; (7) foreign corporate debt securities; and (8) foreign sovereign debt securities.[21] Under the definitions that were provided in Rule 3a1-1, investment grade and non-investment grade corporate debt securities have three elements in common. They are securities that: (1) evidence a liability of the issuer of such security; (2) have a fixed maturity date that is at least one year following the date of issuance; and (3) are not exempted securities, as defined in Section 3(a)(12) of the Exchange Act.[22] The distinguishing characteristic of an investment grade corporate debt security was that it has been rated in one of the four highest categories by at least one NRSRO.[23] A non-investment grade corporate debt security under our rules was a corporate debt security that has not received such a rating.[24]

The Commission is revising Rule 3a1-1 by replacing paragraphs (b)(3)(v) and (b)(3)(vi), which define investment grade corporate debt securities and non-investment grade corporate debt

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20 Specifically, the Commission may – after notice to an ATS and an opportunity for it to respond – require the ATS to register as an exchange if, during three of the preceding four calendar quarters, the ATS had: (1) 50% or more of the average daily dollar trading volume in any security and 5% or more of the average daily dollar trading volume in any class of securities; or (2) 40% or more of the average daily dollar volume in any class of securities. See 17 CFR 240.3a1-1(b)(1).

21 See 17 CFR 240.3a1-1(b)(3).

22 Compare 17 CFR 240.3a1-1(b)(3)(v) with 17 CFR 240.3a1-1(b)(3)(vi).

23 See 17 CFR 240.3a1-1(b)(3)(v).

24 See 17 CFR 240.3a1-1(b)(3)(vi).

securities, respectively, with a single category "corporate debt securities" in paragraph (b)(3)(v).[25] This new definition retains verbatim the three elements common to the existing definitions of investment grade and non-investment grade debt securities. The 5% and 40% thresholds beyond which the Commission could require an ATS to register as an exchange also remain unchanged.[26] Under amended Rule 3a1-1, the Commission can, for example, determine that an ATS must register as an exchange if the system had – during three of the preceding four calendar quarters – 50% or more of the average daily dollar trading volume in any security and 5% or more of the average daily dollar trading volume in corporate debt securities, or 40% of the average daily dollar trading volume in corporate debt securities.[27]

2. Rules 300, 301(b)(5) and 301(b)(6) of Regulation ATS

As proposed, the Commission is making similar changes to Rules 300, 301(b)(5) and 301(b)(6) of Regulation ATS. Rule 300 sets forth definitions used in Regulation ATS, including of "investment grade corporate debt security" and "non-investment grade corporate debt security."[28]

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25 Existing paragraphs (b)(3)(vii) and (b)(3)(viii) are unchanged but redesignated as paragraphs (b)(3)(vi) and (b)(3)(vii), respectively.

26 See supra note 19. While the percentage thresholds remain unchanged, the dollar volume needed to reach these thresholds has increased. For example, under Rule 3a1-1 as it existed prior to today's action, an ATS that had 40% of the average daily dollar trading volume in non-investment grade corporate debt securities and 0% of the average daily dollar trading volume in investment grade corporate debt securities for three consecutive months could have been required by the Commission to register as an exchange. Under the amended Rule 3a1-1, the Commission will not be able to require the ATS to register as an exchange because the ATS's combined average daily dollar trading volume in corporate debt securities would be less than 40%.

27 The other six classes of securities – equity securities, listed options, unlisted options, municipal securities, foreign corporate debt securities, and foreign sovereign debt securities – remain unchanged. Therefore, as under Rule 3a1-1 prior to today's amendments, the Commission may also determine that an ATS must register as an exchange if the system exceeds the volume thresholds in any of these other classes of securities.

28 See 17 CFR 242.300(i) and (j).

Rule 301(b)(5) of Regulation ATS imposes a "fair access" requirement, whereby an ATS that exceeds certain volume thresholds in any class of securities must establish written standards for granting access to trading on its system and not unreasonably prohibit or limit any person in respect to access to the services it offers.[29] Prior to today's amendments, the fair access standard applied if an ATS had 5% or more of the average daily volume during at least four of the preceding six calendar months in any of the following: (1) any individual National Market System stock ("NMS stock");[30] (2) any individual equity security that is not an NMS stock and for which transactions are reported to a self-regulatory organization ("SRO"); (3) municipal securities; (4) investment grade corporate debt securities; or (5) non-investment grade corporate debt securities.

Rule 301(b)(6) of Regulation ATS[31] requires an ATS that exceeds certain volume thresholds in any class of securities to comply with standards regarding the capacity, integrity and security of its automated systems. Five classes of securities were identified in Rule 301(b)(6): (1) NMS stocks; (2) equity securities that are not NMS stocks and for which transactions are reported to a SRO; (3) municipal securities; (4) investment grade corporate debt securities; and (5) non-investment grade corporate debt securities.[32]

The Commission is amending Rules 300, 301(b)(5) and 301(b)(6) as proposed to establish a single class of "corporate debt securities" and to eliminate the existing separate classes of investment grade and non-investment grade corporate debt securities. Accordingly, paragraphs (i) and (j) of Rule 300 are replaced with a new paragraph (i) defining "corporate debt

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29 See 17 CFR 242.301(b)(5).

30 See 17 CFR 240.600(a)(47) (defining "NMS stock").

31 17 CFR 242.301(b)(6).

32 17 CFR 242.301(b)(6)(i).

security" to mean any security that: (1) evidences a liability of the issuer of such security; (2) has a fixed maturity date that is at least one year following the date of issuance; and (3) is not an exempted security, as defined in Section 3(a)(12) of the Exchange Act.[33] Former paragraphs (i)(D) and (i)(E) of Rule 301(b)(5) are replaced with a new paragraph (i)(D) providing that an ATS must comply with the access requirements set out in Rule 301(b)(5) if, with respect to corporate debt securities, such system accounts for 5% or more of the average daily volume traded in the United States for the requisite number of months. The 5% threshold at which an ATS would have to grant fair access to its system also remains unchanged.[34] Former paragraphs (i)(D) and (i)(E) of Rule 301(b)(6) are replaced with a new paragraph (i)(D) providing that an ATS must comply with the capacity, integrity and security requirements of Rule 301(b)(6) if, with respect to corporate debt securities, such system accounts for 20% or more of the average daily volume traded in the United States for the requisite number of months. The 20% threshold and the other three classes of securities remain unchanged. As with the changes to Rule 3a1-1, the other classes of securities referenced in these rules remain unchanged.

3. Form ATS-R and Form PILOT

The Commission is making corresponding amendments as proposed to Form ATS-R and Form PILOT. Form ATS-R is used by ATSs to report certain information about their activities to the Commission on a quarterly basis.[35] Form ATS-R requires each ATS to report the total unit volume and total dollar volume in the previous quarter for various categories of securities,

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33 15 U.S.C. 78c(a)(12).

34 When the Commission originally adopted Regulation ATS, it set the fair access threshold at 20%. It later lowered the threshold to 5% in connection with the adoption of Regulation NMS. See Exchange Act Release No. 51808 (June 9, 2005) [70 FR 37496, 37550 (June 29, 2005)].

35 Each ATS must file a Form ATS-R within 30 days of the end of each calendar quarter, and within ten days of a cessation of operations. See 17 CFR 242.301(b)(9).

including – prior to today's amendments – investment grade and non-investment grade corporate debt securities. Consistent with the amendments to Regulation ATS described above, we are revising Form ATS-R to eliminate the separate categories for investment grade and non-investment grade corporate debt securities, and instead creating a single category for "corporate debt securities."

As with the changes to Regulation ATS, "corporate debt securities" is defined in the instructions to Form ATS-R to mean any security that: (1) evidences a liability of the issuer of such security; (2) has a fixed maturity date that is at least one year following the date of issuance; and (3) is not an exempted security, as defined in Section 3(a)(12) of the Exchange Act. Because separate classes for investment grade and non-investment grade corporate debt securities are eliminated for purposes of the thresholds in Rule 3a1-1 and Rules 301(b)(5) and 301(b)(6) of Regulation ATS, no purpose is served by requiring ATSs to separately report their trading volumes for investment grade and non-investment grade debt securities on Form ATS-R. The figures for the separate classes will be added together and reported as a single item on the amended form. The Commission is not making any other changes to Form ATS-R.

Ordinarily, Section 19 of the Exchange Act[36] and Rule 19-4 thereunder[37] require a SRO to file with the Commission proposed rule changes on Form 19b-4 regarding any changes to any material aspect of its operations, including any trading system. Rule 19b-5 under the Exchange Act[38] sets forth a limited exception to that requirement by permitting an SRO to operate a pilot trading system without filing proposed rule changes with respect to that system if certain criteria

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36 15 U.S.C. 78s.

37 17 CFR 240.19b-4.

38 17 CFR 240.19b-5.

are met. One of those criteria is that the SRO files a Form PILOT in accordance with the instructions on that form. Like Form ATS-R, Form PILOT – prior to today's amendments – required quarterly reporting of trading activity by classes of securities, including investment grade and non-investment grade corporate debt securities. For the same reasons we are amending Rule 3a1-1 and Regulation ATS, we are also revising Form PILOT to eliminate these two categories, replacing them with a single category of "corporate debt securities." Corporate debt securities are defined identically in Form PILOT and Form ATS-R. The Commission believes that it is appropriate to obtain trading volumes from pilot trading systems for the combined class of corporate debt securities, and that separate reporting of the two classes is not necessary to adequately monitor the development of pilot trading systems. The Commission notes that, in over nine years since Rule 19b-5 and Form PILOT were adopted, no SRO has ever established a pilot trading system pursuant to Rule 19b-5 to trade corporate debt securities.

4. Discussion

In the Exchange Act Proposing Release, the Commission sought comment on proposed changes to certain Exchange Act rules and forms, including the changes to Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT that the Commission is adopting today. With respect to Rule 3a1-1 under the Exchange Act and Rules 300, 301(b)(5) and 301(b)(6) of Regulation ATS, the Commission sought comment on whether, in light of the proposed combination of investment grade and non-investment grade corporate debt securities into a single class, it should adopt lower thresholds at which an ATS that trades corporate debt securities should be required to register as an exchange. The Commission also solicited comment on whether the proposed amendments to Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT would significantly affect investors, market participants, the national market system or the public interest.

The Commission received many comments broadly arguing that the elimination of references to NRSRO ratings would not reduce undue reliance on the NRSROs and could have a potentially destabilizing effect, but these comments focused on NRSRO references in rules where the NRSRO credit rating was relied upon to determine the credit risk or liquidity of a particular security in order to achieve the rules' regulatory purpose.[39] For example, one commenter suggested that credit ratings are a necessary part of an effective risk measurement, along with each participant's independent analysis of credit risk, and questioned the availability and quality of substitutes for such ratings.[40]

In contrast, the amendments to Regulation ATS and the related Exchange Act rules discussed herein simply use NRSRO ratings to categorize trading activity into market segments

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39 The comment letters are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm (File No. S7-17-08), and also are available on the Commission's Internet Web site (http://www.sec.gov/comments/s7-17-08/s71708.shtml). The Commission received 20 comments in response to the Exchange Act Proposing Release. Many of the comments commended the Commission's efforts to reform the credit rating process, but opposed the proposals outlined in the proposed rulemakings. See, e.g., Comment Letter of Charles Schwab (Sept. 5, 2008) (labeling the Commission's proposed amendments to remove NRSRO rating from its rules as premature and ultimately destabilizing) ("Schwab Comment Letter"); Comment Letter of the Securities Industry and Financial Markets Ass'n. (Sept. 4, 2008) ("SIFMA Comment Letter") (noting that SIFMA has not found that the possibility of undue reliance on credit ratings supports the deletion of references to, and the use of, credit ratings in regulations while stating that the appropriate degree of use of credit ratings by market participants is less of a regulatory issue and more one of best practices within the marketplace). One commenter also encouraged the Commission to analyze the potential consequences of removing particular references to ratings, as opposed to a wholesale abandonment of NRSRO-ratings based criteria. See Comment Letter of Moody's Investor Services (Sept. 5, 2008). Another commenter encouraged the Commission to withdraw the proposals from active consideration until the Commission has coordinated with other regulatory agencies to prevent the proposals from conflicting with existing or proposed regulation of other financial services industries. See Comment Letter of Mortgage Bankers Ass'n. (Sept. 5, 2008). In addition, the majority of commenters specifically opposed the other proposed amendments in the Exchange Act Proposing Release. The Commission is deferring action and seeking additional comments on those other proposed amendments. See NRSRO Comment Re-Opening Release, supra note 12.

40 See Schwab Comment Letter (specifically commenting on Rule 15c3-1 under the Exchange Act (the "Net Capital Rule"), Rule 2a-7 under the Investment Company Act and Rule 206(3)-3T under the Investment Advisers Act).

for purposes of these rules' reporting and other requirements. The two commenters who expressly addressed the specific changes that the Commission is adopting in this release raised no objection to the elimination of references to NRSRO ratings in Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT.[41] One commenter, an NRSRO, was generally supportive of these proposed changes, stating that the current distinction between investment grade and non-investment grade corporate debt securities in these rules and forms was "superfluous and can be eliminated without any untoward consequences for investors."[42] The other commenter was also generally supportive of the proposals, and advocated various additional rule changes that, in its view, would enhance transparency for investors in fixed income securities.[43]

Consistent with the reasons set forth in the Exchange Act Proposing Release and based on the Commission's experience since the adoption of Regulation ATS in 1998, the Commission believes that distinguishing investment grade corporate debt securities and non-investment grade corporate debt securities as separate classes of securities under Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT is no longer necessary. In each case, as discussed, we believe that combining all corporate debt securities into a single class is appropriate. Consolidated reporting is adequate for Commission purposes and removal of NRSRO references in these rules

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41 See Comment Letter of DBRS (Sept. 8, 2008) ("DBRS Comment Letter"); Comment Letter of Multiple-Markets (Sept. 5, 2008) ("Multiple-Markets Comment Letter").

42 See DBRS Comment Letter.

43 See Multiple-Markets Comment Letter. The commenter also suggested reducing the volume threshold in Rule 3a1-1 for the determination of a "substantial market" and distinguishing market centers based on client and product types, and a corresponding reduction of the threshold in Rule 301(b)(6) for determining the applicability of capacity, integrity, and security requirements. The commenter also advocated that the Commission undertake a review of electronic trading platforms to evaluate fair access under Rule 301(b)(5). In addition, the commenter encouraged the Commission to make public the data filed on both Forms ATS and ATS-R. Although these comments go beyond the scope of the initial proposal, the Commission will consider them in connection with any future proposals in this area.

may help marginally reduce any undue reliance on credit ratings.

With regard to Rule 3a1-1, the Commission believes that exceeding a volume threshold for a combined class of all corporate debt securities is a sufficient indication of significant trading activity that could warrant requiring an ATS to register as an exchange, and that it is not necessary to assess trading volumes in the narrower segments of investment grade and non-investment grade corporate debt securities. While the amendment to Rule 3a1-1 adopted today increases the dollar volume of trading in corporate debt securities that an ATS must execute before it is required to register as an exchange, which could potentially reduce the likelihood that an ATS would be required to register as an exchange,[44] we believe that this change is nevertheless appropriate. As noted above, the Commission believes that these NRSRO references are no longer necessary and thus there is no need to analyze "dominance" in separate classes of investment grade and non-investment grade corporate debt securities. We specifically asked in the Exchange Act Proposing Release whether the Commission should lower the threshold in Rule 3a1-1 for the combined class of corporate debt securities. The Commission received no comments in response to this question and no suggestion for an alternate threshold. Following the amendment adopted today, we will continue to analyze for dominance in six other classes of securities (in addition to the new single class for corporate debt securities).[45]

For the same reasons we are amending Rule 3a1-1, we believe that amending Rules 300, 301(b)(5) and 301(b)(6) of Regulation ATS is appropriate because these NRSRO references are no longer necessary to serve their regulatory purpose and such removal may help reduce any undue reliance on credit ratings. The Commission believes that a volume threshold for a

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44 See supra note 25.

45 In over ten years since adopting Rule 3a1-1, the Commission has never determined to require an ATS to register as an exchange because it has become "dominant."

combined class of all corporate debt securities is sufficient for the fair access requirement and the capacity, integrity and security requirements. The Commission believes that the purposes of Regulation ATS will be fulfilled if investment grade and non-investment grade corporate debt securities are combined into a single class. ATSs will continue to be subject to the existing fair access requirement and capacity, integrity and security requirements with respect to the other existing classes of securities set forth in Rules 301(b)(5) and 301(b)(6) of Regulation ATS.

For the reasons described above, the Commission believes that the changes to Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT that we are adopting today to remove references to NRSRO ratings are necessary and appropriate in the public interest and consistent with the protection of investors. While the removal of the distinction between investment grade and non-investment grade corporate debt in the context of ATS reporting may marginally reduce the information immediately available to the Commission regarding corporate debt traded, the Commission believes that these specific references are not necessary.[46] Eliminating these references may help marginally reduce undue reliance on credit ratings and the removal of these requirements relating to credit ratings could marginally reduce compliance costs for ATSs. Moreover, as discussed above, the Commission does not believe that the broad concerns raised by many commenters regarding the risks inherent in removing NRSRO ratings and replacing them with a substitute in response to the Exchange Act Proposing Release are applicable to the specific changes being adopted in today's amendments. Finally, the Commission notes that the two commenters who specifically commented on these changes supported them.

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[46] The Commission retains the authority to request more specific information regarding the securities traded by ATSs. See 17 CFR 242.302-303.

B. Amendments to Rules under the Investment Company Act

Four of the Commission's rules under the Investment Company Act (Rules 2a-7, 3a-7, 5b-3 and 10f-3) and one rule under the Investment Advisers Act of 1940[47] ("Investment Advisers Act") (Rule 206(3)-3T) reference credit ratings by NRSROs. These rules use the credit ratings issued by NRSROs in different contexts, and for different purposes, to distinguish among various grades of debt and other rated securities.

In July 2008, we proposed to amend each rule to omit references to NRSRO ratings and, except with respect to one of the rules, substitute alternative provisions that were designed to achieve the same purpose as the ratings.[48] We received 66 comments on the proposal.[49] Six commenters generally advocated eliminating references to NRSRO ratings in Commission rules.[50] However, most commenters opposed the amendments. Many of those commenters

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47 15 U.S.C. 80b.

48 See Investment Company Act Proposing Release, supra note 10, at Section III.

49 The comment letters are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm (File No. S7-19-08), and also are available on the Commission's Internet Web site (http://www.sec.gov/comments/s7-19-08/s71908.shtml).

50 Comment Letter of Professor Frank Partnoy (received Sept. 5, 2008) ("I am submitting comments to applaud the Commission's proposed rules, to indicate that there is strong academic support for its proposal ....") ("Partnoy Comment Letter"); Comment Letter of Lawrence J. White, Professor of Economics, Stern School of Business (Sept. 5, 2008) ("White Comment Letter") ("I endorse [the] general spirit of the SEC's proposed rules and urge the SEC to go even further and to eliminate the NRSRO category entirely."); Comment Letter of the Government Finance Officers Ass'n. (Sept. 5, 2008) ("GFOA Comment Letter") ("We also generally support the Commission's proposals to deemphasize the reliance on ratings throughout its Rules."); Comment Letter of The Reserve (Sept. 5, 2008) (advocating removal of the designation of any entities as NRSROs); Comment Letter of Financial Economists Roundtable (Dec. 1, 2008) ("FER Comment Letter") ("strongly endors[ing] eliminating from SEC regulations every prescriptive mandate that is or would be based solely on credit ratings set by NRSROs" but acknowledging a division of opinion with regard to assessing the net benefits of "quasi-safe-harbors (offered mainly to officers and directors of money market mutual funds) based on credit ratings"); Comment Letter of CFA Institute (Mar. 26, 2009) ("CFA Institute Comment Letter") ("agree[ing] with the objectives ... to eliminate, modify or substitute references to ratings assigned by an NRSRO in an effort to reduce reliance on ratings that may have inadvertently conveyed an 'official seal of approval'" but

(footnote continued)

supported the Commission's reevaluation of the use of NRSRO ratings in its rules, but suggested that the Commission continue its evaluation pending implementation of the additional requirements for NRSROs that we recently adopted under the Credit Rating Agency Reform Act.[51] Most commenters also addressed specific proposed rule amendments, which we discuss in more detail below.

Today we are amending Rules 5b-3 and 10f-3 under the Investment Company Act.[52] As

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questioning the breadth of certain proposed changes and urging retention of current regulation for certain rules).

51 See, e.g., Comment Letter of the Investment Company Institute ("ICI Comment Letter") (Sept. 5, 2008); Comment Letter of the American Securitization Forum (Sept. 5, 2008) ("ASF Comment Letter"); Comment Letter of the Vanguard Group (Aug. 1, 2008) ("Vanguard Comment Letter"). We proposed and adopted rules under the Credit Rating Agency Reform Act in 2007. See Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 55231 (Feb. 2, 2007) [72 FR 6378 (Feb. 9, 2007)] (proposing release); Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 55857 (June 5, 2007) [72 FR 33564 (June 18, 2007)] (adopting release). We also have, among other things, adopted amendments to those rules this year to impose additional requirements on NRSROs to address concerns about the integrity of their rating procedures and methodologies. See, e.g., Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 59342 (Feb. 2, 2009) [74 FR 6456 (Feb. 9, 2009)]. We believe, however, that the amendments eliminating the references to NRSRO ratings in certain rules would address our separate concerns discussed above. See supra text accompanying note 11.

52 As discussed below and in a companion release, we are adopting amendments to Rule 5b-3 with respect to investments in refunded securities, and are deferring consideration of action on and requesting further comment on, amendments to Rule 5b-3 with respect to investments in repurchase agreements. See NRSRO Comment Re-Opening Release, supra note 12. We are also requesting further comment on the proposed amendments to Rule 3a-7 under the Investment Company Act and Rule 206(3)-3T under the Investment Advisers Act. See id. In June 2009, as part of our proposal on money market fund reform, we requested further comment on whether we should eliminate the use of NRSRO ratings in Rule 2a-7. See Money Market Fund Reform, Investment Company Act Release No. 28807 at Section II.A.a (June 30, 2009) [74 FR 32688 (July 8, 2009)] ("Money Market Fund Proposing Release"). We also sought comment on what other alternatives we could adopt to encourage more independent credit risk analysis and meet the regulatory objectives of the requirement in Rule 2a-7 regarding NRSRO ratings. We asked whether we should consider a roadmap for phasing in the eventual removal of NRSRO references from the rule. We specifically noted that we were considering an approach under which a money market fund's board would designate three (or more) NRSROs that the fund would look to for all purposes under Rule 2a-7 in monitoring whether a security held by a fund continues to be an "eligible security" for purposes of the rule. We are not pursuing this approach with regard to the rules we are amending today because Rules 5b-3 and 10f-3 require that certain standards be met

(footnote continued)

discussed further below, we believe that these amendments eliminate unnecessary references to credit ratings. The amendments may marginally reduce any undue reliance on credit ratings and may advance the goal of promoting better analysis of underlying investment decisions. In addition, because the references are no longer necessary and an adequate substitute exists for the reference in Rule 10f-3, reliance on credit ratings in these contexts is no longer justified. We believe the amendments to Rule 5b-3 are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Investment Company Act.[53] We also believe that the amendments to Rule 10f-3 are consistent with the protection of investors.[54]

1. Refunded Securities (Rule 5b-3)

Under Rule 5b-3, a "refunded security" is a debt security whose principal and interest payments are to be paid by U.S. government securities that have been irrevocably placed in an escrow account and are pledged only to the payment of the debt security.[55] Section 5(b)(1) of the Investment Company Act limits the amount that a fund that holds itself out as being "diversified" may invest in the securities of any one issuer (other than the U.S. Government). Rule 5b-3 permits a fund that acquires a refunded security to treat it as an acquisition of the escrowed government securities for purposes of the diversification requirements of Section 5(b)(1) of the Act, if certain conditions are met.[56]

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when the fund acquires those securities, and do not require subsequent monitoring of credit ratings by various NRSROs. See Rule 5b-3(c)(iv); Rule 10f-3(a)(3).

53 See Section 6(c) of the Investment Company Act.

54 See Section 10(f) of the Investment Company Act.

55 Rule 5b-3(c)(4).

56 Rule 5b-3(b). Similarly under Rule 2a-7, a money market fund may treat the acquisition of a refunded security, as defined in Rule 5b-3(c)(4), as the acquisition of the escrowed government securities for purposes of Rule 2a-7's diversification requirements. Rule 2a-7(c)(4)(ii)(A), (B), (footnote continued)

One of the conditions of Rule 5b-3 is that an independent certified public accountant ("independent accountant") must have certified to the escrow agent that the escrowed securities will satisfy all scheduled payments of principal, interest, and applicable premiums on the refunded securities.[57] The rule requires the certification by an independent accountant (together with the other conditions) to ensure that the bankruptcy of the issuer of the pre-refunded securities would not affect payments on the securities from the escrow account.[58] This condition is not required, however, if the refunded security has received a debt rating in the highest rating category from an NRSRO.[59] The Commission included this exception because in rating refunded securities, NRSROs typically require the same determination.[60]

Last year the Commission proposed to eliminate the exception to the certification requirement for securities that have received the highest credit rating from an NRSRO. Under the proposed amendment, the accountant certification condition would apply uniformly to all refunded securities, regardless of the securities' credit rating.

We are amending Rule 5b-3, as proposed, to eliminate the exception for refunded securities with certain credit ratings.[61] Under the amended rule, an independent accountant must

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2a-7(a)(20) (definition of "refunded security").

57 Rule 5b-3(c)(4)(iii).

58 See Treatment of Repurchase Agreements and Refunded Securities as an Acquisition of the Underlying Securities, Investment Company Act Release No. 25058 (July 5, 2001) [66 FR 36156 (July 11, 2001)] ("Rule 5b-3 Adopting Release"), at text accompanying n.25 (explaining that the conditions required in the definition of refunded security correspond to those in the definition of the term in Rule 2a-7); Revisions to Rules Regulating Money Market Funds, Investment Company Act Release No. 21837 (Mar. 21, 1996) [61 FR 13956 (Mar. 28, 1996)] ("Rule 2a-7 1996 Amending Release"), at Section II.D.2.

59 Rule 5b-3(c)(4)(iii).

60 See Technical Revisions to the Rules and Forms Regulating Money Market Funds, Investment Company Act Release No. 22921 (Dec. 2, 1997) [62 FR 64968 (Dec. 9, 1997)], at Section I.B.2.c.

61 Amended Rule 5b-3(c)(4)(iii).

have certified to the escrow agent that the deposited securities will satisfy all scheduled payments of principal, interest and applicable premiums on the refunded securities.[62] Thus, the same standard will apply for securities with the highest NRSRO debt rating as currently apply to those that have received lower or no ratings.

Three commenters objected to the proposed amendment, asserting that requiring funds to obtain independent accountants' certifications for refunded securities is inefficient, could increase fund expenses and could decrease liquidity if funds choose not to bid on refunded securities for which certificates are not readily available.[63] The amended rule, however, does not require that funds obtain such a certification. Rather, it requires that an independent accountant certify to the escrow agent that the escrowed securities will satisfy all scheduled payments. This requirement may be met, for example, by the fund manager confirming that a certification meeting the requirements of the rule was provided to the escrow agent.

Bond indentures or resolutions authorizing the issuance of the refunded bonds typically require that the escrow agent receive a certificate from an independent accountant that the escrowed securities will satisfy all scheduled payments on the refunded securities. Fund managers could confirm that the escrow agent has received such a certification, and this confirmation could come from any of multiple sources at little expense, such as the issuer's Web site, a municipal dealer's Web site or the escrow agent's Web site.[64] Moreover, and as explained in the Proposing Release, a fund could satisfy the certification requirement of Rule 5b-3 by

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62 Id.

63 See Calvert Comment Letter (Sept. 5, 2008); Letter of Connecticut Treasurer (Sept. 4, 2008) ("Connecticut Treasurer's Comment Letter"); Oppenheimer Comment Letter (Sept. 4, 2008).

64 Although such information may not be readily available from all of these sources today, issuers, dealers, escrow agents or NRSROs are likely to provide such information to meet the needs of fund managers.

determining that a third party such as an NRSRO, in the course of evaluating an offering of refunded securities, already has determined that an independent accountant provided the required certification to the escrow agent.[65]

Because we understand that accountant certifications are typically provided during the course of a refunding transaction, we believe that it will not be difficult or expensive for fund managers to confirm that the certification has been provided to the escrow agent. Thus, we do not believe that eliminating the ratings requirement exception in Rule 5b-3 is likely to result in significant additional costs to purchasers. Fund managers' ability to confirm without significant difficulty or expense that the requisite certification has been provided to the escrow agent should address concerns that the amendment could decrease the liquidity of refunded securities as a result of funds choosing not to bid on refunded securities for which certificates are unavailable.

2. Affiliated Underwritings (Rule 10f-3)

Section 10(f) of the Investment Company Act prohibits a registered fund from knowingly purchasing any security for which an underwriter having certain relationships with the fund or its

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[65] See Investment Company Act Proposing Release, supra note 10, at text accompanying n.59. Some rating agencies require certifications that we understand meet the requirements of Rule 5b-3. See, e.g., Moody's Investors Services, RATINGS METHODOLOGY: REFUNDED BONDS (June 2007) (available at http://www.moodys.com/moodys/cust/research/MDCdocs/29/2006700000441141.pdf?doc_id=2006700000441141&frameOfRef=municipal) ("The initial verification reports should be prepared by an individual Certified Public Accountant (CPA), a CPA firm, a Public Accounting Firm, or by another entity with nationally recognized proficiency in providing verification reports. Importantly, the verification should be provided by an entity independent of the issuer and refunding transaction."); Fitch Ratings, Guidelines for Rating Prerefunded Municipal Bonds (Apr. 2, 2009) available at http://www.fitchratings.com/creditdeskreports/report_frame.cfm?rpt_id=431370; Standard & Poor's, Criteria/Governments/U.S. Public Finance: Defeasance (June 26, 2007) available at http://www2.standardandpoors.com/portal/site/sp/en/us/page.article/2,1,1,0,1204836565946.html#ID199.

investment adviser ("affiliated underwriter") is acting as a principal underwriter[66] during the existence of an underwriting or selling syndicate for that security.[67] The prohibition was designed to prevent the "dumping" of unmarketable securities on affiliated funds, either by forcing the fund to purchase unmarketable securities from the underwriting affiliate itself or by forcing or encouraging the fund to purchase the securities from another member of the syndicate.[68]

The Commission adopted Rule 10f-3 in 1958 to permit a fund that is affiliated with a member of an underwriting syndicate to purchase securities from the syndicate if certain conditions are met.[69] The conditions are designed to address the risks raised by purchases that

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66 The term "principal underwriter" means (in relevant part) an underwriter who, in connection with a primary distribution for securities: (1) is in privity of contract with the issuer or an affiliated person of the issuer; (2) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate; or (3) is allowed a rate of gross commission, spread, or other profit greater than the rate allowed another underwriter participating in the distribution. 15 U.S.C. 80a-2(a)(29).

67 Section 10(f) prohibits a registered fund from knowingly purchasing a security during the existence of an underwriting or selling syndicate if a principal underwriter of the security is an officer, director, member of an advisory board, investment adviser, or employee of the fund or is a person of which any such officer, director, member of an advisory board, investment adviser, or employee is an affiliated person. An affiliated person of a fund includes, among others: (1) any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting securities of the fund; (2) any person five percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the fund; and (3) any person directly or indirectly controlling, controlled by, or under common control with the fund. 15 U.S.C. 80a-2(a)(3)(A), (B) and (C).

68 See REPORT OF THE SEC, INVESTMENT TRUSTS AND INVESTMENT COMPANIES, H.R. DOC. NO. 279, 76th Cong., 2d Sess., pt. 3, at 2581, 2589 (1939). The sales were also used to alleviate certain of an affiliated underwriter's financial difficulties. For example, an underwriter could benefit by rapidly turning over its securities inventory to produce working capital and to reduce the related expenses of carrying the inventory. Congress also expressed concern regarding the amount of underwriting fees earned by the sponsors and affiliated persons who placed the securities with the fund. See HEARINGS ON S.3580 BEFORE A SUBCOMMITTEE OF THE COMMISSION ON BANKING AND CURRENCY, 76th Cong., 3d Sess. 209, 212-23 (1940).

69 Exemption of Acquisition of Securities During Existence of Underwriting Syndicate, Investment Company Act Release No. 2797 (Dec. 1, 1958) [23 FR 9548 (Dec. 10, 1958)]. The rule codified the conditions of orders that the Commission had granted prior to 1958 exempting certain funds

(footnote continued)

could benefit fund affiliates. For example, one condition of the rule requires that securities be purchased before the end of the first day on which any sales are made, at a price that is not more than the price paid by each other purchaser of securities in that offering or in any concurrent offering of the securities.[70] In addition, the commission, spread or profit received or to be received by the principal underwriters must be reasonable and fair compared to the commission, spread or profit received by other such persons in connection with the underwriting of similar securities being sold during a comparable time period.[71] The rule also requires public reporting of securities purchases made in reliance on the rule. A fund must report the existence of any such purchases on Form N-SAR, and provide a written record of each transaction, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the transaction, and the information or materials on which the board has made a determination that the transaction complied with the procedures approved by the board.[72]

We amended Rule 10f-3 in 1979 to add municipal securities to the class of securities that funds could purchase under the rule.[73] The rule defines municipal securities that may be purchased during an underwriting in reliance on the rule ("eligible municipal securities") to include securities that have an investment grade rating from at least one NRSRO or, if the issuer or the entity supplying the revenues or other payments from which the issue is to be paid has been in continuous operation for less than three years (i.e., the security is a less seasoned

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from Section 10(f) to permit them to purchase specific securities.

70 See Rule 10f-3(c)(2) (also providing an exception from the pricing provision for rights offerings required by law in certain foreign offerings).

71 See Rule 10f-3(c)(6).

72 See Rule 10f-3(c)(9).

73 Rule 10f-3(c)(1)(iii). See Exemption of Acquisition of Securities During the Existence of Underwriting Syndicate, Investment Company Act Release No. 10736 (June 14, 1979) [44 FR 36152 (June 20, 1979)] ("Rule 10f-3 1979 Adopting Release").

security), one of the three highest ratings from an NRSRO.[74] The rating requirement was designed to prevent the purchase of less seasoned and lower quality securities, and thereby reduce the risk of unloading unmarketable securities on the fund.[75]

In July 2008, we proposed to eliminate the references to NRSRO ratings in Rule 10f-3 and substitute alternate provisions that require the assessment of liquidity and credit risk.[76] Those alternate provisions were designed to achieve the same purpose as that served by the references to credit ratings, in addressing concerns that funds might purchase less seasoned, unmarketable securities in affiliated underwritings.[77]

Most commenters on the proposed amendments did not specifically address the amendments to Rule 10f-3. As noted above, some of those commenters agreed generally with eliminating references to NRSRO ratings from Commission rules, while other commenters did not.[78] One commenter specifically supported the proposed amendments to Rule 10f-3.[79] It noted that, although the duty to make credit determinations "may appear to require expertise beyond typical board experience, boards would be allowed to rely on information and assessments provided by other sources."[80] Seven commenters specifically opposed the amendments to Rule

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74 Rule 10f-3(a)(3). As noted above, an investment grade debt security is a security that has been rated in one of the four highest categories by at least one NRSRO. See supra text following note 22.

75 See Rule 10f-3 1979 Adopting Release, supra note 73; Exemption of Acquisition of Securities During the Existence of Underwriting Syndicate, Investment Company Act Release No. 10592 (Feb. 13, 1979) [44 FR 10580 (Feb. 21, 1979)], at Section B.2.

76 See Investment Company Act Proposing Release, supra note 10, at Section III.D.

77 See id. at Section III.

78 See supra note 50 and accompanying text; Schwab Comment Letter; Calvert Comment Letter; SIFMA Comment Letter.

79 See CFA Institute Comment Letter.

80 Id.

10f-3.[81] Some expressed concerns that the proposed standards would likely increase the time and costs of the board of directors' oversight and could result in a lack of consistency among funds as to what is an eligible municipal security, and a lack of transparency in the board's subjective determinations.[82]

Today we are adopting the amendments as proposed, and we address the concerns of commenters below. The amended rule eliminates the references to ratings and revises the rule's definition of "eligible municipal security" to mean securities that are sufficiently liquid that they can be sold at or near their carrying value within a reasonably short period of time.[83] In addition, the securities would have to be either: (1) subject to no greater than moderate credit risk; or (2) if they are less seasoned securities, subject to a minimal or low amount of credit risk.[84]

The standards we are adopting require a level of liquidity and credit quality that is very similar to that of the current rule, but without the reference to NRSRO ratings.[85] These standards

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81 See, e.g., Independent Trustees of Fidelity Fixed-Income Funds Comment Letter (Oct. 3, 2008) ("Fidelity Independent Trustees Comment Letter"); SIFMA Comment Letter; Realpoint Comment Letter (Aug. 14, 2008).

82 See Fidelity Independent Trustees Comment Letter; SIFMA Comment Letter. SIFMA also asserted that the proposed amendment would provide "little added benefit while creating substantial market uncertainty."

83 For a discussion of the proposed amendments to Rule 10f-3, see Investment Company Act Proposing Release, supra note 10, at Section III.D.

84 The amended rule defines "eligible municipal securities" to mean "'municipal securities' as defined in Section 3(a)(29) of the [Exchange Act], that are sufficiently liquid such that they can be sold at or near their carrying value within a reasonably short period of time and either (i) [a]re subject to no greater than moderate credit risk; or (ii) [i]f the issuer of the municipal securities, or the entity supplying the revenues or other payments from which the issue is to be paid, has been in continuous operation for less than three years, including the operation of any predecessors, the securities are subject to a minimal or low amount of credit risk." Amended Rule 10f-3(a)(3).

85 As discussed above, some commenters expressed concerns about a possible lack of consistency among funds as to what constitutes an "eligible municipal security" under the amended rule. See supra note 82 and accompanying text. Those commenters did not specify whether such lack of consistency might directly affect funds or investors, or might affect the municipal securities markets in an indirect way. We believe that funds' determinations as to whether particular

(footnote continued)

are designed to address the investor protection concerns that a fund and its investors might be harmed by the fund's purchase of unmarketable securities in an affiliated underwriting. A fund that purchases municipal securities that are sufficiently liquid should, by the terms of the amended rule, be able to sell the securities at or near their carrying value within a reasonably short period of time. Thus, the fund should be able to sell the securities, and thereby unwind its position and reduce its exposure, relatively quickly. Furthermore, securities that are subject to no greater than moderate credit risk or, if less seasoned, are subject to minimal or low credit risk, are similarly less likely to be unmarketable securities that have been "dumped" on the fund.[86] Securities that meet these quality standards are likely to be more liquid, and thus able to be sold relatively quickly by the fund.[87]

Protection of the fund is further provided by other existing provisions in the rule that require the fund's board of directors, including a majority of disinterested directors, to (1) approve procedures under which the fund purchases securities under the rule, (2) approve any needed changes to those procedures and (3) review purchases quarterly to assure that they conformed to the fund's procedures.[88] Those provisions will continue to apply to affiliated

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securities meet the amended rule's standards of credit quality and liquidity will be sufficiently consistent for the purposes that Rule 10f-3 was adopted to promote, i.e., the protection of funds and their investors from the purchase of unmarketable securities.

86 A municipal security (or its issuer) subject to a moderate level of credit risk would present average creditworthiness relative to other municipal or tax exempt issues or issuers. Moderate credit risk also would denote current low expectations of default risk, with an adequate capacity for payment of principal and interest. Municipal securities subject to minimal or low credit risk would be less susceptible to default risk (i.e., have a low risk of default) than those with moderate credit risk. These securities (or their issuers) also would demonstrate a strong capacity for principal and interest payments and present above-average creditworthiness relative to other municipal or tax exempt issues (or issuers).

87 See M. DAVID GELFAND, STATE AND LOCAL GOVERNMENT DEBT FINANCING § 8:72 (2nd. ed. 2007) (noting that municipal securities trade largely on the basis of creditworthiness).

88 See Rule 10f-3(c)(10)(i)-(iii). See also Rule 10f-3 1979 Adopting Release, supra note 73 ("[T]he (footnote continued)

underwritings under the amended rule,[89] and the board's responsibilities with regard to fund procedures will apply to the new standards in the rule regarding liquidity and credit quality.[90]

We believe that the standards provided in the amended rule – that an "eligible security" must be sufficiently liquid that it can be sold at or near its carrying value within a reasonably short period of time, and either subject to no greater than moderate credit risk, or, if less seasoned, subject to a minimal or low amount of credit risk – are sufficiently clear to permit a fund board or fund investment adviser to understand the risks acceptable under the amended rule without significantly increasing the time and costs of board oversight. In addition, as we pointed out when we proposed the amendments to Rule 10f-3, the amendments may emphasize for funds the need to independently evaluate the credit risks associated with the underwritten security, and may possibly benefit funds by enabling them to acquire a wider range of securities, including unrated securities, that present attractive investment opportunities and the requisite level of credit quality, even though they do not meet the current rule's ratings requirement.[91] In exercising caution to ensure compliance with the revised standards, funds also might limit their acquisitions of municipal securities in reliance on the amended rule to securities of higher credit quality than

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Commission expects that investment company directors, in establishing procedures under the rule and determining compliance with such procedures, will address the concerns embodied in section 10(f) of the Act against overreaching and the placing of otherwise unmarketable securities with an investment company."); Exemption for the Acquisition of Securities During the Existence of an Underwriting or Selling Syndicate, Investment Company Act Release No. 22775 (July 31, 1997) [62 FR 42401 (Aug. 7, 1997)] ("1997 Rule 10f-3 Adopting Release"), at text following n.51 ("A fund's board should be vigilant in reviewing the procedures and transactions as required by rule 10f-3 as well as in conducting any additional reviews that it determines are needed to protect the interests of investors, particularly if the fund purchases significant amounts of securities in reliance on rule 10f-3.").

89 Rule 10f-3(c)(10); Investment Company Act Proposing Release, supra note 10, at n.69 and accompanying text.

90 See amended Rule 10f-3(a)(3), (c)(10)(i).

91 See Investment Company Act Proposing Release, supra note 10, at Section VI.A.

required under the current rule.

In developing procedures under the rule, the board of directors may incorporate ratings, reports, analyses, opinions and other assessments issued by third-parties, including NRSROs, although an NRSRO rating, by itself could not substitute for the evaluation performed by the board. We would expect the board to evaluate assessments it intends to incorporate and the third-party sources that provide those assessments.[92] The board could then incorporate in its procedures those third party assessments that it determines are reliable. The ability to incorporate outside assessments may mitigate the potential increased burdens about which some commenters expressed concern.[93]

III. PAPERWORK REDUCTION ACT

A. Rule and Form Amendments under the Exchange Act

Certain provisions of the amendments to the forms contain "collection of information"

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92 When a fund's determination with regard to a security departs from ratings provided by NRSROs (including ratings by "unsolicited" NRSROs), the board may choose to require in its policies and procedures that the fund document the rationale underlying the determination. See Realpoint Comment Letter (recommending that the Commission require that a fund document when its determinations differ from those of "unsolicited" NRSROs). We are not adopting such a requirement because we believe the board should make the determination regarding the extent to which it will rely on the rating of any NRSRO as an appropriate indication of credit quality or liquidity.

93 See supra note 82 and accompanying text. The ability to rely on outside assessments also addresses to some extent the concerns expressed by one commenter about market uncertainties. See SIFMA Comment Letter. Any remaining increase in uncertainty (for funds and their shareholders) that results from the exercise of discretion by funds and their advisers in determining which municipal securities to purchase under the amended rule, is an inherent corollary of the flexibility added by the rule amendments. We also note, with regard to concerns about transparency, that investors and fund analysts will continue to have access to information about the securities that funds hold and have purchased in reliance on rule 10f-3. See Form N-SAR [17 CFR 274.101], Item 770 (reporting of transactions effected in reliance on rule 10f-3); Form N-CSR [17 CFR 274.128], Item 6(a) (disclosure in shareholder reports of portfolio holdings); Form N-Q [17 CFR 274.130], Item 1 (quarterly schedule of portfolio holdings).

requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[94] The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by these regulations constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The titles of the affected information forms are "Form ATS-R" (OMB Control Number 3235-0509) and "Form PILOT" (OMB Control Number 3235-0507). Responses to this collection are mandatory for broker-dealers that comply Regulation ATS (in the case of Form ATS-R) and for SROs that operate pilot trading systems (in the case of Form PILOT). For the reasons discussed below, we do not believe the amendments will result in a material or substantive revision to these collections of information.[95]

The amendments to Form ATS-R and Form PILOT revise the forms to require that information which had been reported as separate items (i.e., investment grade debt corporate debt securities and non-investment grade corporate debt securities) now will be combined and reported as a single item (i.e., corporate debt securities). In all other respects, as discussed in the Exchange Act Proposing Release, the information collected on these forms remains unchanged.[96] Accordingly, the Commission does not believe the amendments will result in a substantive or material revision to those collections of information[97] within the meaning of the PRA.[98] The Commission received no comments on the PRA analysis in the Exchange Act Proposing Release

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94 44 U.S.C. 3501 et seq.

95 5 CFR 1320.5(g).

96 See Exchange Act Proposing Release, 73 FR at 40097.

97 5 CFR 1320.5(g).

98 44 U.S.C. 3501 et seq.

applicable to Forms ATS-R and PILOT.

B. Rule Amendments under the Investment Company Act

Certain provisions of the amendments to Rule 10f-3 contain "collection of information" requirements within the meaning of the PRA.[99] The title for the collection of information is "Rule 10f-3 under the Investment Company Act of 1940, Exemption for the Acquisition of Securities During the Existence of an Underwriting and Selling Syndicate" (OMB Control No. 3235-0226). Responses to this collection are mandatory for funds that intend to rely on Rule 10f-3. Records of information made in connection with this requirement are required to be maintained for inspection by Commission staff, but the collection will not otherwise be submitted to the Commission. There are currently no approved collections of information for Rule 5b-3, and the amendments we are adopting today would not create any new collections.

We requested comment on the collection of information requirements in the Investment Company Act Proposing Release and submitted the revisions to the collections of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. We received no comments that specifically addressed the collection of information requirements. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Rule 10f-3 permits a fund that is affiliated with a member of an underwriting syndicate to purchase securities from the syndicate if certain conditions are met. In the case of a municipal security, the security generally must have received an investment grade rating by at least one NRSRO, or if it is a less seasoned security, one of the three highest ratings by an NRSRO. The

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[99] 44 U.S.C. 3501-3520.

amended rule eliminates this condition and includes a substitute therefor.[100] Under the amendment an "eligible municipal security" means a security that is sufficiently liquid that it can be sold at or near its carrying value within a reasonably short period of time, and is either: (1) subject to no greater than moderate credit risk; or (2) if it is a less seasoned security, subject to a minimal or low amount of credit risk.

Rule 10f-3 also requires fund boards to (1) approve procedures under which the fund purchases securities in reliance on the rule, (2) approve needed changes to the procedures and (3) review purchases quarterly to ensure they were effected in compliance with the procedures.[101] Accordingly, fund boards currently review purchases of municipal securities made in reliance on Rule 10f-3, and should continue to do so under the amended rule.

In our most recent PRA submission, Commission staff estimated that each year, approximately 350 funds engage in transactions in reliance on Rule 10f-3.[102] Staff further estimated that each fund would, on average, take two hours to review and revise, as needed, written procedures for these transactions. In the Investment Company Act Proposing Release, we stated that we believed that any revisions funds would have to make to comply with the proposed amendment would be incorporated in the two hours of review.[103] Some commenters asserted that the proposed amendment would likely increase the time and costs of the board of directors' oversight.[104]

We continue to believe that the specific changes a board might make to the procedures

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100 See supra notes 83-84 and accompanying text.

101 Rule 10f-3(c)(10).

102 See Submission for OMB Review, Comment Request, Rule 10f-3 [73 FR 13263 (Mar. 12, 2008)].

103 See Investment Company Act Proposing Release, supra note 10, at Section V.B.

104 See supra note 82 and accompanying text.

that are designed to comply with the amendments would not be significant. As noted above, we are adopting a standard regarding liquidity and credit quality that is very similar to that of the current rule.[105] In addition, directors may incorporate securities quality assessments by third party sources that the directors determine are reliable in the procedures they approve and their review of municipal securities purchases made in reliance on Rule 10f-3, which may mitigate the potential increased burdens on fund boards.[106] Nevertheless, in consideration of the comments, we recognize that there may be an additional one-time burden for fund boards to review and approve revised procedures designed to ensure compliance with the amendment to Rule 10f-3.[107] Commission staff estimates that each fund board would incur a one-time burden of two hours for a total burden for all fund boards of 700 hours at a cost of $2.8 million.[108] Amortized over three years, this would be an annual burden of 0.67 hours per fund and 235 hours for all funds.[109]

IV. COST-BENEFIT ANALYSIS

A. Rule and Form Amendments under the Exchange Act

The Commission is sensitive to the costs and benefits imposed by its rules. The Commission notes that no comments addressed the Commission's analysis of the costs and benefits associated with the proposed amendments to Rule 3a1-1, Regulation ATS, Form ATS-R

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105 See supra text accompanying note 85.

106 See supra note 93 and accompanying text. These concerns were expressed with respect to the proposed amendments generally, and commenters did not provide any estimates of the increased burden that boards might incur under the proposed amendments.

107 We do not anticipate the revised procedures would require an increase in the current estimated time the board spends each quarter to review acquisitions of securities for compliance with Rule 10f-3.

108 These estimates are based on the following calculations: 350 fund boards x 2 hours = 700 hours; 700 hours x $4000 = $2,800,000. The estimate for the hourly cost for a fund board is based on an average board size of 8 directors and a cost of $500 per hour for each director.

109 This estimate is based on the following calculation: 350 fund boards x 0.67 hours = 234.5 hours.

and Form PILOT contained in the Exchange Act Proposing Release.

1. Benefits

The amendments to Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT eliminate the separate definitions of and references to investment grade corporate debt securities and non-investment grade corporate debt securities and replace them with a single category, "corporate debt securities." The Commission believes that the inclusion of requirements relating to securities credit ratings are no longer necessary to achieve the regulatory purpose of these rules, and may help marginally reduce any undue reliance on credit ratings.

For reasons discussed above, the Commission believes that it is no longer necessary to assess trading volumes in the narrower segments of investment grade and non-investment grade corporate debt securities to fulfill the purposes of those rules and forms. Broker-dealers that are subject to Regulation ATS will no longer have to purchase and keep track of credit ratings solely for the purpose of Regulation ATS. The other classes of securities and the threshold levels themselves remain unchanged. With respect to the changes to Form ATS-R and Form PILOT, we believe that combining investment grade and non-investment grade corporate debt securities into a single class for purposes of those two forms will benefit market participants by making reporting slightly more streamlined and may reduce undue reliance on references to ratings issued by credit rating agencies. At the same time, the Commission does not believe that the amendments to these rules and forms will significantly affect market participants because the total units and total dollar volume of corporate debt securities transacted will still be reported. In addition, the removal of these requirements relating to credit ratings reduces compliance costs for ATSs.

2. Costs

The amendments to Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT eliminate the separate definitions of and references to investment grade corporate debt securities and non-investment grade debt securities and replace them with a single category, "corporate debt securities." We believe that these changes will not impose any significant costs on market participants.

The amendments to Rule 3a1-1 and Regulation ATS will marginally reduce the likelihood of an ATS meeting the thresholds in those rules. For example, under Rule 3a1-1 as it existed prior to today's action, an ATS that had 40% of the average daily dollar trading volume in non-investment grade corporate debt securities and 0% of the average daily dollar trading volume in investment grade corporate debt securities for at least four of the preceding six calendar months could have been required to register as an exchange. Under amended Rule 3a1-1, the Commission can no longer require the ATS to register as an exchange, because its average daily dollar trading volume in corporate debt securities combined is less than 40%. A potential cost of the amendments to Rule 3a1-1 and Regulation ATS is that an ATS that exceeded one of the thresholds that existed prior to today and thus would have become subject to additional regulatory requirements (in the case of Regulation ATS) or must register as an exchange (in the case of Rule 3a1-1) will no longer exceed the threshold and will not have to meet the attendant requirements. However, the Commission believes that this possibility is remote, and that the amendments are unlikely to impose any costs on investors, market participants or the national market system generally.

We believe that any costs associated with the changes to Form ATS-R and Form PILOT will be minimal. Respondents already determine and report the total units and total trading

volume for investment grade and non-investment grade corporate debt securities separately. On the revised forms, respondents will report them together as a single item for "corporate debt securities." Combining the categories of investment grade and non-investment grade debt on these forms will not significantly affect the level of information available to the Commission in monitoring ATSs. We expect that any programming costs to market participants to implement the reporting changes to these forms will be minimal and involve adding two previously reported items together and reporting the combined amount.

In addition, broker-dealers that are subject to Regulation ATS will no longer be required to purchase and keep track of credit ratings solely for the purpose of Regulation ATS. If broker-dealers subject to Regulation ATS no longer purchase credit rating data from NRSROs, the amendments may marginally reduce the revenues of NRSROs that charge subscriber fees. However, we believe that the number of broker-dealers subject to Regulation ATS is small and these broker-dealers represent a very small portion of NRSRO customers. Further, these broker-dealers may subscribe to NRSRO ratings for other purposes. Therefore, we believe that any impact on the revenues of the NRSROs will likely be small.

Also, combining the categories of investment grade and non-investment grade debt on these forms also will marginally reduce the level of information available to the Commission in monitoring ATSs. This may marginally reduce the ability of the Commission to stay abreast of changes to the trading of corporate debt securities. However, the Commission believes that the elimination of this detailed information will not significantly affect monitoring of ATSs because the Commission will still be able to monitor the volume of corporate debt traded by an ATS.

B. Rule Amendments under the Investment Company Act

As discussed above, the rule amendments we are adopting today eliminate certain

references to NRSRO ratings in Rules 5b-3 and 10f-3. The amendments to Rule 5b-3 remove an exception based on credit ratings. The amendments to Rule 10f-3 substitute references to alternative credit quality and liquidity criteria that are similar to that of the current rule. We prepared a cost-benefit analysis in the Investment Company Act Proposing Release, and received comments relating to that analysis.

1. Benefits

The amendments to Rules 5b-3 and 10f-3 are part of our larger initiative to eliminate references to NRSRO ratings from Commission rules where possible. This initiative is designed to address the concern that the inclusion in the Commission's rules and forms of requirements relating to security ratings could create the appearance that the Commission had, in effect, given its "official seal of approval" on ratings, which could adversely affect the quality of due diligence and investment analysis performed and lead to undue reliance on ratings. We noted that the proposed amendments to eliminate ratings as a whole might result in increased market efficiency by affording funds access to securities that do not meet the rating requirements in the current rules, but that would satisfy the credit risk and liquidity standards in the proposed amendments.[110] It is difficult to estimate specifically the benefits of the amendments to Rules 5b-3 and 10f-3 in isolation. We believe that the amendments to these rules remove unnecessary references to credit ratings, which may reduce undue reliance on credit ratings. Because these references are no longer necessary, and an appropriate substitute exists for the reference in Rule 10f-3, reliance in these contexts is no longer justified. In addition, the amendment to Rule 10f-3 could emphasize the importance to funds that acquire municipal securities in an affiliated underwriting of making an independent evaluation of the credit risks associated with the

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[110] See Investment Company Act Proposing Release, supra note 10, at Section VII.

underwritten security. Finally, by moving away from a required reliance on credit ratings in our rules, funds may possibly benefit by acquiring a wider range of securities that present attractive investment opportunities and the requisite level of credit quality, even though they do not meet the current rule's ratings requirement.

2. Costs

We anticipate that funds and investment advisers may incur certain costs as a result of the amendments we are adopting today. These costs will principally relate to the replacement of the NRSRO ratings standard with the new credit quality and liquidity criteria. Commenters asserted that elimination of a bright-line standard could create additional costs and uncertainty in the application of, compliance with, and enforcement of the rule.[111] They also asserted that the subjective judgment-based standard in the proposed amendments might cause funds to acquire securities that do not meet the particular ratings requirement and that could result in the concerns that the rating requirements were designed to address (e.g., poor liquidity or credit quality). We understand these concerns. However, we believe that the alternative credit quality and liquidity criteria we are substituting for NRSRO ratings will achieve the same purpose the ratings were designed to meet, and that they are sufficiently clear to permit a fund board and adviser to understand the risks acceptable under the rules. In determining a security's credit quality and liquidity, fund boards and advisers will, of course, be free to incorporate ratings, reports and analyses issued by, third parties, including NRSROs. We believe that most fund advisers, in the ordinary course of managing portfolios, already evaluate third party opinions, including those of ratings agencies, that provide assessments of the credit quality and liquidity of debt instruments.

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[111] See, e.g., Oppenheimer Comment Letter ("a subjective standard is difficult to apply, difficult to test for compliance, and causes uncertainty regarding enforcement").

We also believe that the boards and advisers of funds that rely on Rule 10f-3 are likely to look to those third parties in which they have confidence when incorporating third party assessments in making their determinations. For these reasons, we do not anticipate that the amendments will result in significant costs or compromise investor protection.

We are making changes today to two rules under the Investment Company Act, which are limited in scope. As noted above, we believe that the standards in the Rule 10f-3 amendments are similar to the NRSRO ratings they replace. Thus, we believe it is unlikely that the amendments will result in unintended adverse consequences or involve conflicts with other regulations, as some commenters have suggested.[112] Those comments appeared to address the consequences of eliminating references to other rules, such as Rule 2a-7 or the entire group of rules we proposed to amend, the consequences of which could be more substantial.

Rule 5b-3. The amendments we are adopting today eliminate references to NRSRO ratings in the definition of "refunded security" in Rule 5b-3. We anticipate that our elimination of references to NRSRO ratings in the definition of "refunded security" in Rule 5b-3 is unlikely to result in significant additional costs for funds that rely on the rule.[113] Under the amendment, in order to meet the definition of a "refunded security" for purposes of the rule, an independent accountant must have certified to the escrow agent that the deposited securities will satisfy all scheduled payments of principal, interest and applicable premiums on the refunded securities.[114] This standard will apply to all securities regardless of their rating.

Without providing specific estimates, some commenters stated this amendment could

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112 See, e.g., SIFMA Comment Letter; Comment Letter of Institutional Money Market Funds Ass'n (Sept. 5, 2008).

113 See supra Section II.A.2.

114 Amended Rule 5b-3(c)(4).

create higher costs for funds and adversely affect the liquidity of refunded securities by requiring them to obtain an independent accountant's certification.[115] The amended rule, however, does not require funds to obtain accountants' certificates, but requires the escrow agent to have received an accountant's certification. Commenters also indicated that it may not always be clear whether the escrow agent for a refunded security has received the necessary certification, thus requiring funds to incur costs related to determining the certification status of each refunded security.[116] As noted above, we understand that an independent accountant typically provides the escrow agent a certification during the course of a refunding transaction.[117] We believe that fund managers could consult any of multiple sources at little expense to confirm the escrow agent's receipt of this certification, including, for example, the issuer's Web site, a municipal dealer's Web site or the escrow agent's Web site.[118] In addition, funds may be able to satisfy the certification requirement of Rule 5b-3 by confirming that an NRSRO determined that an independent accountant has provided the required certification to the escrow agent.[119] For these reasons, we believe that eliminating the ratings requirement exception in Rule 5b-3 is unlikely to result in additional costs to purchasers. Based on our belief that the amendment to Rule 5b-3 would not result in additional costs or pose compliance difficulties for fund managers, we do not share commenters' concerns that the rule amendment could decrease the liquidity of refunded securities.

Rule 10f-3. In the Investment Company Act Proposing Release, we stated that our belief

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115 See, e.g., Calvert Comment Letter.

116 See, e.g., Connecticut Treasurer's Comment Letter.

117 See supra text preceding note 64.

118 See supra note 64 and accompanying text.

119 See supra note 65 and accompanying text.

that the proposed amendment to Rule 10f-3 would not impose costs on funds that rely on Rule 10f-3 to purchase municipal securities.[120] Some commenters asserted that the proposed amendments might increase the costs and time devoted to board oversight of these transactions and could result in a lack of consistency among funds as to what is an eligible municipal security, and a lack of transparency in the board's subjective determinations.[121] Rule 10f-3 requires the fund's board to determine that the fund has procedures reasonably designed to ensure that purchases are made in compliance with the rule and to determine each quarter that purchases made have been effected in compliance with the procedures.[122] As noted above in our PRA analysis, we currently estimate that boards spend, on average, two hours each year revising procedures designed to ensure compliance with the rule and reviewing transactions to determine whether they have been effected in compliance with the procedures.[123] We anticipate that the specific changes a board might make to the procedures that are designed to comply with the amendments would not be significant because, as noted above, we are adopting a level of credit quality and liquidity that is very similar to that of the current rule. In addition, directors may use securities quality assessments by outside sources that they determine are reliable in the procedures they approve and their review of municipal securities purchases made in reliance on Rule 10f-3. We anticipate this ability to use assessments of third parties may mitigate the potential increased oversight burdens on fund boards.[124] After consideration of the comments,

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120 See Investment Company Act Proposing Release, supra note 10, at text preceding n.107.

121 See, e.g., Fidelity Independent Trustees Comment Letter ("The proposed standards, given their emphasis on judgment, would likely increase the time and costs devoted to that oversight.").

122 Rule 10f-3(c)(10)(i), (iii).

123 See supra text following note 102.

124 See supra text accompanying note 106. These commenters did not provide any estimates of the increased burden that boards might incur under the proposed amendments.

however, we recognize that fund boards may incur one-time costs to approve revised policies and procedures as a result of the amendment to Rule 10f-3. Staff estimates that a board may take two hours to review and approve revised procedures designed to ensure that transactions entered into in reliance on the rule comply with the amendment to Rule 10f-3. Staff further estimates that approximately 350 funds engage in transactions in reliance on Rule 10f-3. Staff estimates that boards of these funds would incur one-time costs of $8000 to review and approve revised procedures for a total cost to all funds of $2.8 million.[125]

We do not believe that the amendments would significantly change the amount of time the board would spend to review transactions each quarter. We believe that a fund adviser, rather than the board, determines whether a security meets the definition of an eligible municipal security for purposes of Rule 10f-3. We also believe that the standards in the amended definition are sufficiently clear to allow a fund adviser to understand the risks and level of liquidity acceptable under the rule.[126] Fund advisers may use securities quality assessments by third parties, including NRSROs, that the board or adviser determines are reliable in its review of municipal securities purchases made in reliance on Rule 10f-3, which may offset concerns about additional costs that may result from the amendment. We do not believe that the proposed amendments would result in increased costs for advisers in determining whether securities are "eligible municipal securities" under the amended rule. When the board performs its quarterly

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125 This is based on the following calculation: 350 funds x 2 hours x $4000 per hour of board time = $2,800,000.

126 As discussed above, we believe that funds' determinations as to whether particular securities meet the amended rule's standards of credit quality and liquidity will be sufficiently consistent for the purposes that Rule 10f-3 was adopted to promote, i.e., the protection of funds and their investors from the purchase of unmarketable securities. See supra note 85. With regard to concerns about transparency, we note that investors and fund analysts will continue to have access to information about the securities that funds hold and have purchased in reliance on Rule 10f-3. See supra note 93.

review of transactions, we believe that the board would focus on reviewing whether the purchase was effected in compliance with the procedures the board has established.[127] For these reasons, we continue to believe that the standards we are substituting with respect to eligible municipal securities will not require significantly greater consideration of these transactions on the part of the board than we have previously estimated.

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

A. Rule and Form Amendments under the Exchange Act

Section 3(f) of the Exchange Act[128] requires the Commission, whenever it engages in rulemaking and is required to consider or to determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition and capital formation. In addition, Section 23(a)(2) of the Exchange Act[129] requires the Commission, when promulgating rules under the Exchange Act, to consider the impact any such rules would have on competition. Section 23(a)(2) further provides that the Commission may not adopt a rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission notes that no commenters addressed the effect that the proposed changes to Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT would have on efficiency, competition and capital formation.

We believe that the amendments to Rule 3a1-1 under the Exchange Act and Rules 300 and 301 of Regulation ATS will not create any adverse impact on efficiency, competition or capital formation. The Commission believes that the inclusion of requirements relating to credit

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127 See 1997 Rule 10f-3 Adopting Release, supra note 88, at text following n.51.

128 15 U.S.C. 78c(f).

129 15 U.S.C. 78w(a)(2).

ratings are no longer necessary to achieve the regulatory purpose of these rules, and may help marginally reduce any undue reliance on credit ratings. Broker-dealers that are subject to Regulation ATS will no longer be required to purchase and keep track of credit ratings solely for the purpose of Regulation ATS. This reduces the cost to comply with Regulation ATS. However, we believe that any impact on the revenues of the NRSROs will be inconsequential. Therefore, these changes should not impose any additional burdens on competition.

The Commission believes that combining investment grade and non-investment grade corporate debt securities into a single class of securities for purposes of the thresholds in those rules is unlikely to affect whether an ATS crosses one of those thresholds. Moreover, the other classes of securities for which the thresholds are applied – and the levels of the thresholds themselves – remain unchanged. Therefore, these changes should not affect the development of ATSs or capital formation.

The amendments being adopted today also will increase the effective thresholds for Rule 3a1-1(a) under the Exchange Act and Rules 301(b)(5) and 301(b)(6) of Regulation ATS for systems that trade corporate debt securities. The Commission believes that these changes will not impact whether any ATS crosses one of these thresholds. However, as outlined above,[130] the changes could have the effect of reducing the regulatory requirements for some ATSs at some time in the future by potentially reducing the likelihood that an ATS would be required to register as an exchange. The Commission believes that the efficiency gains from combining the two categories of investment-grade and non-investment grade corporate debt into the single category of corporate debt justifies these risks.

The changes to Form ATS-R and Form PILOT will simplify reporting for ATSs and

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130 See supra Section II.A.4.

SROs that operate pilot trading systems. Form ATS-R and Form PILOT respondents are already required to determine and report the volumes of corporate debt securities. A single reporting item for "corporate debt securities" will replace the existing separate entries for "investment grade corporate debt securities" and "non-investment grade corporate debt securities." Since respondents will no longer have to keep track of ratings, the calculation of these items does not force the respondent to purchase credit ratings solely for the purpose of Form ATS-R or Form PILOT.

For the reasons discussed above, we believe that the changes to Form ATS-R and Form PILOT are unlikely to have any significant impact on efficiency, competition or capital formation.

B. Rule Amendments under the Investment Company Act

Investment Company Act Section 2(c) requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition capital formation.[131]

In the Investment Company Act Proposing Release, we indicated our belief that that the amendments to Rules 5b-3 and 10f-3 would not significantly affect competition or have an adverse affect on capital formation. We noted that the proposed amendments to eliminate ratings as a whole might have some negative effect on efficiency by eliminating an objective standard in credit quality determinations, or might result in increased market efficiency by affording funds access to securities that do not meet the rating requirements in the current rules, but that they

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131 15 U.S.C. 80a-2(c).

would satisfy the credit risk and liquidity standards in the proposed amendments.[132] We also stated that we did not believe that the amendments to Rules 5b-3 and 10f-3 would result in significant costs to investment companies, advisers or investors. We did not receive any comments that specifically addressed the effect of the proposed amendments to Rules 5b-3 and 10f-3 on efficiency, competition and capital formation.

As discussed above, the amendments we are adopting today to Rules 5b-3 and 10f-3 are part of a larger initiative to eliminate certain references to NRSRO ratings from Commission rules. The amendments to Rule 5b-3 remove an exception based on credit ratings, and do not require an analysis of liquidity or credit quality. In the amendment to Rule 10f-3, we have substituted standards that require a level of credit quality and liquidity that is similar to the standards in the current rule, but without references to NRSRO ratings. These standards are designed to achieve the same purpose as ratings references were designed to meet, with minimal costs and consistent with the protection of investors. We believe that the amendments eliminate unwarranted references to credit ratings, which may reduce undue reliance on credit ratings and advance the goal of promoting better analysis of underlying investment decisions. Because these references are no longer necessary and an adequate substitute exists for the reference in Rule 10f-3, reliance on credit ratings in these contexts is no longer justified. With respect to the standards in amended Rule 10f-3, in developing procedures under the rule, boards may incorporate ratings reports, analyses and other assessments issued by third parties, including NRSROs, although an NRSRO rating, by itself, could not substitute for the evaluation required to be performed under the amendments to the rules. For these reasons, we continue to believe that the amendments to Rules 5b-3 and 10f-3 are unlikely to result in any significant impact on

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132 See Investment Company Act Proposing Release, supra note 10, at Section VII.

competition or capital formation. We also believe that the amendment to Rule 10f-3 which is limited in scope, is unlikely to have a significant effect on efficiency by eliminating an objective standard in credit quality determinations, or to result in significant market efficiency by affording funds access to securities that do not meet the rating requirement in the current rule but that would satisfy the revised standards. Similarly, because we believe that fund managers will not have significant difficulty or incur significant expense to confirm that an escrow agent has received the requisite certification from an independent accountant, we do not believe that the amendment to Rule 5b-3 eliminating the exception to this requirement for highly rated securities is likely to have a significant effect on efficiency.

VI. FINAL REGULATORY FLEXIBILITY CERTIFICATION AND ANALYSIS

A. Rule and Form Amendments under the Exchange Act

Section 3(a) of the Regulatory Flexibility Act of 1980[133] ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of proposed rule amendments on small entities unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[134] The Commission notes that no comments addressed the effect that the proposed changes to Rule 3a1-1, Regulation ATS, Form ATS-R and Form PILOT would have on small entities.

For purposes of Commission rulemaking in connection with the RFA, small entities include broker-dealers with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were

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133 5 U.S.C. 603(a).

134 5 U.S.C. 605(b).

prepared pursuant to Rule 17a-5(d) under the Exchange Act,[135] or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[136]

An ATS that complies with Regulation ATS must, among other things, register as a broker-dealer.[137] Thus, the Commission's definition of small entity as it relates to broker-dealers also will apply to ATSs. An ATS that approaches the volume thresholds for investment grade or non-investment grade corporate debt securities in Rule 3a1-1 or Regulation ATS would be very large and thus unlikely to be a small entity or small organization. With respect to the proposed changes to Form ATS-R, even if an ATS is a "small entity" or "small organization" for purposes of the RFA, the only change being proposed to the form is to eliminate the distinction between investment grade and non-investment grade corporate debt securities and to require reporting for the combined class of corporate debt securities. We believe this will impose only negligible costs on ATSs, even if they were small entities or small organizations.

Similarly, SROs are the only respondents to Form PILOT and are not "small entities" for purposes of the RFA. Accordingly, no small entities would be affected by the proposed amendments to Form PILOT.

Under Section 605(b) of the RFA,[138] we certified that, when adopted, the rule amendments would not have a significant economic impact on a substantial number of small

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135 17 CFR 240.17a-5(d).

136 See 17 CFR 240.0-10(c).

137 See 17 CFR 242.301(b)(1).

138 5 U.S.C. 605(b).

entities. We included this certification in Part VIII of the Exchange Act Proposing Release. While we encouraged written comments regarding this certification, no commenters responded to this request as it pertains to the action taken in this release.

B. Rule Amendments under the Investment Company Act

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with 5 U.S.C. 604. We published in the Investment Company Act Proposing Release an Initial Regulatory Flexibility Analysis ("IRFA"), which we prepared in accordance with the RFA. It relates to amendments to Rules 5b-3 and 10f-3 under the Investment Company Act. The amendments remove references to, and the required use of, NRSRO ratings from these rules.

1. Need for and Objectives of the Rule Amendments

The rule amendments are designed to address the concern that the inclusion in the Commission's rules and forms of requirements relating to security ratings could create the appearance that the Commission had, in effect, given its "official seal of approval" on ratings, which could adversely affect the quality of due diligence and investment analysis and lead to undue reliance on ratings.

2. Significant Issues Raised By Public Comment

When the Commission proposed amendments to Rules 5b-3 and 10f-3, we requested comment on the proposal and the accompanying IRFA. In particular, we sought comments regarding:

- The number of small entities that might be affected by the amendments;
- The existence or nature of the potential impact of the amendments on small entities; and
- How to quantify the impact of the amendments, including any empirical data

supporting the extent of the impact.

We received no comments that addressed the proposed amendments' impact on small entities.

3. Small Entities Subject to the Rule Amendments

The amendments to Rules 5b-3 and 10f-3 will affect funds, including entities that are considered to be small businesses or small organizations (collectively, "small entities") for purposes of the RFA. Under the Investment Company Act, for purposes of the RFA, a fund is considered a small entity if it, together with other funds in the same group of related funds, has net assets of $50 million or less as of the end of its most recent fiscal year.[139] Based on Commission filings, we estimate that 122 investment companies may be considered small entities. The Commission staff estimates that all of these investment companies may potentially rely on Rules 5b-3 and 10f-3.

4. Reporting, Recordkeeping and Other Compliance Requirements

The amendments to Rule 5b-3 eliminate the exception for certification requirements in conditions relating to the treatment of refunded securities, by removing the exception for rated debt in the definition of "refunded security."[140] Under the amended rule, in order to meet the definition of "refunded security," an independent accountant must have certified to the escrow agent that the deposited securities will satisfy all scheduled payments of principal, interest and applicable premiums on any refunded securities.[141] The amendment eliminates the current exception that does not require the certification if the refunded security is rated in the highest

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139 17 CFR 270.0-10.

140 See supra Section II.A.1.

141 Amended Rule 5b-3(c)(4)(iii).

category by an NRSRO.

The amendments to Rule 10f-3 eliminate references to NRSRO ratings in the rule's definition of "eligible municipal security" and substitute alternative provisions that require securities to be sufficiently liquid that they can be sold at or near their carrying value within a reasonably short period of time. In addition, the securities must be either:

- Subject to no greater than moderate credit risk; or
- If they are less seasoned securities, subject to a minimal or low amount of credit risk.[142]

Small entities registered with the Commission as investment companies seeking to rely on each of the rules will be subject to the same requirements as larger entities. As discussed in the IRFA and in this FRFA, in developing the amendments to Rules 5b-3 and 10f-3, we considered the extent to which the amendments will have a significant impact on a substantial number of small entities.

5. Commission Action to Minimize Effect on Small Entities

The RFA directs us to consider significant alternatives that may accomplish our stated objective, while minimizing any significant adverse impact on small entities. In connection with the amendments, we considered several alternatives, including the following:

(a) Different reporting or compliance standards or timetables. We believe that the credit quality and liquidity considerations required by the amendments to Rule 10f-3 should apply to all funds relying on the rules, including small entities. We believe that special compliance requirements or timetables for small entities are unnecessary because the substituted standards require a level of credit quality and liquidity that is similar to the standards in the

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142 Amended Rule 10f-3(a)(3).

current rule, but without reference to NRSRO ratings. Thus, these standards are designed to achieve the same purpose that the ratings were designed to achieve without resulting in significant costs for funds, including small entities. In addition, funds that rely on Rule 10f-3 may continue to use or rely on NRSRO ratings in making determinations under the amended rule. Moreover, different or special compliance requirements for small entities consistent with the Commission's goal of removing references to NRSRO ratings in the rule may create a risk that those entities could purchase securities with insufficient liquidity and credit quality, to the detriment of the fund and its investors. As discussed above, we do not believe that the requirement that the escrow agent for all refunded securities (not just those that are not top-rated) have received an independent accountant's certification would result in significant cost burdens for funds. We believe that fund managers may be able to obtain this information from multiple sources at little expense, including, for example, the issuer's Web site, a municipal dealer's Web site or the escrow agent's Web site.[143] In addition, funds can satisfy the certification requirement of Rule 5b-3 by determining that an NRSRO required an independent accountant to make the same determination.[144] Because we understand that these certifications are typically provided during the course of refunding transactions, we believe that it will not be difficult or expensive for fund managers to confirm that the certification has been provided to the escrow agent.

(b) Clarification, consolidation or simplification of reporting and compliance requirements. Where we have substituted alternative credit quality and liquidity criteria for ratings references in the amended rules, we have endeavored to make the criteria as clear and straightforward as possible. We believe that the standards provided by the amended rule are

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143 See supra note 64 and accompanying text.

144 See supra note 65 and accompanying text.

sufficiently clear to permit a fund (or a fund adviser conducting the analysis on behalf of the fund board) to understand the risks acceptable under the rule. The amended rules are designed to minimize the regulatory burden, consistent with the Commission's objectives, on all entities eligible to rely on the respective rules, including small entities.

(c) Performance rather than design standards. Rules 5b-3 and 10f-3, as amended, do not dictate any particular design standards that must be employed to meet the objectives of the rules. In fact, the amendments to the rules substitute a performance standard for references to NRSRO ratings.

(d) Exempting small entities. Continuing to require small entities to rely exclusively on NRSRO ratings for the credit quality and liquidity determinations required by the amendments to Rule 10f-3 would not be consistent with the goals underlying our amendments. Moreover, fund boards may incorporate ratings reports, analyses and other assessments issued by third parties, including NRSROs, in making their determinations, although an NRSRO rating, by itself, could not substitute for the evaluation required to be performed under the amendments.

VII. STATUTORY AUTHORITY

The Commission is adopting amendments to Rule 3a1-1, Rules 300 and 301 of Regulation ATS and Forms ATS-R and Pilot under the Exchange Act under the authority set forth in Sections 3, 11A(c), 15, 17, 23(a) and 36(a)(1) of the Exchange Act [15 U.S.C. 78c, 78k-1(c), 78o, 78q, 78w(a) and 78mm(a)(1)]. The Commission is adopting amendments to Rule 5b-3 under the Investment Company Act under the authority set forth in Sections 6(c) and 38(a) of the Investment Company Act [15 U.S.C. 80a-6(c) and 80a-37(a)]. The Commission is adopting amendments to Rule 10f-3 under the Investment Company Act under the authority set forth in Sections 10(f), 31(a) and 38(a) of the Investment Company Act [15 U.S.C. 80a-10(f), 80a-30(a) and 80a-37(a)].

List of Subjects

17 CFR Parts 240, 242 and 249.

Broker, Reporting and recordkeeping requirements, Securities.

17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

TEXT OF RULE AMENDMENTS

For reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11 and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 240.3a1-1 by revising paragraphs (b)(3)(v), (b)(3)(vi) and (b)(3)(vii) and by removing (b)(3)(viii) to read as follows:

§ 240.3a1-1 Exemption from the definition of "Exchange" under Section 3(a)(1) of the Act.

* * * * *

(b) * * *

(3) * * *

(v) Corporate debt securities, which shall mean any securities that:

(A) Evidence a liability of the issuer of such securities;

(B) Have a fixed maturity date that is at least one year following the date of issuance; and

(C) Are not exempted securities, as defined in section 3(a)(12) of the Act, (15 U.S.C. 78c(a)(12));

(vi) Foreign corporate debt securities, which shall mean any securities that:

(A) Evidence a liability of the issuer of such debt securities;

(B) Are issued by a corporation or other organization incorporated or organized under the laws of any foreign country; and

(C) Have a fixed maturity date that is at least one year following the date of issuance; and

(vii) Foreign sovereign debt securities, which shall mean any securities that:

(A) Evidence a liability of the issuer of such debt securities;

(B) Are issued or guaranteed by the government of a foreign country, any political subdivision of a foreign country or any supranational entity; and

(C) Do not have a maturity date of a year or less following the date of issuance.

PART 242 — REGULATIONS M, SHO, ATS, AC AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

3. The authority citation for Part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29 and 80a-37.

4. Section 242.300 is amended by revising paragraph (i), removing paragraph (j) and

redesignating paragraph (k) as paragraph (j).

The revision reads as follows:

§ 242.300 Definitions.

* * * * *

(i) Corporate debt security shall mean any security that:

(1) Evidences a liability of the issuer of such security;

(2) Has a fixed maturity date that is at least one year following the date of issuance; and

(3) Is not an exempted security, as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)).

* * * * *

5. Section 242.301 is amended by:

a. Adding the word "or" to the end of paragraph (b)(5)(i)(C);

b. Revising paragraph (b)(5)(i)(D);

c. Removing paragraph (b)(5)(i)(E);

d. Adding the word "or" to the end of paragraph (b)(6)(i)(C);

e. Revising paragraph (b)(6)(i)(D); and

f. Removing paragraph (b)(6)(i)(E).

The revisions read as follows:

§ 242.301 Requirements for alternative trading systems

* * * * *

(b) * * *

(5) * * *

(i) * * *

(D) With respect to corporate debt securities, 5 percent or more of the average daily volume traded in the United States.

* * * * *

(6) * * *

(i) * * *

(D) With respect to corporate debt securities, 20 percent or more of the average daily volume traded in the United States.

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

6. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

7. Form ATS-R (referenced in § 249.638) is amended by:

a. In the instructions to the form, Section B, revising the second term, "Investment Grade Corporate Debt Securities," and removing the third term, "Non-Investment Grade Corporate Debt Securities"; and

b. In Section 4 of the form, revising Line L, to read "Corporate debt securities,"

removing Line M and redesignating Lines N and O as Lines M and N.

The revision reads as follows:

Note: The text of Form ATS-R does not and this amendment will not appear in the Code of Federal Regulations.

FORM ATS-R, QUARTERLY REPORT OF ALTERNATIVE TRADING SYSTEM ACTIVITIES

FORM ATS-R INSTRUCTIONS

B. * * *

* * * * *

CORPORATE DEBT SECURITIES - Shall mean any securities that (1) evidence a liability of the issuer of such securities; (2) have a fixed maturity date that is at least one year following the date of issuance; and (3) are not exempted securities, as defined in Section 3(a)(12) of the Exchange Act, (15 U.S.C. 78c(a)(12)).

* * * * *

8. Form PILOT (referenced in § 249.821) is amended by:

a. In the instructions to the form, Section B, revising the second term, "Investment Grade Corporate Debt Securities," and removing the third term, "Non-Investment Grade Corporate Debt Securities"; and

b. In Section 9 of the form, revising Line J, to read "Corporate debt securities," removing Line K and redesignating Lines L, M, N and O as Lines K, L, M and N.

The revision reads as follows:

Note: The text of Form PILOT does not and this amendment will not appear in the Code of Federal Regulations.

FORM PILOT, INITIAL OPERATION REPORT, AMENDMENT TO INITIAL OPERATION REPORT AND QUARTERLY REPORT FOR PILOT TRADING SYSTEMS OPERATED BY SELF-REGULATORY ORGANIZATIONS

FORM PILOT INSTRUCTIONS

B. * * *

* * * * *

CORPORATE DEBT SECURITIES - Shall mean any securities that (1) evidence a liability of the issuer of such securities; (2) have a fixed maturity date that is at least one year following the date of issuance; and (3) are not exempted securities, as defined in Section 3(a)(12) of the Exchange Act, (15 U.S.C. 78c(a)(12)).

* * * * *

PART 270--RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

9. The authority citation for Part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a-1 et seq., 80a-34(d), 80a-37 and 80a-39, unless otherwise noted.

* * * * *

10. Section 270.5b-3 is amended by revising paragraph (c)(4)(iii) to read as follows:

§ 270.5b-3 Acquisition of repurchase agreement or refunded security treated as acquisition of underlying securities.

* * * * *

(c) * * *

(4) * * *

(iii) At the time the deposited securities are placed in the escrow account, or at the time a substitution of the deposited securities is made, an independent certified public accountant has certified to the escrow agent that the deposited securities will satisfy all scheduled payments of principal, interest and applicable premiums on the Refunded Securities.

* * * * *

11. Section 270.10f-3 is amended by:

a. Revising paragraph (a)(3);

b. Removing paragraph (a)(5); and

c. Redesignating paragraphs (a)(6), (a)(7) and (a)(8) as paragraphs (a)(5), (a)(6) and (a)(7).

The revision reads as follows:

§ 270.10f-3 Exemption for the acquisition of securities during the existence of an underwriting or selling syndicate.

(a) * * *

(3) Eligible Municipal Securities means "municipal securities," as defined in section 3(a)(29) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(29)), that are sufficiently liquid that they can be sold at or near their carrying value within a reasonably short period of time and either:

(i) Are subject to no greater than moderate credit risk; or

(ii) If the issuer of the municipal securities, or the entity supplying the revenues or other payments from which the issue is to be paid, has been in continuous operation for less than three years, including the operation of any predecessors, the securities are subject to a minimal or low amount of credit risk.

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated October 5, 2009

Commissioner Casey not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60792 / October 6, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3056 / October 6, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13640

In the Matter of **MICHAEL J. MOORE, CPA AND MOORE & ASSOCIATES CHARTERED,** **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 Michael J. Moore ("Moore") and Moore & Associates Chartered ("M&A") ("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 submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for 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.

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, and the findings contained in Section III.3. 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 ("Order"), as set forth below.

III.

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

1. Michael J. Moore, age 55, is a resident of Las Vegas, Nevada. Moore is a certified public accountant, currently licensed in Texas (1984 to 1994 and 2000 to present) and Nevada (2000 to present). Moore is the president and majority owner of Moore & Associates Chartered ("M&A"). Moore was M&A's only CPA from its inception through 2008 and the auditor with final responsibility for all M&A audits during those years.

2. M&A is a Nevada corporation and public accounting firm headquartered in Las Vegas, Nevada. M&A is registered with the Public Company Accounting Oversight Board ("PCAOB").

3. On August 27, 2009, the Commission filed a complaint against Moore and M&A in SEC v. Michael J. Moore, et al., Civil Action No. 2:09-cv-01637-LDG-GWF, in the United States District Court for the District of Nevada. On September 25, 2009, the court entered an order permanently enjoining Moore and M&A, by consent, from future violations of Sections 10(b), 10A(a)(1) and 10A(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(b), 78j-1(a)(1), and 78j-l(b)(1)] and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5], and Regulation S-X Rules 2-02(b)(1) and 2-06 [17 C.F.R. §§ 210.2-02(b)(1) and 210.2-06]. Moore and M&A were ordered to pay jointly and severally disgorgement of $179,750.00 and prejudgment interest of $10,151.59 for a total of $189,901.59. Moore was also ordered to pay a civil money penalty of $130,000.00.

4. The Commission's complaint alleged, among other things, that Moore and M&A issued unqualified audit reports in connection with its audits of Ethos Environmental, Inc. (2007-2008); Tombstone Exploration Corporation (2006-2007); Studio One Media, Inc. (2006-2008); Biocoral, Inc. (2005-2007); Centergistic Solutions, Inc. (2006-2007); and Standard Drilling, Inc. (2006-2008) that falsely stated that their audits were conducted in accordance with PCAOB Standards and that the entities' financial statements were fairly presented in accordance with U.S. Generally Accepted Accounting Principles. The complaint further alleged that, contrary to the representation in the audit reports, Moore and M&A's audits failed to meet numerous PCAOB Standards and were so deficient that they amounted to no audits at all. Among other things, Moore and M&A's employees lacked adequate technical training and proficiency as auditors, and Moore and M&A failed to train or supervise these employees; the audits were not properly planned; and Moore and M&A failed to obtain sufficient competent

evidential matter to afford a reasonable basis for an opinion regarding the financial statements under audit or to perform any meaningful audit procedures, even when there were red flags that the financial statements were materially misstated. The complaint further alleged that Moore and M&A improperly modified audit documentation. By their conduct, Moore and M&A violated Sections 10(b), 10A(a)(1), and10A(b)(1) of the Exchange Act and Rule 10b-5 thereunder, and Regulation S-X Rules 2-02(b)(1) and 2-06.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Respondents are suspended from appearing or practicing before the Commission as accountants.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Corrected

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 239, 240 249 and 274

[Release Nos. 33-9070; 34-60797; IC-28942; File No. S7-24-09]

RIN 3235-AK41

CREDIT RATINGS DISCLOSURE

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; correction.

SUMMARY: We are proposing amendments to our rules to require disclosure of information regarding credit ratings used by registrants, including closed-end management investment companies, in connection with a registered offering of securities so that investors will better understand the credit rating and its limitations. The amendments we are proposing today also would require additional disclosure that would inform investors about potential conflicts of interest that could affect the credit rating. In addition, we are proposing amendments to require disclosure of preliminary credit ratings in certain circumstances so that investors have enhanced information about the credit ratings process that may bear on the quality or reliability of the rating. The proposed amendments would be applicable to registration statements filed under the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Company Act of 1940, and Forms 8-K and 20-F.

DATES: Comments should be received on or before December 14, 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/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-24-09 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 S7-24-09. 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 Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Blair F. Petrillo, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, or with respect to questions regarding investment companies, Devin F. Sullivan, Staff Attorney in

the Office of Disclosure Regulation, Division of Investment Management, at (202) 551-6784, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Regulation S-K,[1] and forms under the Securities Act of 1933,[2] the Securities Exchange Act of 1934[3] and the Investment Company Act of 1940.[4] In Regulation S-K, the Commission is proposing to amend Items 10[5] and 202.[6] Under the Securities Act, the Commission is proposing to amend Form S-3[7] and Form S-4.[8] Under the Exchange Act, the Commission is proposing to amend Rule 13a-11[9] and Rule 15d-11,[10] as well as Form 8-K[11] and Form 20-F.[12] The Commission is also proposing amendments to Form N-2[13] under the Securities Act and the Investment Company Act.

I. Proposed Amendments

A. Introduction

The disclosure requirements we are proposing today are intended to enhance credit rating disclosure so that investors will better understand credit ratings and their

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1 17 CFR 229.10 through 1123.

2 15 U.S.C. 77a et seq.

3 15 U.S.C. 78a et seq.

4 15 U.S.C. 80a-1 et seq.

5 17 CFR 229.10.

6 17 CFR 229.202.

7 17 CFR 239.13.

8 17 CFR 239.25.

9 17 CFR 240.13a-11.

10 17 CFR 240.15d-11.

11 17 CFR 249.308.

12 17 CFR 249.220f.

13 17 CFR 239.14; 17 CFR 274.11a-1.

limitations. These proposals reflect our concerns that even though credit ratings appear to be a major factor in the investment decision for investors and play a key role in marketing and pricing of the securities,[14] investors may not have access to sufficient information about credit ratings. We believe our proposed rules would improve investor protection by providing information about credit ratings that will place the credit rating in an appropriate context.

We have four principal areas of concern. First, we are concerned that investors may not be provided with sufficient information to understand the scope or meaning of ratings being used to market various securities. Historically, credit ratings were intended to be a measure of the registrant's ability to repay its corporate debt.[15] As the types of investment products expand and become more complex, however, the returns (including the prospect of repayment) on these securities often are dependent on factors other than the creditworthiness of the registrant.[16] As a result, the information conveyed by ratings

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14 See Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets, January 2003, at http://www.sec.gov/news/studies/credratingreport0103.pdf (noting that issuers use credit ratings in part "to improve the marketability or pricing of their financial obligations."). See also Bo Becker and Todd Milbourn, Reputation and Competition: Evidence from the Credit Rating Industry, Working Paper, (June 2009) at http://www.hbs.edu/research/pdf/09-051.pdf.

15 See Disclosure of Ratings in Registration Statements, Release No. 33-6336 (Aug. 6, 1981) [46 FR 42024].

16 See Disclosure of Security Ratings, Release No. 33-7086 (Aug. 31, 1994) [59 FR 46304] ("1994 Ratings Release") (noting that "[b]ecause of these non-credit payment risks, there is substantially greater uncertainty relating to yield and total return than for traditional debt obligations of comparable credit rating"). See also Joseph Mason and Joshua Rosner, Where Did the Risk Go? How Misapplied Bond Ratings Cause Mortgage Backed Securities and Collateralized Debt Obligation Market Disruptions, Working Paper, (May 2007), at http://ssrn.com/abstract=1027475.

has become increasingly less comparable across types of securities.[17] Investors, however, may not be aware of the differences underlying two securities with the same credit rating even if the securities were issued by the same registrant. The recent turmoil in the credit markets has raised serious concerns that investors may not have fully understood what credit ratings mean, or the limits inherent in them.[18] Even when securities are highly rated, investors can suffer significant losses, as was evident during the recent market crisis.[19] For example, the value of AAA-rated mortgage-backed securities fell 70 percent from January 2007 to January 2008.[20] As a result, we believe that investors should be provided with additional disclosure regarding credit ratings so that investors can choose how much weight to place on a credit rating when making an investment decision.

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17 As we noted in 1994:

> Today, a traditional corporate debt instrument with fixed principal and interest obligations, a structured note whose principal and interest is tied, for example, to an index of securities, an 'interest-only' strip ('IO'), a collateralized mortgage obligation ('CMO') security, a residual interest in a CMO offering, and a cash flow (or 'kitchen-sink') bond all can be designated 'triple-a,' notwithstanding that investment returns on most of these instruments are largely dependent on factors in addition to the issuer's creditworthiness and that the scope of the rating differs among the securities.

See 1994 Ratings Release in note 16 above. See also Alan Blinder, Six Fingers of Blame in the Mortgage Mess, N.Y. Times, Sept. 30, 2007.

18 See e.g. Recommendations of the Securities Industry and Financial Markets Association Credit Rating Agency Task Force (July 2008), at http://www.sifma.org/capital_markets/docs/SIFMA-CRA-Recommendations.pdf (recommending that investor education regarding the nature and limitations of the credit rating process is necessary to prevent over-reliance on credit ratings). See also Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (Apr. 7, 2008), at http://www.financialstabilityboard.org/publications/r_0804.pdf.

19 For a more detailed discussion of the role of nationally recognized statistical rating organizations ("NRSROs") in determining ratings for structured products, particularly subprime residential mortgage backed securities and collateralized debt obligations, in the time period leading up to the credit crisis, see Proposed Rules for Nationally Recognized Statistical Rating Organizations, Release No. 34-57967 (June 16, 2008) [73 FR 36212].

20 See e.g., Marco Pagano and Paolo Volpin, Credit Ratings Failures: Causes and Policy Options, Working Paper, (Feb. 9, 2009), at http://www.italianacademy.columbia.edu/publications/working_papers/2008_2009/pagano_volpin_seminar_JA.pdf.

Second, we are concerned that investors may not have access to information allowing them to appreciate fully the potential conflicts of interest faced by credit rating agencies and how these conflicts may impact ratings. For example, most credit rating agencies are paid by the registrants who receive the credit ratings.[21] This situation creates the potential for a rating to be inflated by a credit rating agency as a result of the credit rating agency's desire to keep the registrant's business for future ratings.[22] Credit rating agencies also may provide additional services to registrants, which can be an important source of revenue for the credit rating agency.[23]

Third, there has been significant discussion of the possibility that "ratings shopping" may lead to inflated ratings.[24] Ratings shopping occurs when a registrant, or someone acting on its behalf, seeks the highest credit rating available from multiple credit rating agencies. We are concerned that investors have not been informed about this practice, which we believe could color their assessment of the reliability of the credit ratings ultimately obtained.

Finally, even though credit ratings appear to be a key part of investment decisions and are used to market securities, disclosure about ratings is not required in prospectuses

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21 See Briefing Paper: Roundtable to Examine Oversight of Credit Rating Agencies (Apr. 2009), at http://www.sec.gov/spotlight/cra-oversight-roundtable/briefing-paper.htm (noting that seven of the ten NRSROs registered with the Commission operate under the issuer-pay model and that the issuer-pay NRSROs have determined 98% of the currently outstanding credit ratings issued by NRSROs).

22 See Pagano and Volpin in note 20 above.

23 As discussed below, Exchange Act Section 15E(h) and (i) and Exchange Act Rule 17g-5 [17 CFR 240.17g-5] identify a series of conflicts arising from the business of determining credit ratings. Under the rule, some of these conflicts must be disclosed and managed, while others are prohibited outright.

24 See e.g. Vasiliki Skreta and Laura Veldkamp, Ratings Shopping and Asset Complexity: A Theory of Ratings Inflation, working paper, (Feb. 2009), at http://pages.stern.nyu.edu/%7Elveldkam/pdfs/ratings.pdf; Patrick Bolton, Xavier Freixas and Joel Shapiro, The Credit Ratings Game, Working Paper, (Feb. 2009), at http://www.nber.org/papers/w14712; Becker and Milbourn in note 14 above.

currently. As a result, we are concerned that investors may not be receiving even basic information about a potentially key element of their investment decisions.

To address these concerns, we are proposing several enhancements to our disclosure rules. As a threshold matter, we are proposing to require disclosure by registrants regarding credit ratings in their registration statements under the Securities Act and the Exchange Act, and by closed-end management investment companies ("closed-end funds") in registration statements under the Securities Act and the Investment Company Act, if the registrant uses the rating in connection with a registered offering. The disclosure requirements are intended to address the concerns noted above. To keep investors apprised of developments relating to credit ratings for their investments, we are also proposing amendments to Exchange Act reports to require registrants to disclose changes to credit ratings. We are not proposing to require registrants to obtain credit ratings; instead, we are proposing to require disclosure about credit ratings used by registrants and other offering participants in connection with a registered offering in order to place the credit rating in its proper context for investors.

In a companion concept release,[25] we seek comment on whether we should propose to repeal the exemption for credit ratings provided by NRSROs from being considered a part of the registration statement prepared or certified by a person within the meaning of Sections 7[26] and 11[27] of the Securities Act currently contained in Rule 436(g) under the Securities Act.[28] If Rule 436(g) were eliminated, there would no longer be a

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25 See the companion concept release considered by the Commission on September 17, 2009 regarding Rule 436(g) under the Securities Act.

26 15 U.S.C. 77g.

27 15 U.S.C. 77k.

28 17 CFR 220.436(g).

distinction between NRSROs and credit rating agencies that are not NRSROs for purposes of liability under Section 11 of the Securities Act.

As we noted, we continue to have concerns about the appropriate use of credit ratings by investors, but we recognize the reality that credit ratings are important to investors. Therefore, we seek to improve investor protection through enhanced disclosure about credit ratings. In addition to proposing the rule amendments set forth in this release, the Commission today is also adopting certain amendments to its existing rules regulating NRSROs, as well as proposing additional amendments and a new rule.[29] We believe that today's proposals could help reduce undue reliance on credit ratings by providing investors with information about what a credit rating is, and what it is not, and other information bearing on the reliability of ratings to place the credit rating in its proper context. In light of the importance of credit ratings to investors and their use by registrants in marketing securities, we believe it is appropriate to require that this information be included in a registrant's prospectus so that all investors receive this information.

B. Background

In 1981, the Commission issued a statement of policy regarding its view of disclosure of credit ratings in registration statements under the Securities Act.[30] This statement marked a clear shift from the Commission's historic practice of discouraging the disclosure of credit ratings in these filings and reflected the Commission's then-

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29 See the releases considered by the Commission on September 17, 2009 regarding (i) amendments to Rule 17g-2 under the Exchange Act; (ii) amendments to Rule 17g-5 under the Exchange Act; (iii) amendments to Regulation FD; (iv) proposed amendments to Rule 17g-3 under the Exchange Act; (v) proposed amendments to the Instructions to Exhibit 6 of Form NRSRO; and (vi) proposed new Rule 17g-7 under the Exchange Act.

30 See Disclosure of Ratings in Registration Statements, in note 15 above.

developing acknowledgement of the growing importance of credit ratings in the securities markets and in the regulation of those markets.[31] Soon thereafter, the Commission amended Regulation S-K to reflect its new policy of permitting the voluntary disclosure of credit ratings in registration statements along with clear disclosure explaining the rating.[32] The Commission also adopted rules to permit the voluntary disclosure of credit ratings in tombstone advertisements,[33] and provided that a credit rating by an NRSRO generally is not part of a registration statement or report prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act.[34]

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31 See Release No. 33-6336 in note 15 above. The Commission announced "that, contrary to prior general staff positions on this matter, it will now permit the disclosure of security ratings assigned by rating organizations in registration statements." In support of this shift in policy, the Commission cited "the general usefulness" of credit ratings to investors and the "importance that the Commission and other regulatory entities have attached to the issuance" of a credit rating. Id.

32 See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380] ("Integrated Disclosure Release"). See also Registration Form for Closed-End Management Investment Companies, Release No. 33-6967 (November 20, 1992) [57 FR 56826] (adopting amendment to Form N-2 regarding voluntary disclosure of credit ratings for closed-end funds).

33 See Integrated Disclosure Release in note 32 above (adopting amendments to Rule 134(a) under the Securities Act to provide that certain communications containing a security rating or ratings of a class of debt securities, convertible debt securities and preferred stock and the name(s) of the rating organization would not be deemed to be a prospectus under Section 2(10) of the Securities Act).

34 Concurrent with the adoption of these rules and guidance, the Commission adopted Securities Act Form S-3, the short-form Securities Act registration statement for eligible domestic issuers [17 CFR 239.13]. Form S-3 provides that a primary offering of non-convertible debt securities may be eligible for registration on the form if rated investment grade. A non-convertible security is an "investment grade security" for purposes of form eligibility if at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories which signifies investment grade, typically one of the four highest rating categories. In adopting this requirement, the Commission specifically noted that commenters believed that the component relating to investment grade ratings was appropriate because non-convertible debt securities generally are purchased on the basis of interest rates and credit ratings. See Section III.A.1 of the Integrated Disclosure Release in note 32 above. Later, in 1992, the Commission expanded the eligibility requirement to delete references to debt or preferred securities and to provide Form S-3 eligibility for other investment grade securities (such as foreign currency or other cash settled derivative securities). See Simplification of Registration Procedures for Primary Securities Offerings, Release No. 33-6964 (Oct. 22, 1992) [57 FR 48970]. Consistent with Form S-3, the Commission adopted a provision in Form F-3 [17 CFR 239.33] providing for the eligibility of a primary offering of investment grade non-convertible debt securities by eligible foreign private issuers. Shelf registration requirements for asset-backed securities, originally adopted in 1992, also depend on a credit ratings component. See General Instruction I.B.5 of Form S-3.

At various times since the policy statement and the adoption of these rules and form eligibility requirements, the Commission has reviewed and reconsidered its approach to the disclosure of credit ratings in filings and the reliance on ratings in the Commission's form eligibility requirements. For example, in 1994, the Commission published a proposing release that would have mandated disclosure in Securities Act prospectuses of a credit rating given by an NRSRO whenever a credit rating with respect to the securities being offered is "obtained by or on behalf of an issuer."[35] The proposals would have required disclosure of specified information with respect to credit ratings, whether or not disclosed voluntarily or mandated by the then-proposed rules. In addition, the release sought comment on various areas relating to the disclosure of credit ratings. The release also proposed to require disclosure on a Form 8-K of any material change in the credit rating assigned to the registrant's securities by an NRSRO.[36] The Commission received wide-ranging comments on those proposals. Commenters' views on whether registrants should be required to provide disclosure regarding credit ratings of their securities in a final prospectus reflected a wide variety of opinions. Commenters who were against the mandatory disclosure of credit ratings argued, among other things, that: NRSROs have incentives to provide quality ratings; information about credit ratings is widely available and understood; requiring disclosure would be costly and burdensome; and requiring disclosure of ratings may increase investors' reliance on them.[37]

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35 See the 1994 Ratings Release in note 16 above.

36 See the 1994 Ratings Release in note 16 above.

37 See e.g. letter regarding File No. S7-24-94 of Moody's Investor Service, Inc. (Dec. 5, 1994); and letter regarding File No. S7-24-94 of Fitch Investors Service Inc. (Dec. 6, 1994).

Commenters who supported mandatory disclosure regarding credit ratings argued, among other things, that: credit ratings have the potential to confuse and mislead investors; investors do not receive sufficient information about the credit rating; and investors expect to know the credit rating when buying a security, so the proposed required disclosure would comport with investor expectations.[38] The Commission did not act on the proposals.

In 2002, as part of the broader changes to the Form 8-K current reporting requirements, the Commission again proposed to require a registrant to file a Form 8-K current report when it received a notice or other communication from any rating agency regarding, for example, a change or withdrawal of a particular rating.[39] Comments were mixed on whether changes to a credit rating should be reported on a Form 8-K.[40] Commenters against the requirement generally believed it was unnecessary because the information was publicly available.[41] Commenters who supported the requirement generally believed it should be limited to ratings provided by NRSROs.[42] The new Form 8-K filing regime adopted in 2004 did not include this requirement.[43] In declining to adopt a Form 8-K reporting requirement for credit rating changes, the Commission noted

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38 See e.g. letter regarding File No. S7-24-94 of Savings & Community Bankers of America; and letter regarding file No. S7-24-94 of A.G. Edwards & Sons, Inc..

39 See Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8106 (June 17, 2002) [67 FR 42914].

40 See also the discussion of Form 8-K in Section I.D. below.

41 See e.g. letter regarding File No. S7-22-02 of CIGNA Corporation (Aug. 26, 2002), at http://www.sec.gov/rules/proposed/s72202.shtml.

42 See e.g. letter regarding File No. S7-22-02 of Investment Counsel Association of America (Aug. 26, 2002), at http://www.sec.gov/rules/proposed/s72202.shtml.

43 See Additional Form 8-K Filing Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15594], amended by Additional Form 8-K Disclosure Requirements and Acceleration of Filing Dates; Correction, Release No. 33-8400A (Aug. 4, 2004) [69 FR 48370].

that it was continuing to consider the appropriate regulatory approach for rating agencies.[44]

In 2003, the Commission issued a concept release requesting comment on whether it should cease using the NRSRO designation and, as an alternative to the ratings criteria, provide for Form S-3 eligibility where investor sophistication or large size denomination criteria are met.[45] In 2008, the Commission proposed changes to certain of its forms and rules that would have removed references to credit ratings and would have amended Securities Act Rule 436(g), which exempts NRSROs from liability under Section 11 of the Securities Act, so that the exemption would apply to all credit rating agencies, including those that are not NRSROs.[46]

In April 2009, the Commission held a roundtable to examine the oversight of credit rating agencies.[47] Topics addressed by the panels at the roundtable included current actions being taken by NRSROs, competition within the industry and how to improve oversight of the industry. Participants and the public were invited to submit comments regarding the issues addressed at the roundtable. Commenters addressed a wide range of issues.

The Commission's history in considering the possibility of mandating disclosure of credit ratings reflects the complexity of the issues raised by investors' reliance on

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44 Id.

45 See Rating Agencies and the Use of Credit Ratings under the Federal Securities Laws, Release No. 33-8236 (June 4, 2003) [68 FR 35258] ("2003 Concept Release"). Most of the commenters that addressed the issue supported retaining the requirement to use NRSRO ratings for purposes of Form S-3 eligibility. Comments on the concept release are available at http://www.sec.gov/rules/concept/s71203.shtml. See also the extensive discussion of market developments in Release No. 34-57967 in note 19.

46 See Security Ratings, Release No. 33-8940 (Jul.1, 2008) [73 FR 40106].

47 See generally http://www.sec.gov/spotlight/cra-oversight-roundtable.htm .

them. Our rules under the Securities Act and the Exchange Act require that investors be provided material information in order to evaluate investment opportunities. We understand that investors will continue to use credit ratings in making investment decisions; therefore, we are proposing disclosure requirements we believe will provide investors with additional meaningful information that they can use to make those decisions. We acknowledge the risk that requiring disclosure of credit ratings could emphasize their significance and draw attention away from other, more important information about the registrant and its securities. However, we believe the recent market crisis and questions about the use of credit ratings suggest that investors may not have sufficient information to understand credit ratings fully. In light of the concerns discussed above, we believe all investors would benefit from the proposed revisions to our disclosure rules to require specific disclosures about ratings.

C. Mandatory Disclosure of Credit Ratings

As noted above, the Commission's policy on credit ratings currently is set forth in Item 10(c) of Regulation S-K. Specifically, the policy permits registrants to voluntarily disclose ratings assigned by credit rating agencies to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports.[48] Item 10(c) also provides the Commission's views on important matters registrants should consider in disclosing credit ratings in Securities Act and Exchange Act filings. So that all investors are provided with appropriate information about credit ratings, the amendments we propose today would mandate much of the disclosure

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[48] We understand that only a small number of registrants include disclosure regarding credit ratings in their prospectuses. Generally, if ratings are disclosed, they are disclosed in free writing prospectuses filed pursuant to Rule 433 [17 CFR 230.433].

permitted under Item 10(c) when a registrant uses a credit rating in connection with a registered offering and would remove the policy statement and recommended disclosure from that Item.

Specifically, we are proposing a new paragraph in Item 202 of Regulation S-K that would require much of the specific disclosure currently permitted under Item 10(c).[49] As more fully described below, proposed Item 202(g) would require disclosure of all material scope limitations of the credit rating and any related published designation, such as non-credit payment risks, assigned by the rating organization with respect to the security.[50] In addition, in order to highlight potential conflicts of interest, the proposed rule would require disclosure of the source of payment for the credit rating; and if any additional non-rating services have been provided by the credit rating agency or its affiliates to the registrant or its affiliates over a specified period of time, disclosure of the services and the fees paid for those services would be required. Disclosure required pursuant to proposed Item 202(g) of Regulation S-K would be required in Securities Act and Exchange Act registration statements. We are proposing to amend Item 9 of Form S-3 and Item 4(a)(3) of Form S-4 so that disclosure regarding credit ratings is provided in all registration statements on that form when the trigger for disclosure is met. We also are proposing to require, in certain circumstances, disclosure of preliminary ratings, as well as final ratings not used by a registrant, so that investors will be informed when a registrant may have engaged in ratings shopping. Finally, we are proposing to amend

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49 See proposed new paragraph (g) to Item 202 of Regulation S-K.

50 See note 67 below.

Exchange Act reports to require reporting of changes in credit ratings in certain circumstances.

We are proposing to apply similar mandatory disclosure requirements regarding credit ratings of senior securities issued by closed-end funds registered under the Investment Company Act. Like other companies, closed-end funds sometimes issue senior securities that are rated by one or more credit rating agency and currently are permitted to voluntarily disclose these credit ratings in their registration statements.[51] We are proposing to amend Form N-2 to require that closed-end funds include credit ratings disclosure in their registration statements under the Securities Act and the Investment Company Act. We are also proposing to amend Exchange Act Rules 13a-11 and 15d-11 to require reporting by closed-end funds of changes in credit ratings in certain circumstances.

We believe that the proposed amendments to require disclosure of certain information regarding credit ratings, rather than permitting voluntary disclosure, would provide investors with the information they need about credit ratings to put the rating in the appropriate context. The proposed amendments also may benefit companies that in the past may have hesitated to provide disclosure voluntarily by leveling the playing field so that all companies using credit ratings in connection with a registered offering of securities would be required to provide disclosure.

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[51] Section 18(f) of the Investment Company Act [15 U.S.C. 80a-18(f)] generally prohibits a registered open-end management investment company (i.e., mutual fund) from issuing senior securities.

1. Trigger for Required Disclosure

We believe that it is appropriate for registrants to provide the proposed disclosure when they use a credit rating in connection with a registered offering of their securities. As discussed above, investors rely on credit ratings in making investment decisions. We believe requiring disclosure when a registrant uses the credit rating to offer or sell securities would provide investors with the information they need about the credit rating to put the credit rating in its appropriate context. Specifically, we are proposing to amend Item 202 of Regulation S-K,[52] Item 12 of Form 20-F,[53] and Item 10.6 of Form N-2[54] to require registrants to provide detailed disclosure regarding credit ratings if the registrant, any selling security holder, any underwriter, or any member of a selling group uses a credit rating[55] from a credit rating agency[56] with respect to the registrant or a class of securities issued by the registrant, in connection with a registered offering. The proposed rule would not require that registrants obtain a credit rating on any security; however, if a

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52 See proposed new paragraph (g) to Item 202 of Regulation S-K.

53 Form 20-F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. "Foreign private issuer" is defined in Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 12b-2 [17 CFR 240.12b-2]. We are proposing to amend Item 12 of Form 20-F, which pertains to securities other than equity securities, to elicit the same disclosure that would be required by proposed Item 202(g) of Regulation S-K. We also propose to amend Item 10 of Form 20-F to require the same disclosure under proposed Regulation S-K Item 202(g) for a class of preferred securities, including non-participatory preferred stock as that term is used under 17 CFR 230.902(a)(1).

54 Form N-2 is the registration form used by closed-end funds to register under the Investment Company Act and to offer their securities under the Securities Act. We are proposing to amend Item 10.6 of Form N-2 to elicit the same disclosure that would be required by proposed Item 202(g) of Regulation S-K.

55 As proposed, a "credit rating" would have the same meaning as the definition in Section 3(a)(60) of the Securities Exchange Act [15 U.S.C. 78c(a)(60)].

56 As proposed, a "credit rating agency" would have the same meaning as the definition in Section 3(a)(61) of the Securities Exchange Act [15 U.S.C. 78c(a)(61)].

registrant uses a credit rating in connection with a registered offering, then disclosure would be required.

We have proposed to require disclosure regarding credit ratings if the registrant, a selling security holder, underwriter or any member of a selling group uses a credit rating in connection with a registered offering. We included selling security holders, underwriters and other members of the selling group in the proposed trigger for disclosure so that registrants would not be able to structure their selling efforts in a manner that would avoid triggering disclosure under the proposed rule. In addition, there are circumstances where the underwriter obtains the credit rating on behalf of the registrant, and if the underwriter uses that rating, we believe disclosure should be required.

A credit rating may be "used" in a variety of ways. For example, in addition to oral and written selling efforts of the registrant and other members of the selling group, we would consider a credit rating to be used in connection with a registered offering of securities when it is disclosed in a prospectus or a term sheet filed pursuant to Rule 433 or Rule 497[57] under the Securities Act.

Furthermore, as proposed, a credit rating also would be considered to be used in connection with a registered offering of securities if it is used in connection with a private offering of securities that is made in reliance on an exemption from registration under the Securities Act when the privately offered securities are exchanged shortly thereafter for substantially identical registered securities.[58] Disclosure would be required even if the

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57 17 CFR 230.497. This would include closed-end fund advertisements that, under Rule 497(i) [17 CFR 230.497(i)], are considered to be filed with the Commission upon filing with a national securities association registered under Section 15A of the Exchange Act [15 U.S.C. 78o].

58 See proposed Instruction 3 to Item 202(g).

rating was not disclosed in the registered exchange offer.[59] As a result, registrants would not be able to avoid the proposed disclosure requirements regarding credit ratings by disclosing a credit rating to investors in a private offering but not using it in connection with the registered exchange offer to those same investors of substantially identical securities.

We intend for the proposed rule to apply to both oral and written selling efforts. Thus, for example, disclosure would be required when a credit rating is disclosed to potential purchasers by the registrant, any selling security holder, any underwriter or any member of a selling group in response to an inquiry from an investor. A registrant would not be able to avoid providing the proposed disclosure by using a rating only in oral selling efforts and not including it in written communications related to an offering, by not "volunteering" the information about the credit rating except upon request or by referring an investor to a website that discloses the credit rating. We believe that if a credit rating is used in connection with a registered offering, then investors should have the benefit of all of the disclosure required by our proposed amendments.

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[59] These transactions are sometimes referred to as Exxon Capital exchange offers based on a series of no-action letters issued by the staff beginning in May 1988 that outline the staff's interpretive positions regarding such exchange offers. In a typical Exxon Capital exchange offer, an issuer sells debt securities to a broker-dealer in reliance on the exemption in Section 4(2) of the Securities Act [15 U.S.C. 77d(2)]. The broker-dealer then immediately resells those securities to qualified institutional buyers in reliance on Rule 144A under the Securities Act. [17 CFR 230.144A]. The issuer then files a registration statement on Form S-4 to register the exchange of the securities for substantially identical securities. Upon effectiveness of the S-4 registration statement, the qualified institutional buyers exchange restricted securities for registered securities, and therefore, may resell the securities they receive in the exchange offer without further registration or prospectus delivery. See Exxon Capital Holdings Corporation, SEC No-Action Letter (pub. avail. May 13, 1988); Morgan Stanley & Co., Inc., SEC No-Action Letter (pub. avail. June 5, 1991); Mary Kay Cosmetics, Inc., SEC No-Action Letter (pub. avail. June 5, 1991); K-III Communications Corp., SEC No-Action Letter (pub. avail. May 14, 1993); Shearman & Sterling, SEC No-Action Letter (pub. avail. July 2, 1993); Brown & Wood LLP, SEC No-Action Letter (pub. avail. Feb. 5, 1997).

We have not proposed to require that a registrant provide disclosure when it has not sought or otherwise solicited the credit rating unless the rating is used in connection with a registered offering of its securities, as we believe that such a requirement may create an undue burden for registrants to follow and provide disclosure on all of the ratings outstanding on their securities. In this regard, we note that regulatory changes could increase the number of unsolicited ratings being provided.[60] If we were to require disclosure of unsolicited ratings not used in connection with a registered offering of a security, a registrant would have to monitor all of the credit rating agencies to determine not only whether a credit rating had been issued with respect to a security, but also whether the rating has been changed or withdrawn.

We are aware that some registrants discuss their credit rating in other contexts in their periodic reports or Securities Act registration statements. As proposed, the disclosure requirement regarding credit ratings would not be triggered if the only disclosure of a credit rating in a filing with the Commission is related to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering. For instance, some registrants note their ratings in the context of a risk factor discussion regarding the risk of failure to maintain a certain rating and the potential impact a change in credit rating would have on the registrant. A registrant also may refer to its rating in the context of its liquidity discussion in

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60 The Commission is adopting today various changes to Exchange Act Rule 17g-5 [17 CFR 240.17g-5] that would provide the opportunity for other credit rating agencies to use the information provided to NRSROs by the registrant to develop "unsolicited ratings" for certain rated asset-backed securities. See the adopting release considered by the Commission on September 17, 2009.

Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"). Registrants may need to discuss ratings when they describe debt covenants, interest or dividends that are tied to credit ratings or potential support to variable interest entities. We have proposed to exclude these references to credit ratings from the trigger that would require additional disclosure regarding credit ratings because we believe that the additional information is not necessary in that setting. We believe that the material information to be conveyed in that setting relates to the fact that a credit rating has the potential to have a material impact on the registrant. We believe additional information about scope limitations, conflicts of interest, preliminary ratings and other matters does not appear to be necessary to understand that disclosure.

We are proposing to amend Item 9 of Form S-3 and Item 4(a)(3) of Form S-4 so that disclosure regarding credit ratings is included in all registration statements where appropriate. Currently, Item 9 requires registrants to include the disclosure required by Item 202 of Regulation S-K in a registration statement on Form S-3 unless capital stock is to be registered and securities of the same class are registered pursuant to Section 12 of the Exchange Act.[61] Item 4(a)(3) of Form S-4 requires registrants to include the disclosure required by Item 202 of Regulation S-K unless the registrant would meet the requirements for use of Form S-3 and capital stock is to be registered, securities of the same class are registered pursuant to Section 12 of the Exchange Act, and the security is listed on a national securities exchange. We are proposing to amend these items so that the disclosure required by proposed Item 202(g) of Regulation S-K would be included in a registration statement on Form S-3 or Form S-4 even if securities of the same class are

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[61] 15 U.S.C. 78l.

registered under Section 12 of the Exchange Act so long as the trigger for disclosure under proposed Item 202(g) has been met. We believe these amendments are appropriate so that investors would receive information about credit ratings in circumstances where securities of the same class have been previously registered because securities of the same class that are issued at different times may have different ratings.

Request for Comments

- As proposed, we would require disclosure of credit ratings if the registrant, any selling securityholder, underwriter or member of a selling group uses a credit rating in connection with a registered offering. Are there any other persons that should be included as persons who could cause the disclosure requirement to be triggered? Are there reasons to exclude any of the persons or entities currently included in the proposal?
- Should the proposed rule mandate disclosure of a credit rating obtained by a registrant regardless of whether the rating is used in connection with a registered offering? For example, should we require disclosure whenever a registrant discloses a rating? Do the triggers in the requirement encourage the use and related disclosure of only favorable ratings? Are there other circumstances that should trigger the proposed disclosure?
- Would the rule, as proposed, have an effect on the frequency with which registrants seek credit ratings? Why or why not?
- As proposed, we would consider a credit rating to be used in connection with a registered offering of securities if it is disclosed upon request of an investor. We believe this approach should reduce the risk that practices might develop

that would undermine the purpose of our proposal, such as a registrant or member of a selling group not offering the information about a credit rating unless asked. Is this approach necessary or appropriate? Should registrants be excluded from the proposed requirement to provide disclosure regarding credit ratings if they and the offering participants decide not to use the rating in selling efforts, but disclose the rating in response to an investor who specifically asks about the rating?

- Would registrants and other members of a selling group be able to circumvent the rule as proposed? How would they be able to do that? How could we modify the rule proposal to avoid circumvention? Could the proposed trigger for disclosure lead to procedural modifications to the practice of assigning credit ratings so that registrants could avoid the disclosure requirement even though the credit rating is used in connection with a registered offering? If so, how could we modify the proposal to avoid such modifications?
- As proposed, a credit rating would be considered used for purposes of the proposed disclosure trigger if it is used in connection with a private offering even if not used in a subsequent registered exchange offering for substantially identical securities made to the purchasers in the private placement. Is this trigger for disclosure appropriate in light of the unique structure of these transactions? Should we expand the instruction to include a credit rating obtained in connection with a private offering if those securities are subsequently registered for resale?

- Is the instruction, as proposed, that a credit rating would be considered used if it is used in connection with a private offering but not used in a subsequent registered exchange offering for substantially identical securities, appropriate for closed-end funds?
- As proposed, a registrant would not be required to make disclosure with regard to solicited or unsolicited ratings unless the rating is used in connection with the registered offering of a security. Is there a difference between solicited and unsolicited ratings such that they should be treated differently for purposes of this proposal? Would requiring disclosure of all unsolicited ratings regardless of whether they are used in connection with a registered offering be too burdensome for registrants? Should disclosure be triggered only if the registrant, or someone acting on its behalf, obtains the credit rating (i.e., a solicited rating) and uses the rating in connection with a registered offering? If we were to require disclosure of unsolicited ratings regardless of whether they are used in connection with a registered offering of securities, should we impose limitations on how many ratings, or which credit rating agencies' ratings, should be required to be disclosed? For example, should we require disclosure for unsolicited ratings issued by NRSROs only? Would such disclosure impose an undue burden on the registrant?
- Should the proposed mandatory disclosure of credit ratings apply to closed-end funds?
- Investment companies, including both closed-end funds and mutual funds, sometimes represent that they invest only in securities that have a specified

credit rating, such as investment grade, or disclose the percentage of their portfolios comprised of securities with specified ratings. As noted above, investors may not have access to sufficient information in order to understand fully what credit ratings mean, or the limits inherent in them. Do current investment company disclosure requirements adequately address the meaning and limitations of credit ratings of portfolio securities? If not, how could investment company disclosure requirements be changed to better promote investor understanding of credit ratings of portfolio securities?

- The proposed amendments apply to the disclosure of credit ratings. Mutual funds sometimes obtain other non-credit ratings and use such ratings in connection with the offer or sale of their securities. For example, rating agencies issue credit quality ratings to fixed-income funds, which examine credit risk in the fund's underlying portfolio.[62] Ratings agencies may also issue volatility ratings, which are designed to identify the potential volatility of the market value of a fund's shares.[63] In addition, at least one rating agency issues principal stability ratings that are designed to identify a money market fund's capacity to maintain stable principal or a stable net asset value.[64] Should we require the mandatory disclosure of these additional fund

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62 See, e.g., Fitch's Fund and Asset Manager Ratings, at http://www.fitchratings.com/jsp/sector/Sector.faces?selectedTab=Overview&Ne=11%2b4293330821 (last visited on Aug. 11, 2009) ("Fitch's Fund and Asset Manager Ratings"); Moody's Ratings Definitions, Money Market and Bond Fund Ratings, at http://v3.moodys.com /ratings-process/Money-Market-and-Bond-Fund-Ratings/002001018 (last visited Aug. 11, 2009) ("Moody's Ratings Definitions"); Standard & Poor's Ratings Definitions, Ratings Direct, (Apr. 30, 2009), available at http://www2.standardandpoors.com/spf/pdf/fixedincome/Ratings_Definitons_Update.pdf ("Standard & Poor's Ratings Definitions).

63 See, e.g., Fitch's Fund and Asset Manager Ratings; Standard & Poor's Ratings Definitions.

64 See, e.g., Standard & Poor's Ratings Definitions.

ratings as part of a fund's prospectus or statement of additional information if the ratings are used in connection with the offer or sale of an investment company's securities? If so, what disclosures should we require?

- The proposed disclosure item includes an instruction that provides that a registrant would not trigger the disclosure requirement regarding credit ratings if the credit rating is not otherwise used in connection with a registered offering, and the only disclosure of a credit rating in a filing with the Commission is related to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings. Is this approach appropriate? Are there other disclosures about credit ratings of a similar nature that should be added to this instruction? Would registrants avoid such references because of concerns that it might trigger the proposed additional disclosure requirements? Would this instruction be used to circumvent the disclosure requirement?
- We are proposing to amend Item 9 of Form S-3 and Item 4(a)(3) of Form S-4 so that disclosure regarding credit ratings would be included (if applicable) in registration statements for offerings of capital stock even if securities of the same class have previously been registered pursuant to Section 12 of the Exchange Act. Are there any other circumstances where we need to amend forms so that information regarding credit ratings is provided to investors when a credit rating is used in connection with a registered offering?
- Schedule B under the Securities Act provides the disclosure requirements for foreign governments or political subdivisions thereof that register their

securities for public offering in the United States. The disclosure requirements for those issuers are located directly in the Securities Act, and there are no corresponding disclosure regulations or forms under Schedule B applicable to foreign governments[65] or their political subdivisions.[66] However, through market practice and investor expectation, registration statements prepared under Schedule B generally contain disclosure beyond the requirements of the statute, and may include, for example, credit rating information relating to the sovereign issuer's debt. Should we extend the proposals for the disclosure of credit ratings to foreign government issuers? Or should we continue to permit foreign governments to disclose credit ratings on a voluntary basis? Should a foreign government be required to disclose credit ratings in Schedule B registration statements under the Securities Act and in Exchange Act documents, including the annual report on Form 18-K and the registration statement on Form 18, if it uses the credit rating in connection with a registered offering of its debt securities? If we extend the credit rating disclosure requirements to foreign governments, are there some forms or documents that in whole or in part should be exempt from these requirements? Would disclosure of credit ratings be appropriate for foreign government issuers? If so, why? If not, why should they be exempt?

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65 "Foreign government" refers to any issuer that is eligible to register securities under Schedule B of the Securities Act, including political subdivisions and some quasi-governmental entities.

66 Unlike other issuers, foreign government issuers that register securities under Schedule B of the Securities Act are not subject to reporting obligations under Section 15(d) of the Exchange Act [15 U.S.C. 78o(d)]. However, foreign government securities listed on a U.S. exchange must be registered under Section 12(b) of the Exchange Act [15 U.S.C. 78l(b)], as is the case with the securities of other issuers. Foreign governments that have securities registered under Section 12(b) file annual reports with the Commission on Form 18.

If mandatory credit ratings disclosure in filings under the Securities Act or the Exchange Act is appropriate for foreign government issuers, should they be subject to requirements analogous to those proposed for other issuers or are there different factors that should be considered in any amendments that may be adopted for foreign government issuers? What are those considerations?

2. Required Disclosure

Under the proposed amendments, a registrant would be required to disclose the information for each credit rating that triggers disclosure. The proposed disclosure seeks to provide investors with a specific description of the ratings and to make clear to investors:

- The elements of the securities that the credit rating addresses;
- The material limitations or qualifications on the credit rating; and
- Any related published designation, such as non-credit payment risks, assigned by the credit rating agency with respect to the security.

The disclosure would be required in registration statements under the Securities Act and the Exchange Act, including Form 10 and Form 20-F, and in registration statements filed by closed-end funds on Form N-2 under the Securities Act and the Investment Company Act.

a) General Information Including Scope and Limitations

As proposed, our amendments would require disclosure of certain general information regarding credit ratings, including the scope of the rating and any limitations on the scope of the rating. In this regard, our proposed rules would require:

- The identity of the credit rating agency assigning the rating and whether such organization is an NRSRO;
- The credit rating assigned by the credit rating agency;
- The date the credit rating was assigned;
- The relative rank of the credit rating within the credit rating agency's classification system;
- A credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;
- All material scope limitations of the credit rating;[67]
- How any contingencies related to the securities are or are not reflected in the credit rating;
- Any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the rating, along with an explanation of the designation's meaning and the relative rank of the designation;
- Any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and (i) the minimum obligations of the security as specified in the governing instruments of the security; and (ii) the terms of the securities as used in any marketing or selling efforts; and

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67 A limited scope rating is a rating that assesses less than the promised or expected return on a security. We are proposing disclosure of any material scope limitations in order to mitigate the potential risk that investors may not understand the limited scope of the rating. See the 1994 Release in note 15 above.

- A statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific class of securities to which it applies; and that investors should perform their own evaluation as to whether an investment in the security is appropriate.[68]

A preliminary prospectus would include information about any credit rating that is used in connection with a registered offering of securities. For example, a registrant would disclose the initial rating (if any) assigned by the credit rating agency in the preliminary prospectus when a final rating is not assigned until after the effectiveness of a registration statement. If a disclosed rating is changed or if a different rating becomes available before effectiveness, the registrant would be required to convey the rating change to the purchaser. The registrant would be required to update the final prospectus to reflect the final rating assigned and all related disclosure. In connection with delayed shelf offerings, the final rating would be disclosed in a prospectus supplement.[69]

We are proposing to require disclosure of the relative rank of the credit rating within the credit rating agency's classification system and the credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities. We believe this disclosure will help put the credit rating in its appropriate

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68 See proposed amendments to Item 202(g) of Regulation S-K, Item 12 of Form 20-F, and Item 10.6 of Form N-2.

69 The registrant could also disclose the credit rating in a free writing prospectus, such as a term sheet, as long as it was also included in the registration statement (including through disclosure in a prospectus supplement that becomes a part of the registration statement in accordance with Rule 430B).

context and provide investors with important information about the credit rating agency's assessment of the degree of risk presented by the security.

Under the proposed amendments, a registrant would be required to disclose any material limitations on the scope of the credit rating and how any contingencies related to the securities are or are not reflected in the credit rating. For example, a registrant would be required to disclose if the credit rating takes into account less than the promised return on a security. A residual security, for example, typically represents a beneficial interest in whatever cash flows remain in a pool of financial assets after obligations to pay all other outstanding classes have been satisfied. Sometimes, because of the highly speculative nature of these cash flows, a residual security incorporates a fixed promise to pay a nominal amount of principal to the residual holder in the early months of the securities' existence. The amount of the nominal fixed obligation may have no relationship to the amount paid for the residual security, nor to the anticipated residual cash flow. The credit rating for the residual interest represents only an evaluation of the likelihood that the nominal fixed obligation would be paid. It does not evaluate whether there will be any residual cash flow. Under the proposed rule, such a limitation would be required to be disclosed. We believe this type of disclosure would help investors understand what the rating is intended to cover, and, just as importantly, the limitations on the rating issued. In addition, if the security is subject to contingent payment obligations, registrants would be required to disclose how those contingencies are reflected in the credit rating. We believe these requirements will provide investors with better information so that they can make important distinctions about the nature of risks presented by securities with the same or similar ratings.

If the credit rating includes a related published designation, such as non-credit payment risk assessments, volatility assessments or other analyses performed by the credit rating agency that do not solely reflect credit risk, the proposed amendments would require a description of the additional analysis, so that investors relying on the designation are not left unaware of the related evaluation. For example, the related evaluations covered by such designation could include an analysis of prepayment speeds, effects of interest rates or other market based factors, or volatility assessments done in connection with a credit rating.[70] We believe disclosure of these published designations together with a description of the analysis would provide meaningful additional information to investors regarding the information taken into consideration by the credit rating agency. We also believe disclosure of these related designations would signal to investors that significant differences may exist between a security with a credit rating that includes a published designation indicating that an evaluation of additional risk was done by the credit rating agency and a security with a similar credit rating without such a designation. In addition, we believe disclosure of published designations would help investors understand the limitations on comparing credit ratings across different types of securities.

Under the proposed amendments, registrants would be required to disclose any material differences between the terms of the security as considered or assumed by the

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[70] See e.g., Moody's Global Credit Policy, Rating Methodology, Updated Report on V Scores and Parameter Sensitivities for Structured Finance Securities (Dec. 2008), at http://www.moodys.com (indicating that the evaluations are intended to address the degree of uncertainty underlying the assumptions made in determining ratings and how sensitive the ratings are to changes in those assumptions); Fitch Ratings Structured Finance Global Criteria Report, Criteria for Structured Finance Loss Severity Ratings (Feb. 2009), at http://www.fitchratings.com (indicating that a Loss Severity Rating is intended to indicate the relative risk that a security will incur a severe loss in the event of default).

credit rating agency for purposes of determining the rating, the terms in the governing documents of the securities and the terms of the securities as marketed to investors. We believe this disclosure may allow investors to better evaluate the credit rating and the security to which it applies because they would understand if the credit rating was based on assumptions or terms different from the information provided to investors. For example, this item would require disclosure if the security was rated using a yield assumption which differs from the expected yield being disclosed to investors.

We have also proposed to require that registrants include a statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific class of securities to which it applies; and that investors should perform their own evaluation as to whether an investment in the security is appropriate. We believe this statement will alert investors to some of the limitations inherent in a credit rating so that the credit rating is placed in an appropriate context.

Under the proposed amendments, a closed-end fund would be required to include the disclosure concerning credit ratings in its prospectus, unless the prospectus relates to securities other than senior securities that have been rated by a credit rating agency, in which case such disclosure may be provided in the statement of additional information unless the rating criteria will materially affect the registrant's investment policies.[71]

For closed-end funds, current Item 10.6 of Form N-2 requires that, if a registrant discloses a rating assigned by an NRSRO in its prospectus, the registrant must briefly

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[71] See proposed Instruction 4 to Item 10.6 of Form N-2. Cf. Item 10.6 of Form N-2 (similar current provision regarding inclusion of disclosure in statement of additional information).

discuss the significance of the rating, the basis upon which ratings are issued, any conditions or guidelines imposed by the NRSRO for the registrant to maintain the rating, and whether or not the registrant intends, or has any contractual obligation, to comply with these conditions or guidelines. Current Item 10.6 also requires disclosure of the material terms of any agreement between the registrant or its affiliates and the NRSRO under which the NRSRO provides the rating. The proposed amendments would, if adopted, replace those requirements with the same disclosure requirements contained in proposed Item 202(g) of Regulation S-K, which, in some cases, are substantially similar to the current requirements and, in other cases, provide information that is intended to allow investors to more easily put the credit rating in its appropriate context than the disclosure requirements of current Item 10.6 of Form N-2.[72] We are also proposing technical amendments to remove the current instructions to Item 10.6.[73]

Request for Comments

- We have proposed to require disclosure similar to the disclosure recommended in Item 10(c) of Regulation S-K. Is there a better model for providing disclosure about credit ratings? Should we adopt a general rule that

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72 Proposed Item 10.6 of Form N-2 is substantially similar to current Item 10.6 in that a registrant would be required to disclose the relative rank of the credit rating within the rating agency's overall classification system, the rating agency's definition or description of the category in which the rating agency rated the class of securities, all material scope limitations, how any contingencies related to the securities are or are not reflected in the credit rating, and any material differences between the terms of the securities as assumed or considered by the rating agency and (i) the minimum obligations of the security as specified in its governing instruments and (ii) the terms of the security as used in any marketing or selling efforts. Rather than require disclosure of the material terms of any agreement between the registrant or its affiliates and the NRSRO under which the NRSRO provides the rating as set forth in current Item 10.6, proposed Item 10.6 would require disclosure of the identity of the person compensating the rating agency for providing the rating and a description of any other non-rating services provided by the rating agency to the registrant or its affiliates and any fees paid for such non-rating services.

73 The current instructions to Item 10.6 define NRSRO, cross-reference Rule 436(g)(1) under the Securities Act, and cross-reference Item 10(c) of Regulation S-K.

all material elements of a credit rating be disclosed and give examples of the types of information that should be disclosed? Does our proposed approach capture the information that investors would need to make informed investment decisions?

- Does the proposed disclosure requirement add too much weight to the credit rating?
- Non-investment company registrants would be required to make the Item 202(g) disclosures in their Securities Act and Exchange Act registration statements, and closed-end funds would be required to make similar disclosures in their Securities Act and Investment Company Act registration statements. Is disclosure about a registrant's credit ratings appropriate disclosure for such filings? Are there alternative or additional filings in which the disclosure should be made? Should we also require that similar disclosure be provided in any written selling materials that disclose the rating? Should this disclosure be recommended rather than required?
- Is there another means that could be used to provide investors with this information, and the information described below, when a credit rating is used in connection with a registered offering?
- Is the proposed disclosure regarding credit ratings adequate to provide investors with sufficient information to be able to understand the ratings assigned by a credit rating agency and to understand the limitations associated with a rating? Is there other information that would be useful?

- As proposed, Item 202(g) and Item 10.6 of Form N-2 include a list of specific items that must be disclosed about the credit rating. Is this approach appropriate? Should we also include a "catch-all" provision that would require any other information necessary to understand the credit rating? Would including a catch-all help to assure that our rules will be flexible enough to elicit material information about credit ratings, as securities and credit ratings change in response to innovations and market developments? Would Rule 408 under the Securities Act be sufficient to capture any additional material information?[74]
- Should our proposed disclosure distinguish between corporate debt and structured finance products? Is there different information that would be relevant for ratings of corporate debt and structured finance products? Should we require disclosure of the differences in risk characteristics between corporate debt and structured finance products? Is this information already available to investors in all cases?
- Would investors benefit from the disclosure of the relative rank of the credit rating within the credit rating agency's classification system and the credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities? Is there other or additional information that would assist investors in placing the credit rating in context?

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[74] 17 CFR 230.408. Rule 408 provides that, in addition to the information expressly required to be included in a registration statement, the registrant is required to include any additional material information necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

- In addition to requiring the disclosure about a credit rating that currently is recommended in Item 10(c) of Regulation S-K, proposed Item 202(g) of Regulation S-K, Item 12 of Form 20-F and Item 10.6 of Form N-2 would require disclosure of all material scope limitations of the rating, how any contingencies are or are not reflected in the credit rating and any related designation (or other published evaluation) of non-credit payment risks assigned by the rating agency with respect to the security. Would this additional disclosure assist investors in better understanding the credit rating and assessing the risks of an investment in the security? What additional disclosure would be helpful to investors in making these assessments?
- As noted above, under proposed Item 12 to Form 20-F, foreign private issuers would be required to provide the same disclosure that would be required by proposed Item 202(g) of Regulation S-K for domestic issuers. Is this type of ratings information disclosed by foreign private issuers in their home jurisdictions? Should foreign private issuers be required to provide this type of information? Is there a basis on which to distinguish between foreign private issuers and other registrants for this purpose? If so, please explain. Is there any other type of credit ratings information that foreign private issuers should disclose?
- As proposed, a registrant would be required to disclose additional information about any published designation that reflects the results of any other evaluation done by a credit rating agency. Should we require disclosure for any evaluation by a credit rating agency that is communicated to the

registrant, regardless of whether it is published? Do credit rating agencies communicate information of this type to the registrant? If so, what types of information would this cover?

- We are proposing to require registrants to disclose any material differences between the terms of the security as assumed or considered by the credit rating agency in rating the security and (i) the minimum obligations of the security as specified in the governing instruments, and (ii) the terms of the security as marketed to investors. Would this disclosure be helpful to investors in making an investment decision?
- Does the proposed requirement that registrants include a statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific class of securities to which it applies; and that investors should perform their own evaluation as to whether an investment in the security is appropriate provide meaningful information to investors? Would this statement help to place the credit rating in an appropriate context? Why or why not?
- Are the proposed disclosure requirements appropriate for closed-end funds or should they be modified? Should we instead, or in addition, require all or any of the disclosures that are enumerated in current Item 10.6 of Form N-2? For example, should we expressly require disclosure of the basis upon which ratings are issued by the credit rating agency or disclosure of any conditions

or guidelines imposed by a credit rating agency for the registrant to maintain a credit rating? Is it appropriate, as proposed, to permit closed-end funds to include the proposed disclosure in the statement of additional information, rather than the prospectus, if the prospectus relates to securities other than senior securities of the registrant that have been rated by a credit rating agency unless the rating criteria will materially affect the registrant's investment policies?

b) Potential Conflicts of Interest

We also are proposing to require disclosure regarding credit ratings that would address potential conflicts of interest.[75] Specifically, our proposed rules would require disclosure of the identity of the party who is compensating the credit rating agency for providing the credit rating. In addition, if during the registrant's last completed fiscal year and any subsequent interim period up to the date of the filing, the credit rating

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[75] There are rules applicable to NRSROs currently in place that are designed to address certain conflicts of interest of NRSROs. Pursuant to Exchange Act Rule 17g-5 [17 CFR 240.17g-5], an NRSRO must disclose and manage certain conflicts of interest, while certain other conflicts are prohibited outright. Paragraph (b) of Rule 17g-5 identifies nine types of conflicts to be disclosed and managed by an NRSRO, including a new type of conflict being adopted today by the Commission in a companion adopting release: issuing or maintaining a credit rating for a security or money market instrument issued by an asset pool or as part of any asset-backed or mortgage-backed securities transaction that was paid for by the issuer, sponsor, or underwriter of the security or money market instrument. Paragraph (c) of Rule 17g-5 identifies seven conflicts of interest that are prohibited outright, including three added by the Commission in February 2009: issuing or maintaining a credit rating with respect to an obligor or security where the NRSRO or a person associated with the NRSRO made recommendations to the obligor or the issuer, underwriter, or sponsor of the security about the corporate or legal structure, assets, liabilities, or activities of the obligor or issuer of the security; issuing or maintaining a credit rating where the fee paid for the rating was negotiated, discussed, or arranged by a person within the NRSRO who has responsibility for participating in determining or approving credit ratings or for developing or approving procedures or methodologies used for determining credit ratings, including qualitative and quantitative models; and issuing or maintaining a credit rating where a credit analyst who participated in determining or monitoring the credit rating, or a person responsible for approving the credit rating received gifts, including entertainment, from the obligor being rated, or from the issuer, underwriter, or sponsor of the securities being rated, other than items provided in the context of normal business activities such as meetings that have an aggregate value greater that $25.

agency or its affiliates has provided non-rating services to the registrant or its affiliates, the proposed rules would require a description of the other non-rating services and separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during such period.

We believe that the proposed disclosure regarding fees and services would alert investors to potential conflicts of interest that may have influenced the rating decision of the credit rating agency. We believe investors should know who paid for the rating since that may influence their assessment of the impartiality of the credit rating agency in assigning the rating. For example, many of the NRSROs are paid by the registrants for whom they are providing the credit rating. This business model can create a conflict of interest because the NRSRO providing the credit rating may be concerned that if it issues a lower rating than the registrant expects, the registrant would no longer seek credit ratings from that NRSRO. As a result, an NRSRO that is paid by a registrant may have an incentive to give a higher credit rating than it would have if no potential conflict of interest existed. In addition, we believe that the disclosure we are proposing to require regarding non-rating services and related fees paid to the credit rating agency should help investors gauge whether the credit rating agency's decision may have been influenced by a desire to gain or retain other business from the registrant. [76]

We are not proposing to require disclosure of the fee paid for the credit rating unless disclosure of other non-rating services is required as described above. We preliminarily believe that when no such other non-rating services are provided, disclosure of the source of the payment for the rating as proposed would sufficiently convey the

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[76] See note 21 above.

potential conflict of interest. We are requesting comment, however, on whether we should require the amount of the fee to be disclosed in all cases.[77]

Request for Comments

- We have proposed to require disclosure of information related to the party paying for the rating, as well as any additional non-rating services provided by the credit rating agency or its affiliates to the registrant or its affiliates. Would the proposed disclosure provide helpful information for investors in order for them to judge whether potential conflicts of interest may have impacted the rating? Is the provision of other services indicative of potential conflicts of interest? Would requiring disclosure regarding other services decrease the other services being provided? Would that have an effect on the quality of ratings? If so, how? Is there other disclosure that would provide additional or better information regarding potential conflicts of interest? If so, what information would provide investors the ability to assess potential conflicts of interest?
- Is the information that we have proposed to require meaningful? Should we require additional context such as the percentage of revenue that the NRSRO

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77 In a companion proposing release, the Commission is also today proposing a new rule that would require an NRSRO, on an annual basis, to make publicly available on its Internet Web site a consolidated report that shows three items of information with respect to each person that paid an NRSRO to issue or maintain a credit rating; specifically, (1) the percent of the net revenue attributable to the person that was earned by the NRSRO for that fiscal for year from providing services and products other than credit rating services; (2) the relative standing (top 10%, top 25%, top 50%, bottom 50%, and bottom 25%) of the person in terms of the person's contribution to the total net revenue of the NRSRO for the fiscal year as compared with other persons who provided the NRSRO with revenue; and (3) all outstanding credit ratings paid for by the person. The proposed rule also would provide that the NRSRO must include a generic disclosure statement each time the NRSRO publishes a credit rating or credit ratings indicating where on its Internet Web site the consolidated report is located. See the proposing release considered by the Commission on September 17, 2009 related to proposed new Rule 17g-7 under the Exchange Act.

or other credit rating agency earns from the registrant so that an investor would be aware of when a registrant accounts for a significant percentage of the NRSRO's revenue? Would requiring disclosure only if non-rating services are provided place too much emphasis on the mix of revenue that the registrant provides to the credit rating agency, rather than the total revenue earned from the registrant? In proposed Exchange Act Rule 17g-7, the Commission is proposing to require that NRSROs publish a report on an annual basis with respect to each person that paid an NRSRO to issue or maintain a rating disclosing (1) the percent of the net revenue attributable to the person that was earned by the NRSRO for that fiscal year from providing services and products other than credit rating services; (2) the relative standing (top 10%, top 25%, top 50%, bottom 50%, and bottom 25%) of the person in terms of the person's contribution to the total net revenue of the NRSRO for the fiscal year as compared with other persons who provided the NRSRO with revenue; and (3) all outstanding credit ratings paid for by the person. Should registrants be required to disclose the aggregate fees paid by the registrant to the credit rating agency for ratings and non-rating services, regardless of whether non-rating services have been provided, and the relative standing of the registrant in terms of the registrant's contribution to the total net revenue of the credit rating agency in registration statements? If we were to require this disclosure, should it be updated to the date of the registration statement instead of being provided as of the end of the last fiscal year? Would registrants have access to this information? If not, could they

negotiate with the credit rating agency so that this information could be obtained from the credit rating agency, such as through the contract for services? What would the costs of providing such disclosure be? Would requiring this disclosure affect a registrant's ability to obtain a rating or to raise capital? Would investors benefit from having this information in the registration statement?

- Our proposed disclosure requirements relate only to fees paid to the credit rating agency. We are aware that there are other relationships that could present potential conflicts of interest. Item 509 of Regulation S-K[78] currently requires disclosure by a credit rating agency that is not an NRSRO when it (i) is paid on a contingent basis, (ii) has a substantial direct or indirect interest in the registrant, or (iii) has a connection to the registrant as a promoter, underwriter, officer, director or employee or voting trustee. Is this disclosure sufficient, or should there be a more specific disclosure requirement? For example, Exchange Act Rule 17g-5(a) and (b) provides that certain conflicts are permitted if they are disclosed and managed by the NRSRO. Such permitted conflicts include: conflicts related to being paid by issuers for rating and non-rating services; conflicts related to subscription based services; conflicts related to ownership interests in entities being rated by the NRSRO; conflicts related to business relationships with issuers being rated by the NRSRO; conflicts related to the NRSRO having a broker or dealer associated with it; and any other conflict that would be material to the NRSRO. Should

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78 17 CFR 229.509.

registrants be required to disclose conflicts: conflicts related to being paid by a registrant for rating and non-rating services, regardless of whether non-rating services are being provided, paying the credit rating agency for subscription-based services, any ownership interest by the credit rating agency in the registrants or its affiliates, any business relationships between the credit rating agency and the registrant and its affiliates, any interest the credit rating agency has in a broker or dealer associated with it and any other material conflicts? Would all of the information be relevant to investors? Would registrants have access to this information? If not, could they negotiate with the credit rating agency so that this information could be obtained from the credit rating agency, such as through the contract for services? Rule 17g-5 currently requires annual reporting by NRSROs of these conflicts. If registrants were also required to disclose these types of conflicts, should we require the disclosure to be updated to the date of the registration statement? What would the costs of providing such disclosure be? Would requiring this disclosure affect a registrant's ability to obtain a rating or to raise capital? Would investors benefit from having this disclosure in the registration statement?

- Exchange Act Rule 17g-5(c) provides a category of conflicts that an NRSRO is prohibited from having with respect to a credit rating. These prohibited conflicts include: providing a rating to an entity that accounted for 10% or more of the NRSRO's net revenue; direct ownership interests by the NRSRO or an analyst preparing the rating in the issuer; issuing or maintaining a rating on a person associated with the NRSRO; issuing or maintaining a rating where

a person determining or approving the rating is an officer or director of the issuer; issuing or maintaining a rating where the NRSRO made recommendations with respect to the structure of the rating; issuing or maintaining a rating where the fee for such rating was discussed or negotiated by a person at the NRSRO with responsibility for determining or approving the rating; and issuing or maintaining a rating where a person determining or approving the rating received gifts in excess of $25. These prohibitions are only applicable to NRSROs. To the extent not otherwise required to be disclosed by Item 509 of Regulation S-K, should we require disclosure of the conflicts described above if credit rating agencies that are not NRSROs provide a rating to a registrant and if these conflicts exist or have existed during the registrant's previous two fiscal years through the date of the registration statement so that investors would be aware of such conflicts? Would registrants have this information? If not, could they negotiate with the credit rating agency so that this information could be obtained from the credit rating agency, such as through the contract for services? What would the costs of providing such disclosure be? Would requiring this disclosure affect a registrant's ability to obtain a rating or to raise capital? Would investors benefit from having this disclosure in the registration statement?

- Are there competitive or proprietary concerns that the proposed disclosed requirements should account for? If so, how? For example, will disclosing fees have any effect on the ability to negotiate for services?

- If non-rating services have been provided to the registrant or any of its affiliates by the credit rating agency or any of its affiliates, we have proposed to require a description of the other non-rating services and separate disclosure of the fee paid for the credit rating and the aggregate fees paid for any other non-rating services provided by the credit rating agency or its affiliates during the registrant's last completed fiscal year and any subsequent interim periods up to the filing date. Should we require disclosure for fees paid over a longer period such as two or five years? Should we require disclosure of fees for non-rating services that have been contracted and paid for but not yet delivered? Should we require disclosure for services that have been proposed or solicited but not yet finalized?
- Should we require disclosure of fees paid by the underwriter or its affiliates to the credit rating agency or its affiliates for non-rating services if the underwriter is the party paying for the rating? Should we require disclosure about services provided by the credit rating agency to the underwriter if the underwriter is paying for the rating? Should the underwriter be treated as acting on behalf of the issuer in such circumstances? Would the registrant be able to obtain this information? If not, should we consider initiating rulemaking to provide that underwriters shall make this information available to issuers upon reasonable request? Is there any additional information regarding credit rating agency fees that would be important to investors? Should we require disclosure of any current or anticipated arrangements or

agreements regarding future services? If so, should we require an estimate of the fees to be paid for such services?

- Under our proposal, disclosure of fees would not be triggered if the services in addition to the credit rating are other credit rating services, such as fees to rate another security of the registrant. Is this approach appropriate? Do fees for other credit rating services raise conflict of interest issues similar to fees for non-rating services? Is the distinction between a credit rating service and a non-credit rating service sufficiently clear? Should we provide further guidance on this point? Should we reference the categories in Form NRSRO in this regard?
- Should we require disclosure of the fee paid for the credit rating regardless of whether additional services have been provided? Would this disclosure provide information that is important in evaluating potential conflicts of interest inherent in the issuer-paid ratings model? Is the information useful without additional context, such as the significance of the fee to the credit rating agency? If context is necessary to make the disclosure of fees meaningful, should we require disclosure of the significance of the fee to the credit rating agency? For example, should we require a registrant to disclose the percentage of revenue derived from the fee?[79] Would registrants have access to this information? Is there other information that would convey the significance of the fee to the credit rating agency? Should we require registrants to disclose the total amount of rating-related fees paid to the credit

[79] See note 77 above.

rating agency during the most recent fiscal year completed and any interim periods? During the two most recent fiscal years (or longer?) completed and any interim periods?

- Would disclosure of fees paid to credit rating agencies affect the amount of fees charged, or otherwise affect the competitive landscape for credit rating agencies?
- We note that there may be other factors that could influence the independence of the credit rating agency, such as a reliance on underwriters that refer business to the credit rating agency or the general importance of a particular registrant to the credit rating agency. Should we require disclosure of these sorts of relationships?

c) Ratings Shopping

Reports that registrants, or persons acting on behalf of registrants, may engage in "ratings shopping" raise serious issues about the integrity of the credit ratings process.[80] We believe investors should be made aware of when a registrant (or a person acting on a registrant's behalf) may have engaged in ratings shopping.[81] It is our understanding that ratings shopping occurs because registrants, among others, can solicit preliminary credit ratings from a rating agency. If the registrant believes the preliminary rating is too low,

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80 See note 24 above.

81 In this regard, we note that three of the largest NRSROs entered into an agreement with the Attorney General for the State of New York in June 2008 that provides for certain disclosure regarding preliminary ratings. See Press Release, Office of the Attorney General, "Attorney General Cuomo Announces Landmark Reform Agreements with the Nation's Three Principal Credit Rating Agencies," (June 5, 2008), at http://www.oag.state.ny.us/media_center/2008/jun/june5a_08.html. Our proposed rule, however, would apply to all credit rating agencies. In addition, because our proposed rules apply to registrants, investors would be able to find disclosure regarding preliminary ratings on a registrant-by-registrant and offering-by-offering basis instead of having to search the disclosure of the NRSROs.

the registrant can seek a different credit rating from another credit rating agency.[82] When a registrant can choose which ratings to disclose, including which final ratings to disclose, we believe the registrant will most likely choose the most favorable rating. If less favorable ratings are not disclosed, then investors may not have access to potentially important information that may suggest that the credit rating that is disclosed may be inflated.[83] Similarly, when the credit rating agency knows that the registrant will likely choose to use the credit rating agency that provides the most favorable rating, there may be an incentive for ratings to be inflated by the credit rating agency in order to keep the business of the registrant. Currently, our rules do not require disclosure of any credit ratings, whether preliminary or not. As a result, investors are not aware of when registrants seek a preliminary rating or when registrants obtain additional credit ratings but choose not to use them, and investors are not aware of any differences between the preliminary rating and the final rating.

We are proposing that if a registrant has obtained a credit rating and is required to disclose that credit rating, then all preliminary ratings of the same class of securities as the final rating that are obtained from credit rating agencies other than the credit rating agency providing the final rating must also be disclosed. In addition, we are proposing that if a rating is disclosed pursuant to the trigger described above, then any credit rating obtained by the registrant but not used must also be disclosed. We believe this disclosure requirement would provide investors with important information to assess whether any ratings shopping may have occurred, and whether any rating inflation may have occurred

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82 See Roger Lowenstein, Triple-A Failure, N.Y. Times Magazine, April 27, 2008.

83 See Skreta and Veldkamp and Bolton, Freixas and Shapiro in note 24 above.

between the preliminary rating and the final rating obtained by a registrant as a result of the ratings shopping, or whether the registrant has other credit ratings that it has not used in connection with the offering.

We have not proposed to require disclosure of preliminary ratings obtained by a registrant from the credit rating agency that issues the final rating. We are concerned that such a disclosure requirement may impede useful communications between credit rating agencies and registrants as the credit rating agencies determine their initial ratings and perform continuing work related to monitoring the rating. In addition, there are rules applicable to NRSROs that are intended to prevent some of the problematic practices in this area. For example, Rule 17g-5 under the Exchange Act prohibits an NRSRO from issuing or maintaining a rating where it made recommendations with respect to the structure of the security.

When disclosure of any preliminary rating or unused final rating is required, we are proposing to require similar disclosure as is proposed to be required for a final rating. Because preliminary ratings may vary in their form and level of detail, it is possible that all of the information required to be disclosed about a particular rating would not be available to the registrant. In preparing this disclosure, registrants would be able to rely on Securities Act Rule 409[84] if the information otherwise required to be disclosed cannot be obtained without unreasonable effort or expense.

We believe disclosure of preliminary ratings as described above would provide important information for investors about potential ratings shopping. We believe registrants could identify any preliminary ratings required to be disclosed in the

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84 17 CFR 230.409.

registration statement in a manner that would avoid confusion for investors. For example, registrants could disclose any preliminary ratings under a separate sub-heading, or the registrant could include written disclosure as to the limitations of preliminary ratings.

For purposes of this proposed disclosure requirement, a credit rating, including a preliminary credit rating, generally would be obtained from a credit rating agency if it is solicited by or on behalf of a registrant from a credit rating agency. For these purposes, we would view an underwriter and others involved in structuring a deal, such as a sponsor or depositor, who obtains a credit rating, including a preliminary credit rating, for a deal structure to be acting on behalf of the registrant.

We intend for the phrase "preliminary credit rating" to be read broadly and to include any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating. We believe that a broad reading would better facilitate the purpose of the proposed disclosure in order to alert investors if the registrant has obtained indications of a rating from one credit rating agency but chooses to use a credit rating from another. We are not proposing to limit the required disclosure of preliminary ratings to ratings specific to the registrant. For example, a preliminary rating would include ratings on a particular structure of a security even if not tied to a specific registrant or pool of assets.[85] As proposed, disclosure of a preliminary rating would be required even if there have been

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[85] For instance, an underwriter may approach a rating agency about a newly developed or refined structure for an asset-backed offering of a certain class of assets generally. In some cases, the rating agency may be asked to provide an indication of a rating on that structure without knowledge of the specific pool assets or names of the originators for the assets, although certain criteria for the assets could be outlined. The preliminary rating that is assigned to the structure would need to be disclosed under our proposal if a rating is used in connection with a registered offering of securities by the underwriter with that structure.

changes to the security for which a final rating is disclosed. We believe this disclosure would place the information about ratings in context.

Request for Comments

- Should we require disclosure of preliminary ratings, as proposed? Is there any other information regarding preliminary ratings that should be required to be disclosed? Would the rule as proposed capture all potential ratings shopping practices? As an alternative, should the rule require disclosure of contacts between the registrant and the credit rating agency as a means of disclosing preliminary ratings and negotiations between the registrant and the credit rating agency?[86] Would the rule reduce the number of preliminary ratings sought?
- We have expressed our concerns about ratings shopping by registrants and the potential for credit rating agencies to use less conservative rating methodologies in order to gain or retain business, presumably lessening the value of the ratings. As proposed, a registrant would only be required to provide disclosure of a preliminary rating if it is of the same class of securities as a final rating otherwise required to be disclosed by the rule and is received from a credit rating agency other than the credit rating agency providing the final rating. Are these limitations appropriate? Are there circumstances where disclosure of preliminary ratings would be important even if a final rating was never obtained? Should we require disclosure of all preliminary

86 For example, in the context of roll-up transactions, Item 911(a)(5) of Regulation S-K [17 CFR 229.911(a)(5)] requires disclosure of any contacts between the sponsor or general partner and a third party providing a report, opinion or appraisal on the roll-up transaction. See also Item 1005 of Regulation M-A [17 CFR 229.1105].

ratings obtained by a registrant, including from the credit rating agency that issues the final rating?

- We have proposed to require disclosure of unused final credit ratings obtained by a registrant if a credit rating is otherwise disclosed pursuant to the proposed rules so that investors would be aware of any potential ratings shopping by the registrant in choosing which credit rating to use. Would this provide important information for investors? Do registrants ever obtain final ratings but not use them? Why might a registrant choose not to use a credit rating? Would requiring disclosure of such ratings reveal potential ratings shopping practices of registrants? If not, is there other disclosure that would elicit disclosure about potential ratings shopping?
- Would requiring the proposed disclosure for preliminary or unused final ratings enhance investors' understanding of, and therefore the value of, the ratings? Would such disclosure help to address our concerns with ratings shopping? If you do not believe such disclosure would be helpful, how would you suggest that we address these concerns? Is disclosure of an indication from a credit rating agency of a likely or possible rating appropriate? What effect would our proposed rule have on ratings shopping? Would it encourage or discourage the practice? Why?
- To the extent that a preliminary rating that would be required to be disclosed pursuant to the proposed rule is not based on final and full information, to what extent would disclosure of such preliminary rating present a risk that

investors could form a mistaken impression about the credit quality of the security or the registrant's ratings shopping?

- How would our proposed rule affect communications between registrants and credit rating agencies? Would the proposed requirement result in fewer discussions between credit rating agencies and registrants? Would it affect the quality of information provided by registrants to obtain a rating?
- What types of activities might replace the issuance of preliminary ratings if the proposed rule is adopted? To what extent might some alternative ratings shopping behavior develop?
- Would the proposal have a negative impact on smaller or newer credit rating agencies? Would smaller or newer credit rating agencies have a difficult time establishing their market position if registrants no longer seek multiple preliminary ratings? For example, would registrants be less likely to engage in initial conversations with smaller or newer credit rating agencies in order to understand their methodologies and procedures if we require the disclosure of preliminary ratings?
- How would changes in the structure of a security affect disclosure of preliminary ratings? Would it be difficult for registrants to track preliminary ratings?
- As proposed, a credit rating, including a preliminary credit rating, would be "obtained" if it is solicited by or on behalf of a registrant from a credit rating agency. Is this sufficient to capture all of the preliminary ratings sought from other credit rating agencies?

- Should we include additional guidance as to what constitutes a preliminary rating? Would additional guidance allow registrants and credit rating agencies to structure their dealings to avoid disclosure? Are there less formal preliminary indications given by credit rating agencies that should be included in the required disclosure? Would requiring disclosure of preliminary ratings interfere with other types of communications between registrants and credit rating agencies, such as discussions related to surveillance or maintenance ratings that credit rating agencies may provide on other classes of securities issued by the same registrant for which credit ratings have been provided? If so, how should we address this concern? Would the broad view of "preliminary credit rating" as proposed interfere with any non-rating services provided to the registrant? If so, how could we address this?
- Are there any concerns about the availability of the information about preliminary ratings that we are proposing registrants be required to disclose? Would credit rating agencies object to registrant's disclosure of preliminary ratings where no compensation was paid to the credit rating agency?
- Would disclosure of preliminary ratings have negative effects for investors, registrants or credit rating agencies? For example, would investors be confused by disclosure of preliminary ratings? Would disclosure of preliminary ratings be confusing or misleading? If so, how could we revise the proposal to reduce the risk that investors would be confused or misled? Would credit rating agencies change their practices if preliminary ratings are required to be disclosed? If so, how might their practices change?

- Should our proposed disclosure regarding preliminary ratings distinguish among issuers of corporate debt, structured finance products and/or closed-end funds? Do corporate issuers, issuers of structured finance products and closed-end funds engage in ratings shopping equally or in the same manner? What are the differences? Is there different information regarding preliminary ratings that would be relevant for corporate debt, structured finance products and closed-end funds?

D. Disclosure in Exchange Act Reports

We are proposing to amend Exchange Act reports and rules to require a registrant to provide investors with updated disclosure regarding changes to a previously disclosed credit rating.

If a credit rating that was previously disclosed under the rules proposed above has been changed, including when a rating has been withdrawn or is no longer being updated, that change would be required to be disclosed in a current report on Form 8-K.[87] We are proposing a new item requirement to Form 8-K, which would require a registrant (including a closed-end fund) to file a report within four business days of receiving a notice or other communication from any credit rating agency, that the organization has decided to change or withdraw a credit rating assigned to the registrant or any class of debt or preferred security or other indebtedness of the registrant (including securities or obligations as to which the registrant is a guarantor or has a contingent financial obligation) or take any similar action with respect to a credit rating that was previously

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87 As discussed in this section, we are proposing that foreign private issuers be required to provide disclosure regarding credit rating changes in their annual reports on Form 20-F. As a result, the disclosure for foreign private issuers would not be required to be made within four business days of the rating change.

disclosed pursuant to proposed Item 202(g) of Regulation S-K or proposed Item 10.6 of Form N-2.

As discussed above, we previously proposed in 2002 to require disclosure in current reports of changes in credit ratings when we amended the item requirements for current reports on Form 8-K. We did not adopt the proposal at the time.[88]

Under the proposed item, the registrant would have to disclose the date that the registrant received the credit rating agency's notice or communication, the name of the rating agency, and the nature of the rating agency's decision. We are not proposing to require the registrant also discuss the impact of the change or other decision on the registrant, though it would be permitted to do so. Rather, consistent with similar Form 8-K items, we believe that a discussion of any material impact of the change in credit rating would be required to be disclosed in a registrant's periodic reports.[89] We believe this would provide the registrant with additional time to analyze the impact of the rating change to the registrant between the filing of a current report and the filing of its next periodic reports. We note, though, that a change in a credit rating may require the registrant to make related disclosures under other Form 8-K items, such as Item 2.04 -

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88 See note 39 above and the related discussion.

89 When revisions were adopted to the 8-K reporting requirements in 2004, the Commission noted that it was not adopting requirements for certain new items such as Item 2.04 – Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement that would have required registrants to provide a management's analysis of the change to be included in the Form 8-K. The Commission noted that the analysis might be difficult to provide in the time period required for the filing of the 8-K and that the analysis might be more relevant and complete in the context of financial statements. The Commission reminded registrants, however, that any disclosure made in a report on Form 8-K must include all other material information, if any, that is necessary to make the required disclosure, in the light of the circumstances under which it is made, not misleading. See Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date in note 43 above.

Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

Disclosure under this item would not be required until the rating agency notifies the registrant that the rating agency has made a decision to change the credit rating. If the registrant is still in negotiations or appealing a preliminary indication that a credit rating agency intends an action covered by the proposed item, no disclosure would be required. However, once good faith negotiations and appeals cease, disclosure would be required.

As noted above, we believe the application of our current rules would require a registrant to disclose in its periodic reports the impact on it, if material, of any change in a rating that was previously disclosed under the rules proposed above.[90] For example, if a credit rating agency withdraws or stops updating a rating, the registrant would be required by the proposed amendment to disclose that fact in a current report on Form 8-K, and our current rule requirements would require the registrant to discuss the impact of the change on the company, if material, either in MD&A or in an appropriate location in its next periodic report.

We have proposed to limit the disclosure regarding changes to a credit rating in a current report to credit ratings that were disclosed previously pursuant to the rules we propose today. Thus, a registrant would not be subject to the new requirement to disclose changes to credit ratings that were obtained or used prior to the effectiveness of any new disclosure requirements adopted as a result of this proposal. We believe this distinction strikes an appropriate balance between the burden on registrants in preparing the

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[90] As proposed, this new item in Form 8-K would also be applicable to asset-backed issuers. However, such issuers are unlikely to have additional disclosure in their periodic reports because a change in a rating of an asset-backed issuer's own securities typically does not affect that issuer.

disclosure and the needs of investors for information about credit ratings. Although our new requirements would not be applicable in that setting, we note that disclosure of credit ratings and changes in ratings may be required in periodic reports under our current rules as discussed above.[91]

We are proposing to require closed-end funds to make the same disclosures regarding changes to a credit rating as other registrants because we believe that this information is of similar relevance to investors in closed-end funds and other registrants. Specifically, we propose to amend Exchange Act Rules 13a-11(b)[92] and 15d-11(b)[93] to require a closed-end fund to file a current report on Form 8-K containing the disclosures regarding changes to a credit rating within the period specified in Form 8-K unless substantially the same information has been previously reported by the fund.[94]

We are proposing to require foreign private issuers to provide disclosure regarding changes to a credit rating annually in their reports on Form 20-F. While the disclosure would not be required as frequently or timely as it would be for domestic issuers, investors would still have access to the information in a foreign private issuer's annual report.

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91 Disclosure may also be required pursuant to Exchange Act Rule 12b-20 [17 CFR 240.12b-20], which requires that in addition to the information expressly required to be included in a report, the report is required to include any further material information necessary to make the required statements, in the light of the circumstances under which they are made not misleading.

92 17 CFR 240.13a-11(b).

93 17 CFR 240.15d-11(b).

94 Under Regulation FD [17 CFR 243.100 et seq.], closed-end funds are currently required to make public disclosure of certain material information on Form 8-K unless they disseminate the information through other methods of disclosure that are reasonably designed to provide broad, non-exclusionary distribution of the information to the public. In addition, pursuant to Rule 104 of Regulation BTR [17 CFR 245.104], closed-end funds are required to file notice of a blackout period, if any, on Form 8-K.

In proposing these amendments, we recognize that credit rating changes can be important information to an investor in making investment and voting decisions. Credit rating agencies typically disclose rating changes publicly via press release at the same time or shortly after they notify affected companies of the changes. Therefore, investors already can obtain access to information about rating changes if they know where to find the press releases and are willing to routinely monitor these releases to find information about particular companies and securities. However, we believe some investors may not routinely monitor all press releases issued by credit rating agencies and therefore likely would benefit from disclosure about ratings changes filed by companies on Form 8-K.

Once a credit rating agency stops rating the securities, a registrant would be required to disclose that information in a current report, update a prospectus if necessary, and include any relevant analysis in its next periodic report but would then have no further disclosure obligation related to that rating in subsequent filings.

Request for Comments

- As proposed, we would require disclosure about changes to previously disclosed credit ratings in a registrant's Exchange Act reports, including whether a rating has been withdrawn or will no longer be updated. Would the proposed disclosure provide helpful information for investors? Is there other information about ratings that would be more important to investors? For example, should we include a requirement that the reason for the change in rating be disclosed? Would the disclosure increase reliance on credit ratings? If so, how?

- We have proposed to limit the disclosure regarding changes to a rating to ratings previously disclosed pursuant to proposed Item 202(g) of Regulation S-K or proposed Item 10.6 of Form N-2. As a result, changes to ratings that were obtained prior to the effectiveness of the rule, if adopted, will not be required to be disclosed. Should we expand the scope of the proposed rule to require that all changes to ratings be disclosed regardless of whether they were disclosed previously? Would this create a burden on registrants not in the public interest? Why or why not? How could this information be disclosed at the least cost to registrants?
- Is a requirement to file a current report on Form 8-K necessary in view of the typical practice by credit rating agencies to promptly issue press releases about rating changes under the subscriber paid model? Is current disclosure by credit rating agencies through press releases adequate? Would investors benefit from having companies disclose this information in a uniform place?
- Could registrants provide an analysis of the credit rating change in a Form 8-K in the time allowed for filing a Form 8-K? How does this disclosure compare to disclosure of other matters such as the acceleration of a direct or off-balance sheet obligation where disclosure of the event is required in a Form 8-K, and analysis of the impact is allowed to be deferred to the next periodic report?
- We believe our current rules would require registrants to discuss the significance of a credit rating change in its next periodic report if the impact would be material to the company. Are there circumstances where a credit

rating change would not trigger disclosure in the next periodic report? Should we adopt an explicit requirement that any credit rating change disclosed on Form 8-K would be required to be analyzed and discussed in the following periodic report?

- We have proposed to require disclosure when a rating has changed. Should we also require disclosure of other ratings actions, such as placing an issuer on "credit watch" or assigning a different outlook to the registrant's rating? Are these actions viewed as important by investors? Would requiring this disclosure create a burden for registrants not in the public interest?
- The proposed disclosure would apply only to credit ratings originally used in connection with registered offerings. Are there reasons that disclosure should be limited to registered offerings? Should we require disclosure of credit ratings used in connection with private offerings? Are there any concerns regarding disclosure of credit ratings related to private offerings?
- Is it appropriate to require closed-end funds to file reports on Form 8-K disclosing credit rating changes? Instead of filing reports on Form 8-K, should closed-end funds be permitted to disclose changes to credit ratings through other methods, such as a different filing with the Commission or a notice posted on an internet Web site and/or issuance of a press release? Is there empirical or other evidence demonstrating that one or more of those other methods would provide better dissemination of the information with respect to closed-end funds? What would be the disadvantages, if any, of not

requiring a filing that would be available in the Commission's EDGAR system?

- Is the content of the proposed disclosure requirements on Form 8-K appropriate for closed-end funds or should it be modified? Are there additional disclosures regarding changes to a credit rating that closed-end funds should be required to make? For example, closed-end funds are not required to include MD&A in their periodic reports. Should a closed-end fund be required to disclose in a Form 8-K or Form N-CSR[95] the impact on it, if material, of any change in a credit rating that was previously disclosed under proposed Item 10.6 of Form N-2?
- Are the proposed amendments for foreign private issuers appropriate? Should they be modified? Are there additional disclosures that foreign private issuers should make? Is the information relevant to investors if it is only required in the next annual report?

II. General Request for Comments

We request and encourage any interested person to submit comments regarding:

- the proposed amendments that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release.

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[95] 17 CFR 249.331; 17 CFR 274.128. Form N-CSR is the periodic reporting form used by registered management investment companies.

We request comment from the point of view of companies, investors, and other market participants, including NRSROs and other credit rating agencies. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

In addition, we request comment on the following:

- Should the Commission include a phase-in for registrants beyond the effective date to accommodate pending offerings? As proposed, compliance with the new standards would begin on the effective date of the new rules. Will a significant number of registrants have their offerings limited by the proposed rules? If a phase-in is appropriate, should it be for a certain period of time (for example, six months or one year or longer) or only for the term of a pending registration statement?

III. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule amendments contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 (PRA).[96] The Commission is submitting these proposed amendments and proposed rules to the Office of Management and Budget (OMB) for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of

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[96] 44 U.S.C. 3501 et seq.; 5 CFR 1320.11.

information unless it displays a currently valid control number. The titles for the collections of information are: [97]

"Regulation S-K" (OMB Control No. 3235-0071);

"Form S-1" (OMB Control No. 3235-0065);

"Form S-3" (OMB Control No. 3235-0073);

"Form S-4" (OMB Control No. 3235-0324);

"Form S-8" (OMB Control No. 3235-0066);

"Form S-11" (OMB Control No. 3235-0067);

"Form 10" (OMB Control No. 3235-0064);

"Form 8-A" (OMB Control No. 3235-0056);

"Form 8-K" (OMB Control No. 3235-0060);

"Form F-1" (OMB Control No. 3235-0258);

"Form F-3" (OMB Control No. 3235-0256);

"Form F-4" (OMB Control No. 3235-0325);

"Form 20-F" (OMB Control No. 3235-0288); and

"Form N-2" (OMB Control No. 3235-0026).

We adopted all of the existing regulations and forms pursuant to the Securities Act, the Exchange Act or the Investment Company Act. These regulations and forms set forth the disclosure requirements for registration statements and Exchange Act reports that are prepared by registrants to provide investors with information to make investment decisions in registered offerings and in secondary market transactions.

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97 The paperwork burden from Regulation S-K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S-K.

The hours and costs associated with preparing disclosure, filing forms, and retaining records constitute reporting and cost burdens imposed by the collection of information. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on the EDGAR filing system.

B. Summary of Collection of Information Requirements

We are proposing to amend Item 202 of Regulation S-K to mandate disclosure by registrants regarding their credit ratings in their registration statements when a credit rating is used in connection with a registered offering. We are proposing parallel amendments for closed-end funds and foreign private issuers. We are also proposing to amend Exchange Act reporting requirements to require disclosure when there has been a change to a previously disclosed credit rating.

If a credit rating is used by the registrant, a selling securityholder, an underwriter or a member of a selling group in connection with a registered offering, then the registrant would be required to provide information about the credit rating in the registration statement. Such information would include general information about the rating, including any scope limitations on the rating, the identity of the person paying for the rating, a description of any non-rating services provided to the registrant within a specified period of time, including disclosure of the fees paid for such non-rating services, and disclosure of preliminary ratings obtained from a credit rating agency other than the credit rating agency providing the final rating and unused final ratings. A registrant would also be required to update the prospectus if a final rating is changed or is not available until after the effectiveness of the registration statement.

We are also proposing amendments to Form 8-K (for operating companies and closed-end funds) and to Form 20-F (for foreign private issuers) to require disclosure of changes in a credit rating, including when the rating is no longer being updated or has been withdrawn. For operating companies and closed-end funds, the change in a credit rating would be required to be reported within four business days on Form 8-K. For foreign private issuers, disclosure would be required annually on Form 20-F.

The proposals would increase existing disclosure burdens for Exchange Act reports on Form 8-K and registration statements by requiring disclosure of credit ratings, whether or not issued by an NRSRO, in registrants' registration statements and reports.

C. Paperwork Reduction Act Burden Estimates

For purposes of the Paperwork Reduction Act, we estimate that over a three-year period the average annual incremental increase in the paperwork burden for non-investment company registrants to comply with our proposed collection of information requirements to be approximately 2,120 hours of in-house company personnel time and to be approximately $816,000 for the services of outside professionals.[98] For closed-end funds, we estimate the annual incremental increase to be approximately 157 hours of in-house company personnel time and approximately $108,400 for the services of outside professionals. These estimates include the time and the cost of preparing and reviewing disclosure and filing documents. Our methodologies for deriving the above estimates are discussed below.[99]

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98 We calculated an annual average over a three-year period because OMB approval of Paperwork Reduction Act submissions covers a three-year period. For administrative convenience, the presentation of the totals related to the paperwork burden hours have been rounded to the nearest whole number and the cost totals have been rounded to the nearest thousand.

99 The estimates reflect the burden of collecting and disclosing information under the PRA. Other costs associated with the proposed amendments are discussed in Section IV below.

Our methodologies for deriving the burden hour and cost estimates presented below represent the average burdens for all registrants who are required to provide the disclosure, both large and small. For registration statements, we estimate that 25% of the burden of preparation is carried by the company internally and that 75% of the burden is carried by outside professionals retained by the registrant at an average cost of $400 per hour.[100] The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

Our estimates are based on the assumption that the proposed disclosure would add disclosure for a subset of affected registrants (i.e. those issuing rated securities). We further assume that the new disclosure requirement would not affect the number of registrants. For registration statements, we estimate that the proposed amendments would impose an average of a 60 minute burden of preparation carried by the company internally and a $1,200 cost for outside professionals retained by the registrant reflecting three hours of their time. This estimate includes the time necessary to obtain the relevant information, including certain information that would likely be provided by the credit rating agency such as the relative rank of the rating in the credit rating agency's classification system. Further, based on statistics related to the number of registration statements filed for debt offerings in fiscal years 2007 and 2008 from our Office of EDGAR Information and Analysis, we estimate that 500 registration statements on Forms

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100 We estimate an hourly rate of $400 as the average cost of outside professionals that assist registrants in preparing disclosure and conducting registered offerings.

S-1, S-3, and S-4 will be affected annually by the disclosure requirements.[101] We have attempted to be conservative in our estimates of affected filings. We recognize that not all debt offerings have credit ratings associated with them; however, given the relatively low number of debt filings over the past two fiscal years, we have included most of those filings within our estimate. For closed-end funds, we also estimate that approximately 82 registration statements on Form N-2[102] would be affected annually by the disclosure requirements. For purposes of Form 20-F, there would be an increased burden in Forms 20-F used as registration statements and as annual reports. There were an average of 77 Forms 20-F filed as registration statements in fiscal years 2007 and 2008. Based on a review of a sample of these filings, we estimate that 20 Form 20-F registration statements would include the required disclosure and that 20 Form 20-F annual reports would include disclosure regarding changes to a credit rating.

For current reports on Form 8-K, including Forms 8-K filed by closed-end funds, we estimate that registrants spend, on average, five hours completing the form. We

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101 All of the registration statements would be required to contain the proposed disclosure if the proposed trigger for the disclosure has been satisfied. We have assumed for purposes of this PRA analysis that the distribution of the estimated 500 filings will be proportional to the number of Forms S-1, S-3 and S-4 registration statements filed for debt offerings with approximately 60% of filings on Form S-3, 20% on Form S-1, and 20% on Form S-4. We have not included estimates for Form 10, Form S-8 and Form S-11 as we believe a negligible number of registrants use those forms to register debt securities.

102 Based on Commission filings, we estimate that there are approximately 802 active registered closed-end funds and approximately 205 annual responses to Form N-2. According to statistics maintained by the Investment Company Institute, approximately 322 of these closed-end funds have issued senior securities. See Investment Company Institute, Total Net Assets of Closed-End Funds, 2009: Q1, available at http://www.ici.org/pdf/cef_q1_09_sup_tables.pdf (last visited on Aug. 17, 2009) (showing data as of Mar. 31, 2009). Based on the proportion of the number of closed-end funds that have issued senior securities to the total number of active registered closed-end funds, we have assumed, for purposes of the PRA, that approximately 40% (322 divided by 802) of the annual Form N-2 responses will involve closed-end funds that have issued senior securities. We have further assumed that all closed-end funds issuing senior securities also will be required to disclose credit ratings in their registration statements under the proposed amendments. Therefore, we estimate that approximately 82 (40% of 205) registration statements on Form N-2 filed annually would include disclosure of credit ratings under the proposed amendments.

estimate that 75% of that burden is carried by the company while 25% is carried by outside counsel at a cost of $400 per hour. In order to estimate the number of additional Form 8-Ks that would be required to be filed pursuant to our proposed amendments, we have looked to the number of Forms 8-K filed with disclosure pursuant to Item 2.04-Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement. We believe that many rating changes may also accelerate financial obligations, so that looking to Item 2.04 gives some indication of the number of Forms 8-K that may be filed even though it does not cover the same disclosure. For example, we are aware that Item 2.04 likely would not be triggered by a credit rating upgrade. We solicit comment on better ways to estimate the number of 8-Ks that would be filed pursuant to our proposed requirements. In our fiscal year 2007 and 2008, there were an average of 396 Forms 8-K filed pursuant to Item 2.04. In addition, based on publicly available information concerning changes in credit ratings of senior securities issued by closed-end funds occurring during calendar years 2007 and 2008, Commission staff estimates that approximately 20 additional Forms 8-K would be filed annually by closed-end funds pursuant to proposed Item 3.04. As a result, we estimate that 420 additional Forms 8-K would be filed pursuant to proposed Item 3.04.

Table 1 below illustrates the incremental annual compliance burden in the collection of information in hours and cost for current reports and registration statements.[103]

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[103] The number of responses for Form N-2 reflected in the table equals the actual number of forms filed with the Commission during the 2008 fiscal year. This amount is an increase from the current approved number of annual responses to Form N-2 of 200.

Form	Current Annual Responses	Proposed Annual Responses	Current Burden Hours	Increase in Burden Hours	Proposed Burden Hours	Current Professional Costs	Increase in Professional Costs	Proposed Professional Costs
8-K	108,424	108,844	406,590	1,575	408,165	$54,212,000	$210,000	$54,422,000
20-F	942	942	614,891	120	615,011	$737,868,600	$16,000	$737,884,600
S-1	768	768	182,392	100	182,492	$218,870,800	$120,000	$218,990,800
S-3	2,065	2,065	236,959	300	237,259	$284,350,500	$360,000	$284,710,500
S-4	619	619	628,904	100	629,004	$754,686,601	$120,000	$754,806,601
N-2	200	205	86,468	82	86,550	$3,531,600	$98,400	$3,630,000
Total	113,018	113,443	2,156,204	2,277	2,158,421	$2,053,520,101	$924,400	$2,054,444,501

D. Solicitation of Comments

We request comments in order to evaluate: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.[104]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington,

[104] We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

DC 20549-1090, with reference to File No. S7-24-09. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-24-09, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE, Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

IV. Cost-Benefit Analysis

A. Proposed Amendments

The proposed amendments would require disclosure regarding credit ratings by registrants in their registration statements under the Securities Act, Exchange Act and Investment Company Act if the registrant uses the rating in connection with the offer or sale of securities in a registered offering. Under proposed new paragraph (g) to Item 202 of Regulation S-K, Item 12 of Form 20-F and Item 10.6 of Form N-2, registrants would be required to disclose much of the specific disclosure currently permitted under Item 10(c) of Regulation S-K. The proposal would require disclosure of all material scope limitations of the credit rating and any related published designation, such as non-credit payment risks, assigned by the rating agency with respect to the security. The proposed changes would also require disclosure of the source of the payment for the credit rating. If any non-rating services have been provided by the credit rating agency to the registrant, disclosure of the fees paid for those services also would be required, so that investors would be aware of potential conflicts of interest with respect to the credit rating

used by the registrant. Under the proposed amendments, if a registrant is required to disclose a credit rating, then it would also be required to disclose all preliminary ratings and unused final ratings it received from rating agencies other than the credit rating agency that provided the final rating. This disclosure is intended to provide investors with useful information to assess whether a registrant may have engaged in ratings shopping. In addition, we are proposing to amend Exchange Act reports to require disclosure of a change in previously disclosed credit rating.

The additional information and transparency provided by our proposed amendments are intended to help provide investors with the information they need about credit ratings to put the rating in the appropriate context. The proposed amendments are aimed at addressing concerns that investors may not have sufficient information to understand the scope or meaning of ratings being used to market various securities, that they may not fully appreciate the potential conflicts of interest faced by credit rating agencies and how these conflicts may impact ratings, that ratings shopping may be occurring and may be leading to inflated ratings, and that our current disclosure rules do not require certain basic information about a potentially key element of their investment decision.

The proposed amendments may affect economic behavior if the amendments alter (a) the use of ratings by investors, (b) registrants' security issuance and ratings-seeking behavior, and (c) the credit rating agencies' behavior when providing ratings, These effects will likely vary depending on the asset class (e.g., corporate issues, structured finance products), the type of the registrant (e.g., corporate registrant, sponsor of the financial product, closed-end funds), the type of credit rating agency (e.g., subscriber-

paid rating agencies, issuer-paid NRSROs, unregistered credit rating agencies), the type of investor (e.g., retail investors, institutional investors), and the ongoing changes in the regulatory environment. The economic benefits and costs on market participants associated with these economic effects are discussed below.

B. Benefits

Benefits to investors resulting from increased contextual information about ratings

The proposed amendments would require disclosure of information related to the rating used in a registered offering, such as the relative rank of the credit rating within the assigning credit rating agency's overall classification system, all material scope limitations of the rating, and any published designation that reflects the results of any other evaluation done by the credit rating agency in connection with the credit rating. Some investors may benefit from an improved understanding of the meaning and scope of ratings resulting from these new disclosures. While much of this information is publicly available, requiring it to be presented in the registration statement may increase the degree to which investors understand what the rating means. Additionally, new information, such as changes in ratings, would be disclosed in Exchange Act reports. While ratings are typically public information, available through news services or from the credit rating agency, investors may find it easier to access ratings in a central repository that is available over time. Investors should be better able to put the ratings in context when ratings and the proposed disclosure are presented together with other information in the registration statement. Less sophisticated investors may benefit more

from these disclosures, as sophisticated investors may already have absorbed this information from other sources.

Disclosure of potential conflicts of interests faced by credit rating agencies would provide information to investors that is not currently available. Potential conflicts of interest may arise when a credit rating agency derives significant revenue from a registrant whose securities it also rates. Credit rating agencies, in some cases, offer non-ratings services to registrants, such as consulting services.[105] Both sophisticated and unsophisticated investors could benefit from understanding whether the rating was received in the context of other services; in particular, they may place less weight on ratings in which the agency was substantially compensated for other services. This additional information may, in some cases, reduce the possibility of investors placing undue reliance on ratings. Alternatively, however, if new disclosures cause investors to believe that ratings are not subject to any potential conflict of interest, the additional disclosures may increase the degree to which investors rely on ratings.

The proposed amendments would enable investors to distinguish between solicited ratings (which can rely on both public and non-public information) and unsolicited ratings (which generally rely on only public information). Currently, it is not possible in every case for investors to make this distinction. Under the proposed amendments, if registrants use a rating to sell a security in a registered offering, it will be included in the registration statement; in other cases, it may not be. If a rating is disclosed in a registration statement, the registrant would be required to disclose who paid for the rating.

Benefits to investors from increased informativeness of ratings

The proposed amendments may have the long-term benefit of increasing the informativeness of credit ratings to investors, that is, the degree to which ratings correspond to the credit quality of the rated security or entity. Investors benefit from increased informativeness in several ways. Entities with different credit quality are exposed to distinct economic factors, and investors may take this fact into account when making investment decisions. Additionally, investors can use credit ratings in conducting fundamental analysis of individual securities. As a result, investors benefit from credit ratings that are more informative.

Increased informativeness of ratings can result from a reduction in "ratings shopping."[106] Currently registrants may solicit more ratings than they intend to use, choosing from among ratings providers without making any disclosure regarding the other solicited ratings. Criteria for selecting ratings agencies include the reputation of the agency and the rating itself.[107] There may be other, non-shopping reasons for soliciting multiple ratings, such as obtaining multiple expert views on the registrant's financial health. If the proposed amendments are adopted and registrants continue to solicit more ratings than they intend to use, preliminary and unused final ratings would be made public if the registrant used a rating in connection with a registered offering. Credit

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105 See Frank Partnoy, How and Why Credit Rating Agencies are Not Like Other Gatekeepers, (2006) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900257 for a discussion of non-rating services provided by credit rating agencies.

106 See Aaron Lucchetti and Serena Ng, How Rating Firms' Calls Fueled Subprime Mess, (Aug. 16, 2007), at http://www.realestatejournal.com/buysell/mortgages/20070816-lucchetti.html. See also Skreta and Veldkamp, and Bolton, Freixas and Shapiro in note 24 above.

107 See Dion Bongaerts, Martijn Cremers, and William N. Goetzmann Multiple Ratings and Credit Spreads (June 30, 2009), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307782.

rating agencies would know that their ratings would be disclosed if the registrant uses a final rating from a different credit rating agency in connection with a registered offering. Thus, the market could assess the relative informativeness of ratings used to sell the security and ratings from other agencies. This ability to compare a broader group of ratings, including preliminary ratings, for the same issue may allow investors to identify agencies whose ratings they perceive to be less reliable. This ability may be limited, however, as direct comparisons between preliminary ratings and final ratings may be affected by factors such as changes in information made available to the credit rating agency throughout the ratings process. The proposed disclosure could cause credit rating agencies to expend greater effort to examine the financial health of the underlying entity. Ultimately, increased efforts in the ratings process could improve ratings informativeness.

The proposed amendments may change the way rating agencies compete. This may indirectly improve ratings informativeness. Rating agencies may compete on the quality of ratings or they may engage in ratings-based competition that focuses on producing high ratings. Any potential reduction in ratings-based competition may result in credit rating agencies focusing on enhancing their reputations for producing quality ratings and competing on that basis, rather than competing to produce high ratings so that registrants select them. Rating agencies may have greater incentives to compete on the basis of the quality of ratings as they are likely to face reduced incentives to produce optimistic ratings in the hopes of being selected, since registrants' incentives to obtain a higher rating would be reduced. These changes in registrants' incentives and their consequent effect on credit rating agencies' incentives, however, will be limited, to the

extent that preliminary ratings are incomplete or based on less than full and final information, or that registrants replace the use of preliminary ratings for ratings shopping with new alternative mechanisms. Any potential reduction in the rating-based competition is likely to result in more informative ratings.[108]

Benefits to certain rating agencies from enhanced competitive position

The proposed amendments may benefit certain rating agencies by enhancing their competitive position, relative to others. Enhanced competitive position may result in these agencies charging higher fees, rating more securities, or being more selective in the securities they rate. These effects result from two factors. First, smaller agencies may be asked to provide preliminary ratings less frequently, and may therefore see information about fewer rated securities, thereby limiting their ability to assess the credit quality of the issue that they are rating relative to the rest of the rated issues.[109] Second, registrants may not choose to use ratings from smaller agencies if the registrants elect not to seek the smaller agencies' preliminary ratings. Competitive realignment may represent a cost to the credit rating agencies who are not market leaders. Competitive effects are discussed in detail in the Costs section, below.

Reductions in cost of capital for some registrants

As discussed, the proposed amendments may increase the informativeness of ratings. Credit rating agencies interpret non-public information to which they have

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108 See Becker and Milbourn in note 14 above.

109 See Jeremy Fons, Rating Competition and Structured Finance, J. Structured Fin. (Fall 2008), at http://www.iijournals.com/doi/abs/10.3905/JSF.2008.14.3.007

access, together with public information.[110] This practice may reduce the asymmetry of information between registrants and investors. Additionally, the mandatory disclosure of information about credit ratings used in connection with a registered offering could level the playing field for all registrants and would benefit registrants that in the past may have hesitated to provide such disclosure voluntarily. These reductions in the asymmetry of information between registrants and investors could reduce registrants' cost of capital as investors may demand a lower risk premium when they have access to more information.[111]

If the proposed amendments have the effect of reducing ratings shopping and ratings inflation that may result from such shopping, ratings scales may shift downward – that is, debt issues of the same credit quality may receive a lower rating than currently as an indirect effect of the proposed amendments. In some cases, because of ratings-based investment restrictions faced by some institutional investors, this may result in changes in the cost of capital for registrants, including potential increases and decreases. For example, registrants of securities that would currently be given an investment grade rating, but that would receive a lower rating as an indirect result of the proposed amendments, could face a higher cost of capital. Those registrants whose securities would be investment grade under both sets of circumstances may face a lower cost of

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110 In the discussion of their rating methodologies, Standard and Poor's and Moody's explain how they use confidential non-public information that registrants provide for the purpose of assigning ratings. See http://www2.standardandpoors.com/aboutcreditratings/RatingsManual_PrintGuide.html for the Standard and Poor's rating methodology. See http://v3.moodys.com/sites/products/AboutMoodysRatingsAttachments/2001400000389218.pdf?frameOfRef=corporate for Moody's description of their use of non-public information.

111 See David Easley and Maureen O'Hara, Information and the Cost of Capital, J. Fin. (2004) (arguing that the information composition between public and non-public information affects the cost of capital since investors demand a higher return from their investments when they face asymmetric information).

capital. Reductions in cost of capital constitute benefits to registrants. Additional potential costs are discussed in more detail in the Costs section, below.

C. Costs

Costs of New Disclosures

Registrants will face costs associated with the process of preparing and reporting the proposed disclosures. For purposes of the Paperwork Reduction Act, we estimate that over a three-year period the average annual incremental increase in the paperwork burden for non-investment company registrants to comply with our proposed collection of information requirements to be approximately 2,120 hours of in-house company personnel time and to be approximately $816,000 for the services of outside professionals. For closed-end funds, we estimate the annual incremental increase to be approximately 157 hours of in-house company personnel time and approximately $108,400 for the services of outside professionals. These estimates include the time and the cost of preparing and reviewing disclosure and filing documents. These disclosure costs may be limited by the fact that close-end funds that disclose ratings in their registration statements are already subject to comparable disclosure requirements and that some operating companies may already be providing this information voluntarily.

Temporary uncertainty resulting from potential shift in ratings

As discussed, the proposed amendments may cause ratings scales to shift downward; disclosure of preliminary and unused final ratings in certain circumstances may reduce ratings shopping, in turn reducing the upward bias in ratings resulting from registrants choosing the highest of several ratings. The amount of this shift is uncertain. This uncertainty represents a potential cost to investors, who may temporarily have fewer

highly rated investment options. It also represents a cost to registrants, who may be less sure of the rating they will receive for securities.

Costs to investors resulting from potential undue reliance on ratings

Requiring ratings disclosure may reinforce the importance of ratings, possibly causing investors to place undue reliance on the rating. This effect may be mitigated by accompanying contextual disclosures, such as disclosures on ratings limitations and by any improvements in the quality of ratings.

Costs to registrants resulting from increased prices of ratings

Any enhancement of the competitive position of market leaders that may arise in the medium- or long-term may result in higher prices for assigning ratings, both through a reduction in potential price competition among existing agencies and a reduction in the threat of entry by new agencies. Competitive effects of the proposed amendments are discussed below in this section, as well as in the Competition, Efficiency, and Capital Formation section.

Increases in cost of capital for some registrants resulting from potential declines in the level of ratings

As mentioned in the Benefits section, in some cases, the proposed amendments may alter issuance behavior by affecting investor demand for securities with specific ratings. Some investors are limited, either by regulation or custom, to investing only in the highest rated securities, while others are limited to investing in "investment grade" securities. If ratings shift downward as a result of the proposed amendments, there may be fewer securities available meeting these investment criteria, potentially resulting in a larger price premium for top-rated securities and for investment-grade securities. These

price premia may affect issuance behavior. For example, registrants of securities that would currently be given an investment grade rating, but that would receive a lower rating as an indirect result of the proposed amendments, would potentially face a higher cost of capital, while those registrants whose securities would be investment grade under both sets of circumstances may face a lower cost of capital. These changes in cost of capital may, in turn, affect issuance decisions. In particular, registrants whose securities would no longer be considered investment grade may face greater difficulty in raising capital. These differences in the cost of capital across new classes of "investment-grade" and "non-investment grade" securities may diminish in the long-term. In the short-term, however, the differential in the cost of capital across these two classes of securities are likely to remain due to the limited access to "non-investment grade" securities by certain investors. Similar considerations apply to the ratings at the top of the scale. Some registrants may be effectively shut out from the commercial paper market, for example, if they can no longer obtain top ratings.

These effects depend on the rigidity of institutional ratings-based constraints. If ratings scale downward, these constraints may adapt. For example, a wider range of ratings may be considered investment grade, and the commercial paper market may become viable for lower rated registrants. Any such adaptation is more likely to occur in the long term, however, as ratings-based investment restrictions are costly to modify.

Costs to certain rating agencies resulting from potential changes in competitive environment

Although NRSROs and other credit rating agencies are not subject to the proposed amendments, some of these rating agencies may incur costs. As mentioned in

the benefits section, established market leaders in ratings may indirectly benefit from the proposed amendments, at the expense of smaller, less established credit rating agencies. Currently, the credit ratings industry is highly concentrated. For "corporate issuers" in 2007, for example, Standard and Poor's, Moody's, and Fitch issued 39%, 33%, and 21% of outstanding credit ratings, respectively, for a total of 93% of outstanding credit ratings.[112] This concentration could increase in several ways as described below, such as an increase in market share of certain ratings agencies among the dominant agencies or a reduction in market share of the remaining agencies.

The proposed disclosure requirements for preliminary and unused final ratings may lead registrants to solicit fewer ratings, potentially only as many as they intend to ultimately use. In structured financial products, for example, the market may customarily require registrants to obtain two ratings, but registrants can solicit preliminary ratings from more than two agencies. If the registrant knows that preliminary ratings must be disclosed in certain circumstances, including the most optimistic ratings, then its incentive to shop for ratings may be reduced, because such a practice would become apparent to the market, and its selection of the higher rating may be discounted. Registrants may instead choose to initially solicit ratings only from agencies who are market leaders in the type of product they are issuing. Specifically, they may gravitate toward agencies that have established reputations for high quality ratings and agencies that, for other reasons, such as branding or market share, are best known to investors. They may choose to involve other credit rating agencies only if they do not meet specific ratings hurdles, such as the top rating category, or investment grade. Agencies who are

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[112] See Annual Report on Nationally Recognized Statistical Rating Organizations (2008) at http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0608.pdf.

not market leaders may, as a result, receive information about fewer issues, potentially affecting the perceived quality of their ratings. This may cause registrants to purchase fewer ratings from such agencies. Ultimately, this could strengthen the relative position of market leaders and potentially harm the competitive position of other rating agencies. Relatedly, registrants' conversations with smaller, less-established NRSROs and other credit rating agencies may help them to understand the agencies' methodologies and procedures; these conversations may help smaller NRSROs introduce themselves to registrants. To the extent that registrants contact only established NRSROs, they may not develop this understanding of other agencies' methodologies.

The effect on market leaders' competitive position could be mitigated by an additional factor. A decrease in ratings shopping depends in part on the ability of investors to easily compare final and preliminary ratings. However, investors may feel that they cannot easily compare these ratings. When rating agencies make preliminary ratings, they do so with a more limited set of information. As the ratings process proceeds to a final rating, more information can become available. For example, as time passes, material information about the industry or registrant from public sources may become available. Additionally, the registrant (or those acting on its behalf) may continue to share information with rating agencies. Consequently, investors may consider preliminary ratings to be informative only in a limited sense, and registrants may not experience a significant penalty for using a final rating that is substantially different than preliminary ratings.[113] Thus, to some degree, registrants may still shop for ratings, and agencies may continue to compete based on the level of ratings.

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[113] These factors would also reduce the efficacy of ratings shopping, however, since registrants would also face some uncertainty about what the final rating would be.

The changes in the competitive position of rating agencies discussed above may not occur for structured finance products because of the amendments to Rule 17g-5 being adopted today, since all NRSRO's would be entitled to receive information about all such issues.[114] This would depend, however, on whether credit rating agencies choose to access this information. Access comes with certain obligations, including the obligation to rate 10% of the securities for which information is received.

Another factor that could potentially impact the competitive forces among the credit rating agencies is the mandatory disclosure that a fee was paid for the credit rating and the aggregate fees paid for any other non-rating services provided during such period. This disclosure may present some costs to the extent that it reveals competitive or proprietary information about the business model of the credit rating agency proving the credit rating. To the extent that there are negative competitive effects, some rating agencies may stop providing some of these non-rating services which could result in declines in their revenues.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act[115] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act,[116] Section 3(f) of

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114 See the proposing release related to Rule 17g-5 under the Exchange Act considered by the Commission on September 17, 2009.

115 15 U.S.C. 78w(a).

116 15 U.S.C. 77b(b).

the Exchange Act,[117] and Section 2(c) of the Investment Company Act[118] require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.

The proposed amendments would require registrants to make specified disclosure to investors regarding credit ratings if credit ratings are used in connection with a registered offering. We believe these disclosures would help investors understand the limits and purposes of credit ratings as well as potential conflicts of interest or ratings shopping practices that could affect the quality of the credit rating. Therefore, if adopted, the Commission believes that the disclosure required by these amendments would promote investor protection. We believe that if investors have more information regarding credit ratings, including the scope of the rating, they will be better able to place the rating in its proper context. The Commission anticipates that these proposed amendments could improve investors' ability to make informed investment decisions, which will, therefore, lead to potential increased efficiency and competitiveness of the U.S. capital markets. The Commission expects that this increased market efficiency and investor confidence also may encourage more efficient capital formation for the reasons discussed below and in Section IV above. Specifically, the proposed amendments would enhance the availability of information to investors and the markets with regard to credit

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117 15 U.S.C. 78c(f).

118 15 U.S.C. 8a-2(c).

ratings so that investors will more clearly understand the terms of the credit rating and its limitations.

As discussed in more detail in Section IV, the proposed amendments may reduce the level of ratings-based competition among credit rating agencies. This may indirectly improve ratings informativeness. Any potential reduction in ratings-based competition may result in credit rating agencies increasingly focusing on enhancing their reputations for producing quality ratings and competing on that basis, rather than competing to produce high ratings so that registrants select them. These changes in registrants' incentives and their consequent effect on credit rating agencies' incentives, however, will be limited, to the extent that preliminary ratings are incomplete or based on less than full and final information, or that registrants replace the use of preliminary ratings for ratings shopping with new alternative mechanisms.

Furthermore, the proposed amendments may also increase the informativeness of ratings by reducing the asymmetry of information between registrants and investors. The mandatory disclosure of credit ratings in registration documents would level the playing field for all companies and would benefit companies that in the past may have hesitated to provide such disclosure voluntarily, thereby promoting competition. Furthermore, these reductions in the asymmetry of information between registrants and investors could reduce registrants' cost of capital as investors may demand a lower risk premium when they have access to more information.

Market efficiency and capital formation may be enhanced by more informative ratings because investors would have access to better information and could act on that information accordingly.

The Commission recognizes that requiring disclosure of preliminary ratings and unused final ratings could have an effect on competition among the credit rating agencies. To the extent that the proposed disclosure reduces ratings shopping, then competition among credit rating agencies may be reduced as registrants seek only ratings they intend to use and do not shop around among many agencies. The proposed amendments may benefit the competitive position of certain rating agencies if, for example, registrants seek fewer credit ratings. Enhanced competitive position would enable these agencies to charge higher fees, to rate more securities, or to be more selective in the securities they rate. Competitive realignment may represent a cost to the credit rating agencies who are not market leaders. This may increase the cost of capital for issuers who use smaller credit rating agencies if they are unable to pay the increased fees of the larger credit rating agencies or if the larger credit rating agencies elect not to rate them.

If the proposed amendments have the effect of reducing ratings shopping and ratings inflation resulting from such shopping, rating scales may shift downward – that is, debt issues may receive a lower rating than currently as an indirect effect of the proposed amendments. In some cases, because of ratings-based investment restrictions faced by some institutional investors, this may result in changes in the cost of capital for registrants, including potential increases and decreases. For example, registrants of securities that would currently be given an investment grade rating, but that would receive a lower rating as an indirect result of the proposed amendments, would potentially face a higher cost of capital, while those registrants whose securities would be investment grade under both sets of circumstances may face a lower cost of capital.

The Commission solicits comment on the effects of the proposed amendments on efficiency, competition, and capital formation. The Commission requests comment on whether the required disclosure of ratings in registration statements, especially ratings that a registrant would otherwise choose not to disclose, may affect positively or negatively registrants' ability to raise capital. The Commission requests comment on the anticipated effect of the new disclosure requirements on competition in the market for credit rating agencies. The Commission requests commenters to provide empirical data and other factual support for their views, if possible.

VI. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the Regulatory Flexibility Act.[119] It relates to proposed revisions to Regulation S-K, rules under the Securities Act, and forms under the Exchange Act, the Securities Act, and the Investment Company Act regarding disclosure regarding credit ratings.

A. Reasons for, and Objectives of, the Proposed Action

As discussed throughout the release, we are proposing amendments to our rules to require disclosure of information regarding credit ratings used by registrants in connection with a registered offering of securities so that investors will better understand the credit rating and its limitations. The amendments we are proposing today also would require additional disclosure that would inform investors about potential conflicts of interest that could affect the credit rating. In addition, we are proposing amendments to

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[119] 5 U.S.C. 601.

require disclosure of preliminary credit ratings and unused final ratings in certain circumstances so that investors have enhanced information about the credit ratings process that may bear on the quality or reliability of the rating. The proposed amendments would be applicable to registration statements filed under the Securities Act, the Securities Exchange Act and the Investment Company Act, and Forms 8-K and 20-F.

B. Legal Basis

We are proposing the amendments contained in this document under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act, Sections 12, 13, 15(d) and 23(a) of the Exchange Act, and Sections 8, 24(a), 30, and 38 of the Investment Company Act.

C. Small Entities Subject to the Proposed Action

The proposed amendments could affect some companies that are small entities. The disclosure requirements as proposed would apply to any registrant that uses a credit rating in connection with a registered offering, though based on the staff's observations of market practice, we believe it is unlikely that a small entity would use a credit rating in connection with a registered offering. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[120] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157[121] and Exchange Act Rule 0-10(a)[122] defines a company, other than an investment company, to be a "small

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120 5 U.S.C. 601(6).

121 17 CFR 230.157.

122 17 CFR 240.0-10(a).

business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,229 companies, other than registered investment companies, that may be considered small entities. Investment Company Act Rule 0-10(a)[123] defines a "small business" or "small organization" for purposes of the Investment Company Act as an investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year. We estimate that there are approximately 30 registered closed-end funds that may be considered small entities. The proposed amendments could affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act or Section 30 of the Investment Company Act. In addition, the proposals also could affect small entities that file, or have filed, a registration statement that has not yet become effective under the Securities Act or the Investment Company Act and that has not been withdrawn.

D. Reporting, Recordkeeping, and other Compliance Requirements

The disclosure requirements we are proposing today are intended to enhance credit rating disclosure so that investors will better understand credit ratings and their limitations. These amendments would require small entities that are operating companies or closed-end funds to provide the same disclosure as larger entities if they use a credit rating in connection with a registered offering. The disclosure required would include general information about the credit rating, including all material scope limitations of the credit rating and any related published designation, such as non-credit payment risks,

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[123] 15 U.S.C. 270.0-10(a)

assigned by the rating organization with respect to the security. In addition, the proposed amendments would require disclosure of additional non-rating services provided by the credit rating agency and its affiliates to the registrant and its affiliates, including disclosure of the fees paid for those services, so that investors will be aware of potential conflicts of interest with respect to the credit rating obtained by the registrant. Small entities would be required to include the disclosure in their Securities Act, Exchange Act, and Investment Company Act registration statements. In addition, small entities would be required to provide updating of the rating disclosure. In certain circumstances, small entities would be required to provide disclosure of preliminary ratings or unused final ratings so that investors will be informed of when a registrant may have engaged in ratings shopping.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe the proposed amendments would not duplicate, overlap, or conflict with other federal rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities subject to the rules. In connection with the proposed disclosure amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;

- Use of performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

The proposed amendments would provide investors with more information regarding credit ratings and their limitations so that investors will be able to place the credit rating in its appropriate context. We do not believe these disclosures will create a significant new burden on smaller entities subject to the proposed amendments. To the extent that a small entity must comply with the proposed amendments, we believe uniform, comparable disclosures across all companies will help investors and the markets. Therefore, we are not proposing special requirements, standards or exemptions for small entities. However, because small entities rarely receive credit ratings from credit rating agencies in connection with their offerings, it is unlikely that the proposed amendments would have a significant impact on a substantial number of small entities.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on smaller entities subject to the rules;
- The number of small entity companies that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[124] a rule is "major" if it has resulted, or is likely to result in:

- an annual effect on the U.S. economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment, or innovation.

VIII. Statutory Authority and Text of Rule and Form Amendments

We are proposing the amendments contained in this document under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act; Sections 12, 13, 15(d) and

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[124] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

23(a) of the Exchange Act; and Sections 8, 24(a), 30, and 38 of the Investment Company Act.

List of Subjects

17 CFR Parts 229, 239, 249 and 274

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 229- STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 -- REGULATION S-K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 229.10 by removing and reserving paragraph (c).

3. Amend § 229.202 by:

a. Adding paragraph (g); and

b. Adding Instructions 1 through 5 to Item 202(g).

The additions read as follows:

§ 229.202 (Item 202) Description of registrant's securities.

* * * * *

(g) Credit ratings. If a registrant, any selling security holder, any underwriter, or any member of a selling group in a registered offering uses a credit rating, as that term is defined in 15 U.S.C. 78c(a)(60), from a credit rating agency, as that term is defined in 15 U.S.C. 78c(a)(61), with respect to the registrant or a class of securities issued by the registrant, in connection with a registered offering, the registrant shall disclose the following information for each rating used:

(1) The identity of the credit rating agency assigning the credit rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(2) The credit rating assigned;

(3) The relative rank of the credit rating within the assigning credit rating agency's overall classification system;

(4) The date the credit rating was assigned;

(5) The credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;

(6) The identity of the party who is compensating the credit rating agency for providing the credit rating;

(7) A description of any other non-rating services provided by the credit rating agency or its affiliates to the registrant or its affiliates, and if such other services have been provided, separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during the registrant's last completed fiscal year and any subsequent interim period up to the date of the filing;

(8) All material scope limitations of the credit rating;

(9) How any contingencies related to the securities are or are not reflected in the credit rating;

(10) Any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the credit rating, along with an explanation of the designation's meaning and the relative rank of the designation;

(11) Any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and:

(i) the minimum obligations of the security as specified in the governing instruments of the security; and

(ii) the terms of the securities as used in any marketing or selling efforts;

(12) A statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific security to which it applies; and that investors should make their own evaluation as to whether an investment in the security is appropriate;

(13) A description of a final rating obtained by the registrant but not used in connection with the offering, including the information set forth in paragraphs (1)-(12) of this item; and

(14) A description of any preliminary rating of the class of securities that received the rating being disclosed pursuant to this Item 202(g) of this part if such preliminary rating was obtained by or on behalf of the registrant and received from a

credit rating agency other than the credit rating agency that provided the credit rating disclosed pursuant to this Item 202(g) of this part. Such description shall include:

(i) The identity of the credit rating agency that determined or indicated the rating and an indication of whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(ii) The preliminary rating determined or indicated or a description of the category or range of categories in which the preliminary credit rating agency placed the class of securities;

(iii) The date the preliminary rating was conveyed to the registrant, any party acting on the registrant's behalf or the underwriters;

(iv) The relative rank of the preliminary rating within the preliminary credit rating agency's overall classification system;

(v) Any material scope limitations of the preliminary rating; and

(vi) Any material differences between the terms of the securities on which the preliminary rating was determined and the terms of the securities on which the final rating was determined.

* * * * *

Instructions to Item 202(g):

1. Disclosure is not required by this Item 202(g) if the only disclosure of a credit rating in a filing with the Commission relates to changes to a credit rating, liquidity of the registrant, the cost of funds of a registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering.

2. If a registrant includes information about credit ratings in a prospectus pursuant to this Item 202(g) and the rating has not yet been issued in final form, the registrant shall update the description of each rating as set forth below:

A. If a change in a rating, including the assignment of a final rating, already included in the prospectus is available subsequent to the filing of the registration statement, but prior to its effectiveness, the registrant shall convey to the purchaser the rating change.

B. If an additional rating, including a final rating, that the registrant is required to disclose, or if a material change in a rating already included, becomes available during any period in which offers or sales are being made, the registrant shall disclose such additional rating or rating change by means of a post-effective amendment, or supplement to the prospectus pursuant to § 230.424(b) of this chapter, unless, in the case of a registration statement on Form S-3 (§ 239.13 of this chapter), it has been disclosed in a document incorporated by reference into the registration statement subsequent to its effectiveness and prior to the termination of the offering or completion of sales.

3. For purposes of this Item 202(g), a credit rating is "used in connection with a registered offering of securities" in circumstances, including but limited to, when such rating is used in connection with an unregistered offering of securities, and the securities offered privately are subsequently exchanged for substantially similar registered securities even if the credit rating was not used in connection with the registered exchange offering.

4. A preliminary rating includes any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating. A preliminary rating includes ratings on a particular structure of a security even if not tied to a specific registrant or group of assets. Disclosure of a preliminary rating is required even if there have been changes to the security for which a final rating is disclosed pursuant to this Item 202(g).

5. For purposes of determining whether disclosure of any preliminary rating or unused final rating is required, a credit rating is obtained from a credit rating agency if it is solicited by or on behalf of a registrant from a credit rating agency.

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The authority citation for Part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

5. Amend Form S-3 (referenced in §239.13) by revising Part I, Item 9 to read as follows:

Note -The text of Form S-3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Item 9. Description of Securities to be Registered.

Furnish the information required by Item 202 of Regulation S-K (§ 229.202 of this chapter), unless capital stock is to be registered and securities of the same class are registered pursuant to Section 12 of the Exchange Act, in which case furnish only the information required by Item 202(g) of Regulation S-K.

* * * * *

6. Amend Form S-4 (referenced in §239.25) by revising Part I, Item 4(a)(3) to read as follows:

Note -The text of Form S-4 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

Item 4. Terms of the Transaction.

(a) Furnish a summary of the material features of the proposed transaction. The summary should include, where applicable:

* * *

(3) The information required by Item 202 of Regulation S-K (§229.202 of this chapter), description of registrant's securities, unless: (i) the registrant would meet the requirements for use of Form S-3, (ii) capital stock is to be registered and (iii) securities of the same class are registered pursuant to Section 12 of the Exchange Act and (i) listed for trading or admitted to unlisted trading privileges on a national securities exchange; or (ii) are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association. Notwithstanding the foregoing, furnish the information required by Item 202(g) of Regulation S-K.

* * * * *

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201, et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

8. Amend §240.13a-11 by revising paragraph (b) to read as follows:

§240.13a-11 Current reports on Form 8-K (§249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6-K (17 CFR 249.306) pursuant to §240.13a-16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to §270.30b1-1 of this chapter under the Investment Company Act of 1940, except:

(1) where such investment companies are required to file notice of a blackout period pursuant to §245.104 of this chapter; and

(2) a closed-end company (as defined in 15 U.S.C. 80a-5(a)(2)) is required to file a current report on Form 8-K containing the information required by Item 3.04 of Form 8-K within the period specified in that form unless substantially the same information as required by that item has been previously reported by the registrant.

* * * * *

9. Amend §240.15d-11 by revising paragraph (b) to read as follows:

§240.15d-11 Current reports on Form 8-K (§249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6-K (17 CFR 249.306) pursuant to §240.15d-16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to §270.30b1-1 of this chapter under the Investment Company Act of 1940, except:

(1) where such investment companies are required to file notice of a blackout period pursuant to §245.104 of this chapter; and

(2) a closed-end company (as defined in 15 U.S.C. 80a-5(a)(2)) is required to file a current report on Form 8-K containing the information required by Item 3.04 of Form 8-K within the period specified in that form unless substantially the same information as required by that item has been previously reported by the registrant.

* * * * *

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq., 7201 et seq., and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

11. Amend Form 20-F (referenced in § 249.220f) by redesignating

Instruction 3 to Item 10 as Instruction 4, adding new Instruction 3 to Item 10, redesignating Items 12.C. and 12.D. as Items 12.D. and 12.E., adding new Item 12.C. and the Instructions to Item 12.C., and revising Instruction 1 to Item 12. to read as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20-F

* * * * *

Item 10. Additional Information

* * * * *

Instructions to Item 10:

* * * * *

3. In registration statements filed under the Securities Act or Exchange Act that relate to a class of preferred securities for which a credit rating, as that term is defined in 15 U.S.C. 78c(a)(60), from a credit rating agency, as that term is defined in 15 U.S.C. 78c(a)(61), is being used in connection with the registered offering, disclose the information required under Item 12.C.1 of Form 20-F. If filing Form 20-F as an annual report, furnish the information required by Item 12.C.2 of Form 20-F if there have been any changes to a rating required to be disclosed by Item 12.C.1 of Form 20-F.

* * * * *

Item 12. Description of Securities Other than Equity Securities.

* * * * *

C. Credit ratings.

1. If a company, any selling security holder, any underwriter, or any member of a selling group in a registered offering uses use a credit rating, as that term is defined in 15 U.S.C. 78c(a)(60), from a credit rating agency, as that term is defined in 15 U.S.C. 78c(a)(61), with respect to the company or a class of securities issued by the company, in connection with a registered offering, the company shall disclose the following information for each rating used:

(a) The identity of the credit rating agency assigning the credit rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(b) The credit rating assigned;

(c) The relative rank of the credit rating within the assigning credit rating agency's overall classification system;

(d) The date the credit rating was assigned;

(e) The credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;

(f) The identity of the party who is compensating the credit rating agency for providing the rating;

(g) A description of any other non-rating services provided by the credit rating agency or its affiliates to the company or its affiliates, and if such other services have been provided, separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during the company's last completed fiscal year and any subsequent interim period up to the date of the filing;

(h) All material scope limitations of the credit rating;

(i) How any contingencies related to the securities are or are not reflected in the credit rating;

(j) Any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the credit rating, along with an explanation of the designation's meaning and the relative rank of the designation;

(k) Any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and:

(i) the minimum obligations of the security as specified in the governing instruments of the security; and

(ii) the terms of the securities as used in any marketing or selling efforts;

(l) A statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific security to which it applies; and that investors should make their own evaluation as to whether an investment in the security is appropriate;

(m) A description of a final rating obtained by the company but not used in connection with the offering, including the information set forth in paragraphs (a)-(l) of this item; and

(n) A description of any preliminary rating of the class of securities that received the rating being disclosed pursuant to this Item 12 if such preliminary rating was obtained by or on behalf of the company and received from a credit rating agency other

than the credit rating agency that provided the credit rating disclosed pursuant to this Item 12. Such description shall include:

(i) The identity of the credit rating agency that determined or indicated the rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62);

(ii) The preliminary rating determined or indicated or a description of the category or range of categories in which the preliminary credit rating agency placed the class of securities;

(iii) The date the preliminary rating was conveyed to the company, any party acting on the company's behalf or the underwriters;

(iv) The relative rank of the preliminary rating within the preliminary credit rating agency's overall classification system;

(v) Any material scope limitations of the preliminary rating; and

(vi) Any material differences between the terms of the securities on which the preliminary rating was determined and the terms of the securities on which the final rating was determined.

2. Credit rating agency decisions.

(a) Disclose the information required by paragraph (b) of this Item 12.C.2. if the company is notified by, or receives any communication from, any credit rating agency to the effect that the organization has decided to change or withdraw the credit rating assigned to the company or any class of debt or preferred security or other indebtedness of the company (including securities or obligations as to which the company is a guarantor, or may become directly or contingently liable for arising out of an off-

balance sheet arrangement) that was previously required to be disclosed pursuant to Item 12.C.1 of this Form.

(b) If the registrant has received any notification or other communication as described in paragraph (a) of this Item 12.C.2., file the notice as an exhibit to the annual report on Form 20-F and disclose the following information:

(i) the date the company received the notification or communication;

(ii) the name of the credit rating agency and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62); and

(iii) the nature of the rating agency's decision.

* * * * *

Instructions to Item 12

1. You do not need to provide the information called for by this Item 12 if you are using the form as an annual report for your fiscal years ending before December 15, 2009. For your fiscal years ending on or after December 15, 2009, except for Item 12.C.2, Item 12.E.3. and Item 12.E.4 of this Form, you do not need to provide the information called for by this Item 12 if you are using this form as an annual report. You do not need to provide the information required by Item 12.C.2. of this Form if you are using the form as a registration statement.

* * * * *

Instructions to Item 12.C.1.

1. Disclosure is not required by this Item 12.C.1. of this Form if the only disclosure of a credit rating in a filing with the Commission relates to changes to a credit

rating, liquidity of the company, the cost of funds of a company or terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering.

2. If a company includes information about credit ratings in a prospectus pursuant to Item 12.C.1. of this Form and the rating has not yet been issued in final form, the company shall update the description of each rating as set forth below:

A. If a change in a rating, including the assignment of a final rating, already included in the prospectus is available subsequent to the filing of the registration statement, but prior to its effectiveness, the company shall convey to the purchaser the rating change.

B. If an additional rating, including a final rating, that the company is required to disclose, or if a material change in a rating already included, becomes available during any period in which offers or sales are being made, the company shall disclose such additional rating or rating change by means of a post-effective amendment, or supplement to the prospectus pursuant to Rule 424(b) under the Securities Act (§ 230.424(b) of this chapter), unless, in the case of a registration statement on Form F-3 under the Securities Act (referenced in § 239.33 of this chapter), it has been disclosed in a document incorporated by reference into the registration statement subsequent to its effectiveness and prior to the termination of the offering or completion of sales.

3. For purposes of this Item 12, a credit rating is "used in connection with a registered offering" in circumstances, including but limited to, when such rating is used in connection with an unregistered offering of securities, and the securities offered

privately are subsequently exchanged for substantially similar registered securities even if the credit rating was not used in connection with the registered exchange offering.

4. A preliminary rating includes any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating. A preliminary rating includes ratings on a particular structure of a security even if not tied to a specific company or group of assets. Disclosure of a preliminary rating is required even if there have been changes to the security for which a final rating is disclosed pursuant to this Item 12.

5. For purposes of determining whether disclosure of any preliminary rating or unused final rating is required, a credit rating is obtained from a credit rating agency if it is solicited by or on behalf of a company from a credit rating agency.

Instructions to Item 12.C.2.

1. No disclosure need be made under Item 12.C.2. of this Form during any discussions between the company and any credit rating agency regarding any decision required to be disclosed unless and until the credit rating agency notifies the company that the credit rating agency has made a final decision to take such action.

2. For purposes of Item 12.C.2. of this Form, the term "credit rating agency" has the meaning set forth in Section 3(a)(60) of the Exchange Act [15 U.S.C. 78c(a)(60].

3. For purposes of Item 12.C.2. of this Form, off-balance sheet arrangement has the meaning set forth in Item 5.E.2. of this Form.

* * * * *

12. Amend Form 8-K (referenced in §249.308) by revising Section 3 – Securities and Trading Markets to add Item 3.04 to read as follows:

Note -- The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8-K

* * * * *

Item 3.04. Credit Rating Agency Decisions.

(a) Furnish the information required by paragraph (b) of this Item 3.04 if the registrant is notified by, or receives any communication from, any credit rating agency to the effect that the organization has decided to change or withdraw the credit rating assigned to the registrant or any class of debt or preferred security or other indebtedness of the registrant (including securities or obligations as to which the registrant is a guarantor or may become directly or contingently liable for arising out of an off-balance sheet arrangement) that was previously required to be disclosed pursuant to Item 202(g) of Regulation S-K or Item 10.6 of Form N-2.

(b) If the registrant has received any notification or other communication as described in paragraph (a) of this Item 3.04, file the notice as an exhibit to the report on Form 8-K and furnish the following information:

(1) the date the registrant received the notification or communication;

(2) the name of the credit rating agency and whether such organization is a nationally recognized statistical rating organization as that term is defined in 15 U.S.C. 78c(a)(62); and

(3) the nature of the rating agency's decision.

Instructions to Item 3.04.

1. No disclosure need be made under this Item 3.04 during any discussions between the registrant and any credit rating agency regarding any decision required to be disclosed unless and until the credit rating agency notifies the registrant that the credit rating agency has made a final decision to take such action.

2. For purposes of this Item 3.04, the term "credit rating agency" has the meaning set forth in Section 3(a)(60) of the Exchange Act [15 U.S.C. 78c(a)(60].

3. For purposes of this Item 3.04, off-balance sheet arrangement has the meaning set forth in Item 303(a)(4)(ii) of Regulation S-K [17 CFR 229.303(a)(4)(ii)].

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274 – FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

13. The authority citation for Part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a-8, 80a-24, 80a-26, and 80a-29, unless otherwise noted.

* * * * *

14. Amend Form N-2 (referenced in §§ 239.14 and 274.11a-1), Item 10 by revising paragraph 6 and Instructions to read as follows:

Note: The text of Form N-2 does not, and these amendments will not, appear in the Code of Federal Regulations.

FORM N-2

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Item 10. Capital Stock, Long-Term Debt, and Other Securities

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6. Credit ratings: If the Registrant, any selling security holder, any underwriter, or any member of a selling group in a registered offering uses a credit rating, as that term is defined in section 3(a)(60) of the Exchange Act [15 U.S.C. 78c(a)(60)], from a credit rating agency, as that term is defined in section 3(a)(61) of the Exchange Act [15 U.S.C. 78c(a)(61)], with respect to the registrant or a class of securities issued by the Registrant, in connection with a registered offering, the Registrant shall disclose the following information for each rating used:

a. the identity of the credit rating agency assigning the credit rating and whether such organization is a nationally recognized statistical rating organization as that term is defined in section 3(a)(62) of the Exchange Act [15 U.S.C. 78c(a)(62)];

b. the credit rating assigned;

c. the relative rank of the credit rating within the assigning credit rating agency's overall classification system;

d. the date the credit rating was assigned;

e. the credit rating agency's definition or description of the category in which the credit rating agency rated the class of securities;

f. the identity of the party who is compensating the credit rating agency for providing the credit rating;

g. a description of any other non-rating services provided by the credit rating agency or its affiliates to the Registrant or its affiliates, and if such other services have been provided, separate disclosure of the fee paid for the credit rating required to be disclosed and the aggregate fees paid for any other non-rating services provided during

the Registrant's last completed fiscal year and any subsequent interim period up to the date of the filing;

h. all material scope limitations of the credit rating;

i. how any contingencies related to the securities are or are not reflected in the credit rating;

j. any published designation reflecting the results of any other evaluation done by the credit rating agency in connection with the credit rating, along with an explanation of the designation's meaning and the relative rank of the designation;

k. any material differences between the terms of the securities as assumed or considered by the credit rating agency in rating the securities and (1) the minimum obligations of the security as specified in the governing instruments of the security; and (2) the terms of the securities as used in any marketing or selling efforts;

l. a statement informing investors that a credit rating is not a recommendation to buy, sell, or hold securities; that it may be subject to revision or withdrawal at any time by the assigning credit rating agency; that each credit rating is applicable only to the specific security to which it applies; and that investors should make their own evaluation as to whether an investment in the security is appropriate;

m. A description of a final rating obtained by the registrant but not used in connection with the offering, including the information set forth in paragraphs (a)-(l) of this item; and

n. a description of any preliminary rating of the class of securities that received the rating being disclosed pursuant to this paragraph 6 if such preliminary rating was obtained by or on behalf of the Registrant and received from a credit rating agency

other than the credit rating agency that provided the credit rating disclosed pursuant to this paragraph 6. Such description shall include:

(1) the identity of the credit rating agency that determined or indicated the rating and an indication of whether such organization is a nationally recognized statistical rating organization as that term is defined in section 3(a)(62) of the Exchange Act [15 U.S.C. 78c(a)(62)];

(2) the preliminary rating determined or indicated or a description of the category or range of categories in which the preliminary credit rating agency placed the class of securities;

(3) the date the preliminary rating was conveyed to the Registrant, any party acting on the Registrant's behalf, or the underwriters;

(4) the relative rank of the preliminary rating within the preliminary credit rating agency's overall classification system;

(5) any material scope limitations of the preliminary rating; and

(6) any material differences between the terms of the securities on which the preliminary rating was determined and the terms of the securities on which the final rating was determined.

Instructions:

1. Disclosure is not required by paragraph 6 of this item if the only disclosure of a credit rating in a filing with the Commission relates to changes to a credit rating, liquidity of the Registrant, the cost of funds of a Registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering.

2. If a Registrant includes information about credit ratings in a prospectus pursuant to paragraph 6 of this item and the rating has not yet been issued in final form, the Registrant shall update the description of each rating as set forth below:

a. If a change in a rating, including the assignment of a final rating, already included in the prospectus is available subsequent to the filing of the registration statement, but prior to its effectiveness, the Registrant shall convey to the purchaser the rating change.

b. If an additional rating, including a final rating, that the Registrant is required to disclose, or if a material change in a rating already included, becomes available during any period in which offers or sales are being made, the Registrant shall disclose such additional rating or rating change by means of a post-effective amendment, or supplement to the prospectus pursuant to Rule 497 under the 1933 Act [17 CFR 230.497].

3. For purposes of paragraph 6 of this item, a credit rating is "used in connection with a registered offering of securities" in circumstances, including but limited to, when such rating is used in connection with an unregistered offering of securities, and the securities offered privately are subsequently exchanged for substantially similar registered securities even if the credit rating was not used in connection with the registered exchange offering.

4. A preliminary rating includes any rating that is not published, any range of ratings, any oral or other indications of a potential rating or range of ratings and all other preliminary indications of a rating. A preliminary rating includes ratings on a particular structure of a security even if not tied to a specific registrant or group of assets.

Disclosure of a preliminary rating is required even if there have been changes to the security for which a final rating is disclosed pursuant to this paragraph 6.

5. For purposes of determining whether disclosure of any preliminary rating or unused final rating is required, a credit rating is obtained from a credit rating agency if it is solicited by or on behalf of a Registrant from a credit rating agency.

6. If the prospectus relates to securities other than senior securities of the Registrant that have been assigned a credit rating by a credit rating agency, the information required by this paragraph may be provided in the Statement of Additional Information unless the rating criteria will materially affect the investment policies of the Registrant (e.g., if the rating agency establishes criteria for selection of the Registrant's portfolio securities with which the Registrant intends to comply), in which case it should be included in the prospectus.

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By the Commission.

Elizabeth M. Murphy
Secretary

Dated: October 7, 2009

Corrected

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 220

[Release Nos. 33-9071; 34-60798; IC-28943; File No. S7-25-09]

RIN 3235-AK45

CONCEPT RELEASE ON POSSIBLE RESCISSION OF RULE 436(g) UNDER THE SECURITIES ACT OF 1933

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments; correction.

SUMMARY: As part of the Commission's review of the role of credit rating agencies in the operation of the securities markets, and in light of disclosure regarding credit ratings that is being proposed in a companion release, the Commission is seeking comment on whether Rule 436(g) under the Securities Act of 1933 should be rescinded. In particular, we would like to understand whether there continues to be a sufficient basis to exempt nationally recognized statistical rating organizations from Section 7 and 11 of the Securities Act.

DATES: Comments should be received on or before December 14, 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/concept.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-25-09 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 S7-25-09. 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 Web site (http://www.sec.gov/rules/concept.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Blair F. Petrillo, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: In a companion release,[1] the Commission is proposing amendments to rules under the Securities Exchange Act of 1934[2] and

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1 See the proposing release considered by the Commission on September 17, 2009 regarding proposed disclosure regarding credit ratings in registration statements.

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

Regulation S-K,[3] and forms under the Securities Act of 1933,[4] the Exchange Act and the Investment Company Act of 1940[5] to require disclosure by registrants regarding credit ratings in their registration statements under the Securities Act and the Exchange Act, and by closed-end management investment companies in registration statements under the Securities Act and the Investment Company Act, if the registrant uses the rating in connection with a registered offering. In connection with the proposed amendments, we are soliciting comment on whether the Commission should rescind Rule 436(g) under the Securities Act.[6]

I. Introduction

We are considering whether we should propose rescinding Rule 436(g) under the Securities Act. Rule 436(g) provides an exemption for credit ratings provided by nationally recognized statistical rating organizations ("NRSROs") from being considered a part of the registration statement prepared or certified by a person within the meaning of Sections 7[7] and 11[8] of the Securities Act. The exemption currently does not apply to credit rating agencies that are not NRSROs. We are concerned that there is no longer a sufficient basis to exempt NRSROs and to distinguish between NRSROs and credit rating agencies that are not NRSROs for purposes of liability under Section 11 of the Securities Act. Rescinding the exemption would cause NRSROs to be included in the liability

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3 17 CFR 229.10 through 1123.

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

5 15 U.S.C. 80a-1 et seq.

6 17 CFR 220.436(g).

7 15 U.S.C. 77g.

8 15 U.S.C. 77k.

scheme for experts set forth in Section 11, as is currently the case for credit rating agencies that are not NRSROs.

We solicit comment on what impact removing the rule would have on markets and their participants. Scrutiny of credit ratings and the process of obtaining a credit rating appears to have increased as a result of the turmoil in the credit markets over the past few years. As discussed below and in the companion release proposing to require disclosure regarding credit ratings, as credit ratings have become more significant, we have sought to protect investors while recognizing the role credit ratings play in the offer and sale of securities. In that regard, we are now exploring whether Rule 436(g) is still appropriate in light of the growth and development of the credit rating industry and investors' use of credit ratings. We are mindful of the potential significant impact that rescinding Rule 436(g) could have on registrants, NRSROs and other credit rating agencies, investors and the financial markets in general, and we seek comment on any burdens or benefits that may result. Therefore, we are requesting input on the possible elimination of Rule 436(g) from all market participants and other members of the public.

A. Section 7 and Section 11 of the Securities Act

Section 7 of the Securities Act provides that "[i]f any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement."[9] These persons are referred to as experts for purposes of the

[9] See Section 7 of the Securities Act in note 7 above.

securities laws. Registrants are required to file the consents of experts as exhibits to their registration statements.

Section 11 of the Securities Act imposes liability on various parties who are involved in the preparation of registration statements filed under the Securities Act. Section 11 was enacted so that those persons with a direct role in a registered offering would be subject to a rigorous standard of liability to assure that disclosure regarding securities is accurate.[10] It was also designed to give investors additional protection not available under common law due to the barriers to recovery presented by the common law fraud requirements of scienter, reliance and causation. Liability under Section 11 extends to the issuer, officers and directors who sign the registration statement, underwriters, and persons who prepare or certify any part of the registration statement or who are named as having prepared or certified a report or valuation for use in connection with the registration statement.[11] Section 11 provides that an expert may be held liable if, when the registration statement became effective, the part of the registration statement purporting to be made on his or her authority contained an untrue statement of material fact or omitted to state a material fact necessary to make the statements therein not misleading, unless he can establish that he had, after reasonable investigation, reasonable grounds to believe and did believe at the time such part of the registration statement became effective, that the statements in the registration statement were true and that there was no omission to state a material fact necessary to make the statements therein not

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[10] See William O. Douglas and George E. Bates, The Federal Securities Act of 1933, 43 Yale L.J. 171 (1933); Herman & Maclean v. Huddleston, 459 U.S. 375 (1983).

[11] See Section 11 of the Securities Act in note 8 above.

misleading.[12] Under Section 11, persons other than the issuer may be able to assert as a defense to Section 11 liability that they relied upon an expert that consented to be named in the registration statement (the "experts' defense").[13]

B. Background of Rule 436(g)

Securities Act Rule 436(g) provides that a credit rating assigned by an NRSRO to a class of debt securities, a class of convertible debt securities, or a class of preferred stock is not a part of a registration statement prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act. With one limited exception arising in connection with our Multijurisdictional Disclosure System with Canada, there is no similar provision for credit rating agencies that are not NRSROs.[14] As a result, disclosure of credit ratings in a registration statement currently results in different treatment for NRSROs and for credit rating agencies that are not NRSROs. By virtue of Rule 436(g), an NRSRO is not subject to liability under Section 11 even if its rating is disclosed in a registration statement. A registrant is not required to file consent of an NRSRO with its registration statement, and the experts' defense is not available to other persons involved in the registration statement, regardless of whether they relied on the expertized portion of the registration statement. By contrast, if a credit rating assigned by a credit rating

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12 See Section 11(b) of the Securities Act [15 U.S.C. 77k(b)].

13 See Section 11(b)(3)(C) of the Securities Act [15 U.S.C. 77k(b)(3)(C)].

14 Rule 436(g) applies to ratings disclosed in Form F-9 [17 CFR 239.39.] registration statements by ratings organizations specified in the Instruction to paragraph (a)(2) of General Instruction I of that form. Form F-9 is the Multijurisdictional Disclosure System ("MJDS") form used to register investment grade debt or preferred securities under the Securities Act by eligible Canadian issuers. Under Form F-9, securities are deemed to be investment grade if, at the time of sale, at least one NRSRO or Approved Rating Organization, as specified in the above-referenced Instruction, has rated the securities in a category signifying investment grade.

agency that is not an NRSRO is disclosed in a registration statement, the credit rating agency would be subject to potential liability under Section 11. The registrant is required to file the credit rating agency's consent with its registration statement, and the experts' defense may be available.

In 1977, the Commission published a concept release announcing that it was considering a change in policy to permit disclosure of credit ratings in documents filed with the Commission.[15] In that release the Commission solicited comment on whether an NRSRO is the type of person from whom a consent would be required under Section 7 of the Securities Act (thereby also subjecting it to liability under Section 11). That release contained a list of questions regarding the Commission's then-current policy of discouraging the disclosure of credit ratings and whether the Commission should change that policy or retain it.[16] According to the 1981 release ultimately announcing the Commission's change in position, commenters on the 1977 release generally were opposed to subjecting NRSROs to liability under Section 11 and argued, among other things, that it would interfere with the substance and timing of the registration process, that it would result in changes to the way credit ratings were issued, and that it would

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15 See Disclosure of Security Ratings, Release No. 33-5882 (Nov. 9, 1977) [42 FR 58414].

16 The Commission sought comment on two questions regarding NRSROs and liability under Section 11 of the Securities Act:

> A. (5) Is an entity issuing a security rating the type of person referred to in Section 7 of the Securities Act of 1933 whose consent is required to be filed by the issuer of the security? If so, what costs or other burdens may be associated with the issuer obtaining a consent from the rating agency or, in the case of multiple ratings, from all the rating agencies involved? Assuming, arguendo, that such consents may be waived by the Commission under Section 7, should waivers be granted and, if so, under what circumstances?
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> A. (6) What impact may result, directly or indirectly, from a rating entity being subject to Section 11 under the Securities Act of 1933, with respect to its rating being disclosed in a prospectus?

See the 1977 Release in note 15 above.

result in increased costs and uncertainty over the scope of liability.[17] The NRSROs in existence in 1977 indicated that they would not provide consents to be named in the registration statement.[18] The 1981 release also indicated that commenters were concerned that requiring consent and subjecting NRSROs to Section 11 liability would affect their independence if they were "participants" in the offering and would lessen the quality of ratings because NRSROs likely would rely only on objective, quantifiable information.[19] The commenters in favor of subjecting NRSROs to liability under Section 11 cited the incentive that NRSROs would take more care in determining ratings.[20]

As noted above, in 1981, the Commission announced the shift in policy to permit, but not require, disclosure of credit ratings in registration statements. In addition, the Commission proposed Securities Act Rule 436(g) to provide that a security rating assigned to a class of debt securities, a class of convertible debt securities, or a class of preferred stock by an NRSRO would not be considered a part of the registration statement prepared or certified by a person within the meaning of Section 7 and Section 11 of the Securities Act.[21] In proposing Rule 436(g), the Commission noted that if NRSROs refused to provide consents, then disclosure of credit ratings would not be provided even if permitted by the Commission. As a result, the Commission proposed Rule 436(g) in order to make its new policy position on the disclosure of credit ratings

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17 See Disclosure of Ratings in Registration Statements, Release No. 33-6336 (Aug. 6, 1981) [46 FR 42024].

18 Id.

19 Id.

20 Id.

21 Id.

meaningful.[22] The Commission also cited the fact that NRSROs already were subject to substantial liability under the antifraud provisions of the securities laws and to regulation by the Commission under the Investment Advisers Act of 1940.[23] The Commission then expected that, because of antifraud liability, NRSROs would be required "to adhere to the highest professional standards in determining security ratings."[24] When Rule 436(g) was adopted in 1982, the Commission stated its belief that exempting NRSROs from liability under Section 11 of the Securities Act was appropriate and cited the rationale provided in the proposing release that practical problems would arise in obtaining the consents and that NRSROs were subject to the antifraud provisions of the securities laws.[25]

In 1986, the Commission proposed to expand the Rule 436(g) exemption to include ratings assigned by NRSROs to money market funds.[26] In proposing the rule, the Commission stated "because money market fund shares are equity securities, a money market fund which has received an NRSRO rating must obtain the consent of the NRSRO or seek a waiver of consent under Rule 437 [17 CFR 230.437] before using the rating in its registration statement."[27] The Commission did not act on this proposal, and Rule 436(g) was not amended.

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22 Id.

23 15 U.S.C. 80b-1 et seq. At the time Rule 436(g) was proposed, NRSROs generally were required to register as investment advisers. Congress provided an exclusion from the Advisers Act for NRSROs when it passed the Credit Rating Agency Reform Act of 2006, Pub. L. No. 109-291, 120 Stat. 1327 (Sept. 29, 2006). See Section 202(a)(11)(F) of the Advisers Act [15 U.S.C. 80b-202(a)(11)(F)].

24 See Disclosure of Ratings in Registration Statements in note 17 above.

25 See Adoption of Integrated Disclosure System, Release No. 33-6383 (Mar. 3, 1982) [47 FR 11380].

26 See Disclosure of Security Ratings by Money Market Funds, Release No. 33-6630 (March 21, 1986) [51 FR 9838].

27 Id.

In 1994, the Commission proposed to require disclosure about credit ratings in registration statements.[28] In the 1994 release, the Commission noted that the policy announced in 1981 created a distinction between NRSROs and credit rating agencies that were not NRSROs. The Commission noted that the distinction was most significant in the context of Rule 436(g). While an NRSRO would not be required to provide a consent if its rating was disclosed in a registration statement pursuant to Rule 436(g), "[a]ny non-NRSRO rating organization must furnish a consent and take on expert liability under the Securities Act if its rating is included in the registration statement and prospectus."[29]

The 1994 release did not propose any change to Rule 436(g), but it did solicit comment on whether there should continue to be a distinction between NRSROs and credit rating agencies that are not NRSROs for purposes of Rule 436(g). The release also sought comment on whether Rule 436(g) should be expanded to include credit rating agencies that are not NRSROs or whether the rule should be rescinded. Commenters generally were opposed to subjecting NRSROs and other credit rating agencies to liability under Section 11 of the Securities Act. In particular, one commenter provided several arguments as to why Section 11 liability was not appropriate for NRSROs.[30] Among other things, the commenter argued that: ratings published by NRSROs "are expressions of opinion about risk, not statements," and even if the security defaults in an individual case, it would not necessarily be an indication that the opinion was wrong;[31]

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28 See Disclosure of Security Ratings, Release No. 33-7086 (Aug. 31, 1994) [59 FR 46304].

29 Id.

30 See letter regarding File No. S7-24-94 of Moody's Investor Service, Inc. (Dec. 5, 1994). See also letter regarding File No. S7-24-94 of Fitch Investors Service Inc. (Dec. 6, 1994).

31 Id.

Section 11 liability would violate the NRSROs' First Amendment rights;[32] and Section 11 liability could eliminate the disclosure of security ratings in prospectuses.[33] The Commission did not act on the proposals in the 1994 release.

In July 2008, the Commission proposed to amend Rule 436(g) to extend the exemption to ratings provided by any "credit rating agency," as defined in 15 U.S.C. 78c(a)(61),[34] rather than only to ratings provided by NRSROs. The Commission cited its belief that, among other things, amending Rule 436(g) would foster competition between credit rating agencies. Only three commenters addressed the proposed amendment to Rule 436(g). One commenter opposed it because credit rating agencies that are not NRSROs are not subject to Commission oversight.[35] Another commenter supported extending the exemption in Rule 436(g) to credit rating agencies that are not NRSROs.[36] That commenter did not believe references to ratings should be considered "expertized." The commenter also cited the costs that registrants have to incur absent the amendment of Rule 436(g) to obtain a consent from a credit rating agency that was not an NRSRO. In addition, the commenter discussed the possibility that a rating obtained from a credit rating agency that was not an NRSRO would be omitted, thus offering investors an incomplete view of the ratings for a particular security. A third commenter objected to

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32 NRSROs have taken the position that they "publish" their ratings and that their ratings are protected under the First Amendment. Cases in which NRSROs have asserted this position include: Compuware Corp. v. Moody's Inv. Servs., Inc., 499 F.3d 520 (6th Cir. 2007); Jefferson County Sch. Dist. No. R-1 v. Moody's Inv. Servs., Inc., 175 F.3d 848 (10th Cir. 1999); First Equity Corp. v. Standard & Poor's Corp., 690 F.Supp. 256 (S.D.N.Y. 1988); and Abu Dhabi Commer. Bank v. Morgan Stanley & Co. et al., 2009 U.S. Dist. Lexis 79607 (S.D.N.Y. 2009).

33 See note 30 above.

34 See Security Ratings Release No. 33-8940 (July 1, 2008) [73 FR 40106].

35 See letter regarding File No. S7-17-08 of American Securitization Forum (Sept. 5, 2008), at http://www.sec.gov/comments/s7-18-08/s71808.shtml.

36 See letter regarding File No. S7-17-08 of the American Bar Association (Oct. 10, 2008), at http://www.sec.gov/comments/s7-18-08/s71808.shtml.

requiring disclosure of credit rating agency information without the consent of the relevant credit rating agency but did not cite any concerns about liability.[37] The Commission did not adopt the proposal.

In April 2009, the Commission hosted a roundtable regarding the oversight of credit rating agencies. In connection with the roundtable, the Commission also solicited comment on the topics to be covered at the roundtable, including the appropriate oversight and liability for NRSROs and credit rating agencies that are not NRSROs.[38] One commenter suggested that the Commission reconsider the exemption from liability for NRSROs.[39] That commenter also expressed skepticism regarding the First Amendment arguments asserted by NRSROs against being held liable for their credit ratings because credit rating agencies have become involved in the structuring of complex securities and no longer rate most or all securities, regardless of whether or not they have been hired to do so.[40] In addition, another commenter commissioned a white paper in connection with the roundtable discussion.[41] The paper argues that in order to make NRSROs more accountable, they must be subject to a credible threat of liability.

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37 See letter regarding File No. S7-17-08 of Realpoint LLC (Sept. 8, 2008), at http://www.sec.gov/comments/s7-18-08/s71808.shtml. The commenter appears to be concerned with the potential negative ramifications for subscriber-paid credit rating agencies whose ratings are disclosed publicly in a registration statement.

38 See Roundtable on Oversight of Credit Rating Agencies, Release No. 34-59753 (Apr. 13, 2009) [74 FR 17698].

39 See Statement regarding File No. S7-04-09 of Investment Company Institute (Apr. 15, 2009), at http://www.sec.gov/comments/4-579/4-579.shtml.

40 Id.

41 See Frank Partnoy, Rethinking Regulation of Credit Rating Agencies: An Institutional Investor Perspective, April 2009, at http://www.cii.org/UserFiles/file/CRAWhitePaper04-14-09.pdf (white paper commissioned by Council of Institutional Investors).

Some commenters expressed concern regarding any liability that would allow for second-guessing of judgments made by credit rating agencies.[42]

II. Solicitation of Comment on Rescinding Rule 436(g)

In light of market developments and our proposal to require disclosure of credit ratings and information about credit ratings, we are considering proposing to rescind Rule 436(g) under the Securities Act, and we solicit comment on what impact removing the rule would have on market participants. If we were to rescind Rule 436(g), then NRSROs and credit rating agencies that are not NRSROs would be treated in the same manner for purposes of liability under Section 11 of the Securities Act if their credit ratings are disclosed in registration statements. If we adopt the amendments to require certain disclosure regarding credit ratings in registration statements, and if we were to rescind Rule 436(g), then a registrant who uses a credit rating assigned by an NRSRO or a credit rating agency that is not an NRSRO in connection with a registered offering would be required to file the consent of the rating agency as an exhibit to its registration statement. As a result, both NRSROs and credit rating agencies that are not NRSROs would be subject to potential liability under Section 11 of the Securities Act.

We believe that it may be appropriate to rescind Rule 436(g) for four primary reasons. First, we believe that the original reasons supporting adoption of Rule 436(g) may no longer provide a sufficient basis to continue to provide the exemption to NRSROs. If this is the case, then we believe it is appropriate to reconsider whether NRSROs should continue to be insulated from liability under Section 11. In the nearly

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[42] See e.g. statement regarding File No. S7-04-09 of Standard & Poor's (Apr. 15, 2009) at http://www.sec.gov/comments/4-579/4-579.shtml (noting that some percentage of securities will default and that such a default does not automatically mean the credit rating was inappropriate).

30 years that Rule 436(g) has been in place, the credit ratings industry has grown dramatically in terms of the number of ratings issued and the types of securities being rated.[43] We believe that it is now appropriate to revisit the purposes underlying the adoption of Rule 436(g), particularly in light of the disclosure regarding credit ratings that we are proposing in a companion release. The Commission, in proposing Rule 436(g), stated that the rule was necessary to make its policy of permitting voluntary disclosure about security ratings meaningful. Without the exemption provided by Rule 436(g), the Commission was concerned that registrants would not voluntarily disclose security ratings in their registration statements because of the liability concerns of the NRSROs who provided the ratings. If we adopt the proposal to require disclosure regarding credit ratings if they are used in connection with a registered offering of securities, then we believe the rationale cited by the Commission in 1981 is no longer applicable because we would no longer need to provide a means to encourage disclosure about credit ratings. Registrants would be required to provide such disclosure if they use a credit rating in connection with a registered offering. In addition, when Rule 436(g) was adopted, the Commission believed that the liability that was already applicable to NRSROs was sufficient for the protection of investors.[44] At the time, the Commission noted that NRSROs were subject to liability under both Section 10(b) of the Exchange

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43 See Roger Lowenstein, Triple-A Failure, N.Y. Times Magazine, Apr. 27, 2008 (discussing the dramatic growth in revenues of NRSROs). See also Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agenices (July 2008), at http://www.sec.gov/news/studies/2008/craexamination070808.pdf (noting that some rating agencies struggled with the substantial growth of the number of deals to be rated beginning in 2002); Marco Pagano and Paolo Volpin, Credit Ratings Failures: Causes and Policy Options, Working Paper (Feb. 9, 2009), at http://www.italianacademy.columbia.edu/publications/working_papers/2008_2009/pagano_volpin_seminar_IA.pdf (discussing the role of credit rating agencies in the growth of the market for structured products).

44 See note 17 above.

Act and the Investment Advisers Act.[45] As noted above, NRSROs are no longer required to register under the Investment Advisers Act.[46] NRSROs remain subject to liability under Section 10(b) of the Exchange Act, but they are held liable infrequently.[47] In addition, questions could be raised about whether NRSROs' performance has "adhere[d] to the highest professional standards in determining security ratings" that the Commission expected when Rule 436(g) was adopted.[48]

Second, we believe that when credit ratings are used to sell securities, investors rely on NRSROs and other credit rating agencies as experts and that it may be appropriate for our liability scheme for experts to apply to them. In our view, NRSROs represent themselves to registrants and investors as experts at analyzing credit and risk.[49] Investors rely on the information provided by credit rating agencies for a key part of their investment decision. NRSROs describe the credit ratings that they provide as opinions with respect to the registrant or security of the registrant, and the Commission notes that other professionals provide opinions upon which investors rely, such as legal opinions, valuation opinions, fairness opinions and audit reports, and we treat these opinions as subject to the Securities Act's provisions for experts, including our requirements that registrants include the consents of such professionals if their reports are referenced in

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45 See note 23 above.

46 Id.

47 See e.g. Partnoy in note 41 above (noting that credit rating agencies "have been sued relatively infrequently, and rarely have been held liable").

48 See note 24 above and the related discussion.

49 We are aware that NRSROs generally do not consider themselves as experts because they believe they are providing opinions on risk. See letter of Moody's Investor Service, Inc. in note 30 above. We do not at this time believe, however, that the nature of the credit rating provided by a credit rating agency, including an NRSRO, is in and of itself so distinct from the parts of registration statements provided by other experts that they should be subject to a different standard of liability.

registration statements. It appears to us that NRSROs and other credit rating agencies are experts similar to other parties subject to liability under Section 11 and that it may no longer be consistent with investor protection to exempt NRSROs from the provisions of the Securities Act applicable to experts.[50]

Third, we believe that rescinding Rule 436(g), and therefore potentially increasing the risk of liability under the federal securities laws, could significantly improve investor protection. Enhancing the accountability of NRSROs may help to address concerns about the quality of credit ratings. In light of the proposal to require mandatory disclosure of information about credit ratings, rescinding Rule 436(g) could encourage both NRSROs and credit rating agencies that are not NRSROs to improve the quality of their ratings and analysis in order to reduce the risk of liability under Section 11. An improvement in the quality of credit ratings should, consistent with the goals of the federal securities laws, better protect investors. Of course, we are mindful of the possibility that a risk of greater NRSRO liability as a result of subjecting NRSROs to Section 11 may undermine competition if credit rating agencies decide that they are unable to bear the risk of liability and thus exit the ratings business. Similarly, firms considering entering the ratings business may reconsider in the face of an increased risk of legal liability. The threat of liability may particularly affect smaller, less-established rating agencies that may find it more difficult to negotiate for indemnification or bear the risk of additional liability. It also is possible that, in response to the rescission of Rule

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50 In the merger context, for example, if the fairness opinion provided by the investment banker is disclosed in the registration statement, then the party preparing the opinion must consent to be named as an expert in the registration statement. We note that fairness opinions generally include language that the financial advisor relied upon information provided by the parties to the business combination. In this regard, see In re Global Crossing, Ltd. Sec. Litig., 313 F.Supp. 2d 189 (S.D.N.Y. 2003) and In re AOL Time Warner, Inc. Sec. and ERISA Litig., 381 F.Supp 2d 192 (S.D.N.Y. 2004). See also Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991).

436(g), registrants would begin to take greater advantage of private placements instead of public offerings.

Finally, we believe that the distinction in Rule 436(g) between NRSROs and credit rating agencies that are not NRSROs may contribute to competitive disadvantages. We understand that investors rely on credit ratings issued by NRSROs as much as, if not more than, credit ratings issued by credit rating agencies that are not NRSROs, particularly because the NRSROs dominate the credit rating market.[51] Distinguishing between NRSROs and credit rating agencies that are not NRSROs may create a competitive barrier for those credit rating agencies because they are subject to a higher standard of liability under the securities laws than NRSROs. For credit ratings disclosed in registration statements, it may be more time consuming or costly for a credit rating agency that is not an NRSRO to provide a credit rating to a registrant than it would be for an NRSRO to provide a credit rating because of the potential for liability under Section 11 for the credit rating agency that is not an NRSRO. As discussed above, in 2008 we proposed to amend Rule 436(g) to extend the exemption to cover ratings issued by credit rating agencies that are not NRSROs in order to foster competition in the credit rating agency industry. We did not at that time, however, propose to require disclosure regarding credit ratings. In light of the proposal to require disclosure regarding credit ratings used in connection with registered offerings, we believe that the rationale for extending the exemption to credit rating agencies that are not NRSROs may be achieved by eliminating Rule 436(g) and subjecting both NRSROs and credit rating agencies that

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51 For "corporate issuers" in 2007, for example, Standard and Poor's, Moody's, and Fitch issued 39%, 33%, and 21% of outstanding credit ratings, respectively, for a total of 93% of outstanding credit ratings. See Annual Report on Nationally Recognized Statistical Rating Organizations (2008), at http://www.sec.gov/divisions/marketreg/ratingagency/nrsroannrep0608.pdf.

are not NRSROs to potential liability under Section 11 of the Securities Act. We now believe this approach to fostering competition may be preferable in order to protect investors by including the proposed disclosure of the credit rating within the liability scheme of Section 11 of the Securities Act to which similar disclosure is subject. At the same time, we are mindful that the increased risk of legal liability could undercut competition if certain NRSROs are unable to bear the risk of increased liability.

We are aware that rescinding Rule 436(g) may have significant impact on the market and on market participants. We want to be cognizant of all the implications of our proposed amendments to require disclosure regarding credit ratings as well as a possible future proposal to rescind Rule 436(g). Therefore we are soliciting comments on all of the potential implications that a rescission of Rule 436(g) might have.

We solicit comment below on whether rescinding Rule 436(g) might increase reliance on credit ratings. Preliminarily, we do not believe that requiring registrants to obtain consents from NRSROs and treating NRSROs as experts under the federal securities laws should increase reliance on credit ratings. Rescinding Rule 436(g) would not change the fundamental nature of what a credit rating is. The information credit rating agencies provide is already being relied upon by investors. Rescinding Rule 436(g) would require that, before such information can be used in connection with a registered offering, the registrant would have to obtain the NRSROs' consent to take

responsibility for it (in addition to any liability that would be applicable pursuant to Section 10(b) of the Exchange Act).[52]

While we believe that elimination of Rule 436(g) may have important benefits, as discussed above, we also recognize that NRSROs have in the past expressed an unwillingness to be subject to Section 11 liability. However, we are also aware that providing credit ratings for registrants is the key component of revenues for NRSROs. As a result, we seek comment on how NRSROs would adapt if Rule 436(g) were rescinded and whether they would, in fact, stop issuing credit ratings permanently.

If we were to propose the elimination of Rule 436(g) and require disclosure regarding credit ratings as proposed, we recognize that obtaining and filing consents of all credit rating agencies may raise some practical and timing concerns. Assuming NRSROs are willing to grant consents, we do not wish to create a process that is unduly costly and burdensome or that unnecessarily delays completion of offerings. We have outlined below a potential approach to the question of when consents would be required to be filed and when a new consent would be required to be obtained. We solicit comment on whether this approach would be workable, whether there is a better approach

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52 In the companion release proposing to require disclosure regarding credit ratings, we are proposing to require disclosure of preliminary ratings under certain circumstances. At this stage, we preliminarily believe we should not require consents regarding disclosure of preliminary ratings or unused final ratings. The preliminary rating may be based on preliminary information and may not have been subject to all of the credit rating agency's internal processes for determining credit ratings.

and what other changes to our rules may have to be made in order for this process to work.[53]

The question of when consents need to be filed may turn, in part, on what the credit rating relates to and what form is being used to register the offering. We believe an offering registered on Form S-1, for example, would require a consent for the offering, and the consent would need to be filed prior to the effectiveness of the registration statement. In the context of registered offerings made on a delayed or continuous basis in reliance on Rule 415 under the Securities Act,[54] prospectus supplements are used rather than stand-alone registration statements. As a result, the following different types of ratings may result in different consent filing requirements: (1) a credit rating that is applicable to the issuer and does not necessarily change with each offering; (2) a credit rating that applies to a specific program or type of security, such as a credit rating assigned to a medium-term note program or one for long-term debt and one for short-term debt; and (3) credit ratings that are specific to each issuance of a security. In the first instance, we believe the rating would be disclosed in the prospectus that is part of a registration statement, and the consent would need to be filed prior to the time the registration statement is declared effective.

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53 As noted in the companion release proposing to require disclosure regarding credit ratings, the proposed disclosure requirement regarding credit ratings would not be triggered if the only disclosure of a credit rating in a filing with the Commission is related to changes to a credit rating, the liquidity of the registrant, the cost of funds for a registrant or the terms of agreements that refer to credit ratings, and the credit rating is not otherwise used in connection with a registered offering. We preliminarily believe that a consent would not be required for such disclosure.

54 17 CFR 230.415.

Rule 430B[55] and Rule 430C[56] under the Securities Act deem information contained in prospectus supplements to be part of and included in the registration statement. The prospectus supplement filing does not create a new effective date for experts, and we believe it would not require the filing of a consent, unless the prospectus supplement (including incorporated Exchange Act reports such as current reports on Form 8-K) includes a new report or opinion of an expert. Thus, in the case of an issuer rating or a rating on a class of securities such as a medium-term note facility, we believe only a new or changed rating issued after the date of the last consent by the rating agency or change in any other information as to which the rating agency is an expert would require a new consent. We believe a new consent would always be required in the case of a credit rating that is specific to each issuance of a security.[57]

Request for Comments

We request comment below on specific aspects of a possible proposal to rescind Rule 436(g). While we have grouped comments by how any such proposal might affect a group of market participants, we encourage all market participants to comment on all aspects of this concept release.

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55 17 CFR 230.430B.

56 17 CFR 230.430C.

57 In the event a new consent is required, we anticipate that the consent could be filed by a post-effective amendment to the registration statement or by filing an Exchange Act report, such as an annual report on Form 10-K or a report on Form 8-K or Form 6-K, which is incorporated by reference into the registration statement. The consent would need to be filed prior to the filing of a prospectus under Rule 424 of the Securities Act. Rule 424 requires a prospectus to be filed not later than the second business day following the earlier of the date of the determination of the offering price or the date the prospectus is first used after effectiveness in connection with a public offering or sale of securities. We also anticipate that a new consent would be required for an update pursuant to Section 10(a)(3) of the Securities Act. See 15 U.S.C. 77j(a)(3).

Impact on Registrants and Access to Capital

- If we were to subject all credit rating agencies to Sections 7 and 11 of the Securities Act by rescinding Rule 436(g), would registrants be able to obtain the consent required to use ratings in connection with registered offerings of rated securities? What effects would rescinding Rule 436(g) have on the practice of offering securities? In particular, would doing so affect the use of credit ratings in registered offerings, affect investor reliance on credit ratings, affect the cost of obtaining a credit rating, or affect the decisions of registrants and investors regarding whether to raise capital in registered or unregistered offerings?
- Would access to capital be disrupted if Rule 436(g) were rescinded, or would market participants adjust their practices to accommodate the change? How long would it take market participants to adjust their practices? Would a long phase-in period help to mitigate any disruptions in access to capital? Why or why not? Would a phase-in period of 12 months be sufficient? How long would the phase-in period need to be?
- Would registrants be able to obtain the consent if the rating is not available until after the registration statement goes effective? Are there circumstances where the rating would be available prior to effectiveness?
- Would smaller companies be able to afford any increased costs to obtain a credit rating? What alternatives would these companies have for raising capital? What could we do to help limit any such impact?

- If we propose to rescind Rule 436(g), should we distinguish among issuers of corporate debt, issuers of structured products and closed-end management investment company securities? Are there differences among the markets for corporate debt, structured products and closed-end management investment companies that justify treating the same NRSRO as an expert for purposes of Sections 7 and 11 of the Securities Act for ratings issued on some kinds of securities but not others?
- If the proposal to require disclosure regarding credit ratings is adopted, and we do not eliminate Rule 436(g), officers, directors and underwriters will not be able to rely on NRSROs as experts with respect to the disclosure of credit ratings. Is this appropriate? Why or why not?
- Are there circumstances where a credit rating agency issuing a preliminary rating should be treated as an expert?
- Practically speaking, how would the filing of a consent work in the context of a shelf offering if we propose to rescind Rule 436(g)? Would the approach outlined above work? What other changes to our rules would be necessary?
- Do rating agencies view the issuance of each security issued by a company they rate, including each issuance within a class of securities, as the issuance of a new rating? Do investors or registrants view the issuance of each security by a company as the issuance of a new rating by the rating agency? For instance, does each issuance under a medium-term note facility constitute the issuance of a new rating that should require a consent?

- In the context of an issuer rating, are there concerns for the rating agencies with not having to provide a consent each time the registrant issues a new security?
- We believe investors would view a credit rating as current when it is used in connection with an offering of securities off a shelf registration statement. If that is the case, should we require a new consent for each take-down regardless of the type of rating or type of security? If issuing a new consent each time would be too burdensome, should we propose a rule that would deem the consent filed each time a take-down is made?
- Should a new consent be required if the company has been put on a watch list or the company has been given a positive outlook or negative outlook designation, or there has been some other change other than an actual change in the rating?
- If the proposal to require disclosure regarding credit ratings is adopted, regardless of whether we rescind Rule 436(g), would market practices develop in the context of a take-down from a shelf registration statement where underwriters or other parties would require the credit rating agency to re-affirm its rating?
- In the context of asset-backed securities, if Rule 436(g) is eliminated, should we retain our requirement to disclose whether an issuance is conditioned on the assignment of that rating and the minimum rating that must be assigned? Should we require a consent related to the expected rating[58] and then require a

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58 See Item 1120 of Regulation AB.

subsequent consent for the final rating only if that rating changes? Should we instead treat the consent similar to pricing information under 430A[59] so that it may be filed as part of a pricing supplement but would relate back to the effective date?

- Form F-9 is the MJDS form used by eligible Canadian issuers to register investment grade debt or preferred securities. Under the MJDS, Canadian MJDS filers are largely permitted to use their Canadian provincial disclosure documents when registering their securities with the Commission, although the liability provisions under the Securities Act apply whether or not the registration statement is filed under the MJDS. If we eliminate Rule 436(g) in its entirety, a Form F-9 filer would need to obtain the consent of an NRSRO or Approved Rating Organization in the same circumstances as a similarly situated US issuer, notwithstanding that the Canadian filer may not be required to do so under Canadian provincial law or regulation. How would the elimination of Rule 436(g) affect Form F-9 filers, and why? Should the Rule 436(g) exemption be retained in connection with an NRSRO or Approved Rating Organization rating disclosed in a Form F-9 to maintain consistency of consent requirements with Canadian provincial law or regulation? Should the exemption be retained for an Approved Rating Organization rating only, and eliminated for an NRSRO rating, disclosed in a Form F-9 registration statement? Or, insofar as Rule 436(g) concerns the allocation of liability for portions of a registrations statement, and liability

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[59] 17 CFR 220.430A.

under the Securities Act applies without regard to whether a registration statement is filed pursuant to the MJDS, should we eliminate completely the Rule 436(g) exemption for ratings disclosed in a Form F-9?

Impact on NRSROs and Credit Rating Agencies

- Are there reasons to continue to distinguish between NRSROs and credit rating agencies that are not NRSROs for purposes of Section 11 liability? Is the fact that NRSROs are subject to Commission oversight, a reasonable basis upon which to distinguish between NRSROs and credit rating agencies that are not NRSROs for this purpose?
- How would the financial markets be affected if NRSROs and other credit rating agencies temporarily or permanently stop issuing credit ratings in registered offerings?
- As noted above, NRSROs have previously indicated that they would not provide consent. However, because we are proposing to require disclosure regarding credit ratings in registration statements, we are seeking to understand the practical implications that requiring a consent would have on NRSROs. Would NRSROs and other credit rating agencies initially or permanently refuse to provide consent? Would they initially or permanently stop issuing credit ratings in registered offerings? How would NRSROs adapt if Rule 436(g) were rescinded? How long is it likely such adaptation would take? Are NRSROs likely to adapt in different ways?
- Would rescinding Rule 436(g) reduce or eliminate the incentive for a credit rating agency to become an NRSRO?

- How would rescission of Rule 436(g) affect the process of issuing a credit rating? Would the process take longer? Would the NRSROs and credit rating agencies that are not NRSROs change their procedures? If so, how? Would credit rating agencies seek more, less or different information from registrants in order to provide a credit rating? How would requiring consents from both NRSROs and credit rating agencies that are not NRSROs affect their interactions with registrants and underwriters? Would there be any inflation or deflation of ratings? Why or why not?
- Would rescinding Rule 436(g) affect the types of products that credit rating agencies are willing to rate? How? Would they be less likely to rate lower grade products or products issued by smaller or less well-established registrants?
- Would any additional disclosure be necessary in order for the rating and other statements regarding the rating not to contain an untrue statement of a material fact or fail to state a material fact required to be stated in order to make the statements therein not misleading? What other information would be necessary to make the disclosure not misleading? Should we revise the proposed disclosure in the companion release to include additional items?
- What costs would potential liability under Section 11 impose on NRSROs and other credit rating agencies? Would those costs be passed on to registrants or, ultimately, to investors? What steps would NRSROs and other credit rating agencies take to protect themselves from potential liability under Section 11?

- If we propose to rescind Rule 436(g), should we specify that the credit rating itself would be considered prepared or certified by a person, or a report or valuation prepared or certified by a person within the meaning of Sections 7 and 11 of the Securities Act? Should it include more than just the actual rating? Are there other parts of the registration statement that would be considered prepared or certified by the credit rating agency? How would determining which portions of the registration statement would be considered prepared or certified by a person, or a report or valuation prepared or certified by a person impact other potential defendants who might rely on that portion as a defense to liability?
- Are there issues related to the liability of other experts, such as lawyers, investment bankers and accountants, that we should consider in deciding whether to rescind Rule 436(g)? Are credit rating agencies different from other types of experts from whom we require consent? If so, how? What steps could we take to account for those differences? How would the elimination of Rule 436(g) change the standard of liability to which NRSROs are currently subject for the use of credit ratings in connection with a registered offering? Is there any reason to believe the liability standards applicable to other experts may be applied differently to NRSROs and credit rating agencies that are not NRSROs?
- Is Section 11 liability appropriate for NRSROs and credit rating agencies that are not NRSROs? What is the expected standard of liability for a a credit rating to be actionable under Section 11, and how does it compare to the

standard of liability under Section 10(b) of the Exchange Act? If Section 11 were applicable, what is the practical impact of the different pleading standards under Section 10(b) of the Exchange Act and Section 11 of the Securities Act? How would any claims of First Amendment protection applicable to NRSROs be impacted by potential Section 11 liability?

- To reduce the risk of legal liability, would NRSROs issue more "defensive" ratings than are warranted? If so, how would this affect the cost of capital for registrants?

Impact on Investors

- Would eliminating the exemption in Rule 436(g) so that NRSROs are subject to potential liability under Section 11 be beneficial to investors? What effects would there be for investors if we eliminate the exemption for NRSROs in Rule 436(g)? Would the protections afforded by potential Section 11 liability for NRSROs be offset by any changes in the credit rating process, such as possible increases in the use of unregistered offerings or potential disruptions to registrants' access to capital?
- To what extent do the concerns expressed regarding possible undue reliance by investors on credit ratings suggest that investors actually do consider NRSROs to be persons whose profession gives authority to statements they make, as contemplated by Sections 7 and 11 of the Securities Act?
- How would the elimination of Rule 436(g) affect the quality of credit ratings? Would potential liability under Section 11 provide an incentive for NRSROs to provide higher-quality ratings? Would quality decline? Why?

- If credit rating agencies, including NRSROs, initially refuse to provide consent or stop issuing credit ratings, how would investors be affected?[60] Would investors with guidelines that require them to invest in rated securities be able to continue to invest? Would such investors change their investing guidelines? How long would it take for any such changes to be implemented?
- What effect would rescinding Rule 436(g) have on investors' reliance on credit ratings? Would any investors rely more or less on credit ratings? Would investors view credit ratings as more reliable?

Impact on Competition

- How would rescinding Rule 436(g) affect competition among credit rating agencies? Would treating NRSROs and credit rating agencies that are not NRSROs the same for purposes of liability under Section 11 of the Securities Act lower competitive barriers for credit rating agencies that are not NRSROs? Would it have any impact on the number of companies seeking to be an NRSRO?
- If NRSROs are unable to absorb the litigation costs and risks of Section 11 liability, and competition is reduced as a result, what impact, if any, would that reduced competition have on investor protection?

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60 Should NRSROs refuse to issue ratings, money market funds subject to Rule 2a-7 [17 CFR 270.2a-7] under the Investment Company Act may, for example, be affected to the extent the rule requires certain securities in which they invest to be rated by an NRSRO. See Rule 2a-7(a)(10)(ii)(A) (long-term security with a remaining maturity of less than 397 days that does not have a short-term rating is not an "eligible security" unless it has at least one long-term rating from an NRSRO); Rule 2a-7(a)(10)(ii) (asset backed security must be rated by an NRSRO to be an "eligible security"); and Rules 2a-7(c)(3)(iii) and (a)(10)(iii)(A) (together permitting funds to substitute the credit quality of a guarantor for the credit quality of the issuer only if the guarantee (or guarantor) is rated by an NRSRO). The Commission has requested comment on whether use of these ratings requirements ought to be removed from Rule 2a-7. See Money Market Fund Reform, Release No. IC-28807 (June 30, 2009) [74 FR 32688].

- Would rescinding Rule 436(g) have negative consequences for smaller NRSROs? Would it increase their costs of doing business? Would it make registrants more likely to seek ratings from the larger NRSROs? Would it make smaller NRSROs unable to issue ratings in connection with registered offerings? Would smaller NRSROs be able to adapt to the changes that might occur? Are there ways to mitigate negative competitive consequences if Rule 436(g) were eliminated?

III. General Request for Comments

We request and encourage any interested person to submit comments regarding:

- the concepts that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the concepts contained in this release.

We request comment from the point of view of companies, investors, and other market participants, including NRSROs and other credit rating agencies. With regard to any comments, we note that such comments are of greater assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: October 7, 2009

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60804 / October 8, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13643

In the Matter of **David M. Tavdy,** **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 David M. Tavdy ("Tavdy" 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.3 and 5 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. Tavdy, 40 years old, is a resident of Miami, Florida.

2. From March 2003 to May 2005, Tavdy was a registered representative associated with Assent LLC ("Assent"), a broker-dealer registered with the Commission.

3. On September 29, 2009, a final judgment was entered by consent against Tavdy, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Guttenberg, et al., Civil Action No. 07 CV 1774, in the United States District Court for the Southern District of New York.

4. The Commission's complaint alleged, inter alia, that from 2002 through 2006, Tavdy engaged in illegal insider trading by using material, nonpublic information concerning upcoming analyst recommendations by UBS Securities LLC ("UBS") to purchase and sell securities in a proprietary account at Assent and in his personal accounts.

5. On February 27, 2008, Tavdy pled guilty to one count of conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371, and two counts of securities fraud, in violation of Title 15, United States Code, Sections 78j(b) & 78ff, Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2, and Title 18, United States Code, Section 2, before the United States District Court for the Southern District of New York, in United States v. Mitchel Guttenberg and David Tavdy, Crim. Indictment No. 1:07-CR-141.

6. The counts of the criminal indictment to which Tavdy pled guilty alleged, inter alia, Tavdy illegally conspired with others to trade on material, nonpublic information obtained from UBS concerning upcoming analyst recommendations, and that Tavdy illegally traded on material, nonpublic information obtained from UBS concerning upcoming analyst recommendations.

IV.

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

Accordingly, it is hereby ORDERED:

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

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60802 / October 8, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13641

In the Matter of

Samuel W. Childs, Jr.,

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 Samuel W. Childs, Jr. ("Childs" 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.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Childs, 36 years old, is a resident of Old Lyme, Connecticut.

2. From March 2003 through March 2007, Childs was a registered representative associated with Assent LLC ("Assent"), a broker-dealer registered with the Commission. Childs was a general securities principal at Assent.

3. On April 10, 2008, Childs pled guilty to a count of conspiracy to commit securities fraud, in violation of Title 15, United States Code, Sections 78j(b) & 78ff, and Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2; wire fraud, in violation of Title 18, United States Code, Sections 1343 and 1346; and commercial bribery and commercial bribe receiving, in violation of the laws of the State of New York and in violation of Title 18, United States Code, Section 1952(a)(3) before the United States District Court for the Southern District of New York, in United States v. Samuel W. Childs, Jr. and Laurence McKeever, Indictment No. 1:07-CR-142.

4. The count of the criminal indictment to which Childs pled guilty alleged, inter alia, that Childs discovered an illegal insider trading scheme in which individuals executing trades through Assent ("Assent traders") used material, nonpublic information concerning upcoming analyst recommendations by UBS Securities LLC to purchase and sell securities. In violation of his duties to Assent, Childs concealed the insider trading scheme from Assent management in exchange for bribery payments from the Assent traders.

IV.

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

Accordingly, it is hereby ORDERED:

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

Commissioner Aguilar and Commissioner Paredes not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60805 / October 8, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13644

In the Matter of **TONY E. MORRISON,** **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 Tony E. Morrison ("Morrison" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 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. Tony E. Morrison, age 38, a resident of Mansfield, Texas, is the president of Texas Securities Partners, LLC ("TSP"), a Delaware limited liability company with its principal place of

business in Plano, Texas. TSP was a Commission-registered broker-dealer. Morrison holds Series 22, Series 39, and Series 63 securities licenses.

2. On September 17, 2009, a final judgment was entered by consent against Morrison, permanently enjoining him from future violations of Sections 5(a), 5(c), and 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 styled *Securities and Exchange Commission v. Texas Securities Partners, LLC and Tony E. Morrison*, Civil Action Number 4:09-cv-00467, in the United States District Court for the Eastern District of Texas.

3. The Commission's complaint alleged that Morrison directed TSP registered representatives to misrepresent the true nature of the oil and gas offerings to prospective investors, which included material misrepresentations and omitting material facts regarding past performance, expected returns, and risk. The complaint further alleges that as a result of Morrison's actions, Texas Securities Partners raised $12.7 million by selling fractional interests in 4 oil and gas offerings to over 500 investors nationwide.

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, it is hereby ORDERED:

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

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60799]

Draft 2010-2015 Strategic Plan for Securities and Exchange Commission

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Securities and Exchange Commission (SEC) is providing notice that it is seeking comments on its draft 2010-2015 Strategic Plan. The draft Strategic Plan includes a draft of the SEC's mission, vision, values, strategic goals, planned initiatives, and performance metrics.

DATES: Comments should be received on or before November 16, 2009.

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

Electronic Comments:

- Send an e-mail to strategicplan@sec.gov.

Paper Comments:

- Send paper comments in triplicate to Kenneth A. Johnson, Management and Program Analyst, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2521.

FOR FURTHER INFORMATION CONTACT: Kenneth A. Johnson, Management and Program Analyst, Office of the Executive Director, at (202) 551-4300, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2521.

SUPPLEMENTARY INFORMATION: The draft strategic plan is available at the Commission's Web site at http://www.sec.gov/about/secstratplan1015.htm or by contacting Kenneth A. Johnson, Management and Program Analyst, Office of the

Executive Director, at (202) 551-4300, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-2521.

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: October 8, 2009

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60803 / October 8, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2934 / October 8, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13642

In the Matter of **Erik R. Franklin,** **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 Erik R. Franklin ("Franklin" 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.3 and 5 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. Franklin, 41 years old, is a resident of Denville, New Jersey.

2. From 2001 to 2002, Franklin was associated with Bear, Stearns & Co., Inc. ("Bear Stearns"), which was a broker-dealer and investment adviser registered with the Commission. In 2002, Franklin was associated with DSJ International Resources Ltd. (d/b/a Chelsey Capital) and, from 2003 through 2006, was associated with Q Capital Investment Partners, LP ("Q Capital"). Both Chelsey Capital and Q Capital were investment advisers.

3. On September 29, 2009, a final judgment was entered by consent against Franklin, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Guttenberg, et al., Civil Action No. 07 CV 1774, in the United States District Court for the Southern District of New York.

4. The Commission's complaint alleged, inter alia, that from 2001 through 2006, Franklin engaged in illegal insider trading by using material, nonpublic information concerning upcoming analyst recommendations by UBS Securities LLC ("UBS") to purchase and sell securities in his personal accounts and on behalf of the two hedge funds that he managed, Lyford Cay Capital, LP, a hedge fund at Bear Stearns, and Q Capital. The complaint further alleged that in 2005, Franklin engaged in illegal insider trading by using material, nonpublic information concerning upcoming corporate acquisition announcements involving investment banking clients of Morgan Stanley & Co., Inc. ("Morgan Stanley") to purchase securities in a personal brokerage account and on behalf of Q Capital.

5. On March 2, 2007, Franklin pled guilty to two counts of conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371, one count of securities fraud, in violation of Title 15, United States Code, Sections 78j(b) & 78ff, Title 17, Code of Federal Regulations, Sections 240.10b-5 and 240.10b5-2, and one count of commercial bribery, in violation of Title 18, United States Code, Section 1952(a)(3), before the United States District Court for the Southern District of New York, in United States v. Erik Franklin, Crim. Information No. 07-CR-164.

6. The counts of the criminal information to which Franklin pled guilty alleged, inter alia, that Franklin illegally conspired with others to trade on material, nonpublic information from Morgan Stanley concerning upcoming corporate acquisitions and from UBS

concerning upcoming analyst recommendations. The criminal information also alleged that Franklin traded on the material, nonpublic UBS information in his personal accounts and on behalf of Q Capital, and that Franklin paid cash kickbacks to an employee of a brokerage firm in exchange for stock allocations to Q Capital in certain initial public offerings and secondary offerings.

IV.

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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60806 / October 9, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3057 / October 9, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13645

In the Matter of

PETER Y. ATKINSON, ESQ.,

Respondent.

ORDER INSTITUTING PUBLIC ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 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 Peter Y. Atkinson ("Respondent" or "Atkinson") pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(iii) 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

[1] Rule 102(e)(1)(iii) provides, in pertinent part, that:

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

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[2] that:

Summary

1. These proceedings arise out of a fraudulent scheme pursuant to which former officers of Hollinger International, Inc., now known as Sun-Times Media Group, Inc. ("Hollinger International") diverted corporate funds to themselves through a series of related party transactions involving purported non-competition payments. As part of the scheme, these former officers misrepresented or omitted to state material facts regarding the purported non-competition payments to the Audit Committee of Hollinger International's Board of Directors ("Audit Committee") and Hollinger International's Board of Directors and caused Hollinger International to make material misstatements regarding the related party transactions in its periodic reports and proxy statements filed with the Commission.

Respondent

2. Atkinson, currently incarcerated at Allenwood Federal Correction Center in White Deer, PA, is 62 years old and a citizen and resident of Canada. Atkinson is a licensed attorney in Canada. From approximately 2000 until April 27, 2004, he served as an Executive Vice President of Hollinger International. From approximately May 2002 until January 2004, he served as a Director of Hollinger International. From early 1996 until January 2004, Atkinson was also Vice President and a Director of Hollinger Inc. In May 2000, he was appointed General Counsel of Hollinger Inc. In 2002, he became an Executive Vice President of Hollinger Inc., a position from which he resigned on April 27, 2004. From approximately 1996 until 2004, he also served as the Executive Vice President of The Ravelston Corporation Limited and Ravelston Management, Inc. (jointly "Ravelston"), of which he indirectly owned approximately .97%. On November 17, 2005, the U.S. Attorney for the Northern District of Illinois indicted Atkinson on six counts of mail and wire fraud in connection with his receipt of and failure to disclose certain of the purported non-competition payments discussed herein. In July 2007, Atkinson was found guilty of three counts of mail fraud. On December 10, 2007, Atkinson was sentenced to 24 months imprisonment, ordered to pay a fine of $3,000, and held jointly and severally liable for forfeiture of $6.1 million.

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

Other Relevant Individuals and Entities

3. At all times relevant, Hollinger International was a Delaware corporation with its principal place of business in Chicago, Illinois. During the relevant period, Hollinger International owned and operated newspaper publishing businesses in the United States and abroad, including the Chicago Sun-Times, The Daily Telegraph in London, England, The Jerusalem Post in Israel and a number of other publications. During the relevant period, Hollinger International's stock was comprised of Class A and Class B stock. Hollinger International's Class A Common Stock was registered with the Commission under Section 12(b) of the Exchange Act, and its shares were traded on the New York Stock Exchange. Hollinger International's Class B Common Shares were directly and indirectly owned by Hollinger Inc.

4. At all times relevant, Hollinger Inc. was a publicly held Canadian company with its principal place of business located in Toronto, Canada. Hollinger Inc.'s shares were traded on the Toronto Stock Exchange. Hollinger Inc. was also a foreign private issuer whose shares were registered with the Commission pursuant to Section 12(g) of the Exchange Act. Hollinger Inc.'s primary holding was its shares of Hollinger International stock. During 1998 through 2003, Hollinger Inc. was the controlling shareholder of Hollinger International through its direct and indirect ownership of all of the approximately 14,990,000 shares of Hollinger International's Class B Common Stock, which had a 10-to-1 voting preference over shares of Hollinger International's Class A Common Stock. Hollinger Inc. also held several million shares of Hollinger International's Class A Common Stock. The remaining Class A shares were held primarily by public shareholders. Hollinger Inc. was controlled by Ravelston.

5. Conrad Black ("Black"), currently incarcerated, was the Chairman of Hollinger International from approximately October 1995 until January 17, 2004, and Chief Executive Officer ("CEO") from October 1995 until November 19, 2003. At all times relevant, Black was the Chairman and CEO of Ravelston, and, through Conrad Black Capital Corp., was Ravelston's 65.1% majority stockholder. At all times relevant, Black, through Ravelston, was the controlling shareholder of Hollinger Inc., which, in turn, held voting control over Hollinger International. In late 2005, the U.S. Attorney for the Northern District of Illinois charged Black with several counts of mail and wire fraud, money laundering, racketeering, and obstruction of justice in connection with his receipt of and failure to disclose certain purported non-competition payments. In July 2007, after a four month trial, Black was found guilty of three counts of mail fraud in connection with certain of these payments and one count of obstruction of justice. On December 10, 2007, Black was sentenced to 78 months imprisonment, fined $125,000, and pursuant to the U.S. Attorney's forfeiture motion, found jointly and severally liable for the $6.1 million in ill-gotten "non-competition" payments received by him and the other criminal defendants.

6. F. David Radler ("Radler") was Deputy Chairman, Director, President and Chief Operating Officer ("COO") of Hollinger International and former Publisher of the Chicago Sun-Times, a subsidiary of Hollinger International, until he resigned on November 17, 2003. At all times relevant, Radler was also the Deputy Chairman and COO of Hollinger Inc. and was also the President of Ravelston, and owned approximately 14.2% of stock in Ravelston through F.D. Radler Limited. On August 18, 2005, Radler was indicted on seven counts of mail and wire fraud

in connection with his receipt of and failure to disclose certain of the non-competition payments. On September 20, 2005, Radler pled guilty to one count of mail fraud in connection with his receipt of and failure to disclose certain of the non-competition payments. On December 17, 2007, Radler was sentenced to 29 months imprisonment, and ordered to pay a fine of $250,000.

7. John A. Boultbee ("Boultbee"), currently incarcerated, is a chartered accountant in Canada. From 1990 until 1995, Boultbee served as a Director of Hollinger International, and from 1995 until 1999, he served as the Chief Financial Officer ("CFO") of Hollinger International, after which time he became an Executive Vice President of Hollinger International. However, in 2000 and 2001, he acted as CFO of Hollinger International. He remained an Executive Vice President of Hollinger International until November 17, 2003. From approximately 1987 to 2004, Boultbee served on the Board of Directors of Hollinger Inc. and was the CFO and Executive Vice President of Hollinger Inc. Boultbee was also an Executive Vice President of Ravelston, of which he indirectly owned approximately .97%. On November 17 and December 15, 2005, the U.S. Attorney for the Northern District of Illinois indicted Boultbee on nine counts of mail and wire fraud in connection with his receipt of and failure to disclose certain purported non-competition payments. In July 2007, Boultbee was found guilty of three counts of mail fraud. On December 10, 2007, Boultbee was sentenced to 27 months imprisonment, ordered to pay restitution of $152,000, and held jointly and severally liable for forfeiture of $6.1 million.

8. Mark S. Kipnis ("Kipnis") was, from January 1998 until November 2003, the Secretary and Vice President, Law of Hollinger International. He served as the General Counsel for Hollinger International's Chicago newspapers. On August 18 and November 17, 2005, the U.S. Attorney for the Northern District of Illinois indicted Kipnis on nine counts of mail and wire fraud in connection with the non-competition payments discussed herein. Kipnis was found guilty of two counts of mail fraud and on December 10, 2007, was sentenced to five years probation and was held jointly and severally liable for forfeiture of $5.5 million.

Facts

9. In 2001, Atkinson received a total of $152,500 in purported non-competition payments in connection with Hollinger International's sales of certain of its U.S. community newspapers to Forum Communications Company ("Forum") and PMG Acquisition Corporation ("Paxton") and from American Publishing Company, a Hollinger International subsidiary.

10. On September 30, 2000, Forum and Hollinger International entered into an asset purchase agreement for approximately $14 million, of which $400,000 was allocated to a non-competition agreement. On October 2, 2000, Paxton and Hollinger International entered into an asset purchase agreement for approximately $59 million, of which $2 million was allocated to a non-competition agreement. Neither the asset purchase agreements nor the non-competition agreements provided for non-competition agreements with or non-competition payments to any individual executive officers of Hollinger International.

11. In April 2001, approximately six months after the transactions had closed, Black and Radler paid themselves $285,000 each and Atkinson and Boultbee $15,000 each from the reserves of the Forum and Paxton transactions as purported "supplemental non-competition

payments." Black, Radler, Atkinson and Boultbee were not parties to and did not execute non-competition agreements in connection with these transactions. Atkinson knew that he had not executed non-competition agreements and was not entitled to non-competition payments in connection with these transactions.

12. In February 2001, Black, Radler, Atkinson, Boultbee and Kipnis orchestrated the payment of $5.5 million in purported non-competition payments, $2,612,500 each to Black and Radler and $137,500 each to Atkinson and Boultbee, from American Publishing Company, a Hollinger International subsidiary. There was no sale of newspapers associated with these payments, and no reason for the individuals to execute agreements not to compete with a Hollinger International subsidiary. Moreover, at the time, American Publishing Company owned only one small community newspaper which it sold shortly thereafter for $1.

13. Kipnis prepared non-competition agreements between American Publishing Company and Black, Radler, Atkinson and Boultbee and backdated the non-competition agreements to December 31, 2000. On February 8, 2001, Kipnis sent the non-competition agreements to Atkinson, which Atkinson returned in executed form on or about March 1, 2001. The non-competition payments to the individuals were made in February 2001, but Kipnis caused the checks to be backdated to December 31, 2000.

14. It was the policy and practice of Hollinger International that related party transactions were to be reviewed and approved by the Audit Committee. Atkinson did not present the American Publishing Company and Paxton and Forum non-competition payments to Hollinger International's Audit Committee or Board for review or approval.. In addition, Atkinson failed to disclose his receipt of these purported non-competition payments in his responses to the questionnaires used by Hollinger International to prepare its proxy statements and Forms 10-K.

15. Hollinger International's filings with the Commission contained misstatements and omissions of material fact regarding the non-competition payments made in connection with the American Publishing Company and Forum and Paxton transactions. The non-competition payments to the executives were not disclosed in Hollinger International's 2000 Form 10-K or 2001 proxy statement and were not disclosed in any way to Hollinger International's shareholders until Hollinger International's 2001 Form 10-K filed on April 1, 2002.

16. The disclosure in the 2001 Form 10-K stated:

> In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, the Company, Lord Black and three senior executives entered into non-competition agreements with the purchasers . . . for aggregate consideration paid in 2001 of $0.6 million. These amounts were in addition to the aggregate consideration paid in respect of these non-competition agreements in 2000 of $15 million. Such amounts were paid to Lord Black and the three senior executives. The Company's independent directors have approved the terms of these payments.

17. Hollinger International's 2002 Form 10-K filed on March 31, 2003 contained a nearly identical disclosure. Hollinger International's 2002 proxy statement filed on April 2, 2002 contained a similar disclosure, but also reported that $7,197,500 was paid to Black and Radler each and $602,500 was paid to Atkinson and Boultbee each.

18. Atkinson participated in preparing Hollinger International's proxy statements and Forms 10-K and reviewed and approved the relevant disclosures contained in these filings. Atkinson also signed Hollinger International's 2002 Form 10-K.

19. Hollinger International's disclosures in its 2001 and 2002 Forms 10-K and in its 2002 proxy statement regarding the non-competition payments to the executives were materially false and misleading because: (1) the American Publishing Company and Forum and Paxton non-competition agreements and payments were not made "to satisfy a closing condition" or required by a purchaser and were not made in connection with the sales of newspaper properties; (2) the individuals did not execute non-competition agreements in connection with the Forum or Paxton payments; (3) only $9.5 million in non-competition payments were paid in 2000 and another $6 million, specifically the American Publishing Company and Forum and Paxton payments, was paid in 2001; and (4) the payments were not approved by Hollinger International's independent directors.

20. Hollinger Inc.'s 2002 proxy statement filed on its Form 6-K on April 23, 2002 also contained materially false and misleading statements regarding the non-competition payments to the individuals in connection with the U.S. newspaper transactions. The 2002 Form 6-K reported:

> In connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, Hollinger [Inc.], Hollinger International, Lord Black and Messrs. Radler, Atkinson and Boultbee entered into non-competition agreements with the purchasers . . . for aggregate consideration paid in 2001 and 2000 of U.S.$15,600,000, consisting of U.S.$7,197,500 paid to Lord Black, U.S.$7,197,500 paid to Mr. Radler, U.S.$602,500 paid to Mr. Atkinson and U.S.$602,500 paid to Mr. Boultbee.

21. Hollinger Inc.'s 2001 annual report filed on its Form 40-F on May 22, 2002 contained a similar disclosure, stating:

> [i]n connection with the sales of United States newspaper properties in 2000, to satisfy a closing condition, Hollinger International, Lord Black and three senior executives entered into non-competition agreements with purchasers ...for aggregate consideration paid in 2001 of U.S. $600,000 ($917,000). These amounts were in addition to the aggregate consideration paid in respect to these non-competition agreements in 2000 of U.S. $15 million ($22.5 million). All such amounts were paid to Lord Black and the three senior executives. The independent directors of Hollinger International have approved the terms of the payments.

Hollinger Inc.'s 2002 Form 20-F filed on June 27, 2003 and its amended 2002 Form 20-F/A filed on September 17, 2003 contained a nearly identical disclosure.

22. Atkinson participated in drafting and reviewed and approved the Hollinger International disclosures described above, which he knew served as the basis for Hollinger Inc.'s disclosures. He also participated in the drafting of and reviewed and approved Hollinger Inc.'s disclosures. Atkinson reviewed and approved the 2001 and 2002 financial statements and the 2002 Proxy during Hollinger Inc. Board meetings, and failed to ensure that those filings disclosed the true facts concerning the related party payments.

23. For the reasons discussed above in paragraph 19, the disclosures contained in Hollinger Inc.'s filings regarding the non-competition payments were also materially false and misleading.

24. Atkinson knew or was reckless in not knowing that the Hollinger International and Hollinger Inc. filings discussed above contained materially false and misleading information concerning the American Publishing Company, Forum and Paxton non-competition agreements and payments. Atkinson knew or was reckless in not knowing that the purchasers in Forum and Paxton did not request him to sign non-competition agreements or receive funds and that there was no non-competition agreement with Paxton or Forum and any of the executives. Atkinson also knew that the American Publishing Company "non-competition" payments were not in connection with any sale of newspapers. He also knew that only $9.5 million in non-competition payments were paid in 2000 and another $6 million was paid in 2001. Finally, Atkinson knew or was reckless in not knowing that the payments had not been approved by Hollinger International's independent directors. Atkinson also knew that the executives had received purported non-competition payments that were not disclosed in the 2000 Form 10-K and 2001 proxy statement.

25. Atkinson has paid to Hollinger International, with interest, all of the non-competition monies he received. In total, Atkinson has paid more than $2,798,424 to Hollinger International. Atkinson has also paid certain criminal monetary penalties and forfeiture amounts assessed against him.

Violations

26. Based on the foregoing, the Commission finds that Atkinson willfully violated Sections 10(b), 13(b)(5), and 14(a) of the Exchange Act and Rules 10b-5, 13b2-1,14a-3 and 14a-9 thereunder; willfully aided and abetted and caused Hollinger International's violations of Sections 13(a), 13(b)(2)(A) and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 13a-13, 14a-3 and 14a-9 thereunder; and willfully aided and abetted and caused Hollinger Inc.'s violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-16 thereunder.

IV.

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

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

A. Atkinson shall cease and desist from committing or causing any violations and any future violations of Sections 10(b), 13(b)(5), and 14(a) of the Exchange Act and Rules 10b-5, 13b2-1, 14a-3 and 14a-9 thereunder; and from causing any violations and any future violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1, 13a-13, and 13a-16 thereunder.

B. Pursuant to Section 21C(f) of the Exchange Act, Atkinson be, and hereby is, prohibited 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 or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

C. Atkinson is denied the privilege of appearing or practicing before the Commission as an attorney.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 210, 229 and 249

[RELEASE NOS. 33-9072; 34-60813; File No. S7-06-03]

RIN 3235-AK48

INTERNAL CONTROL OVER FINANCIAL REPORTING IN EXCHANGE ACT PERIODIC REPORTS OF NON-ACCELERATED FILERS

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: We are amending temporary rules that require companies that are non-accelerated filers to include in their annual reports, pursuant to rules implementing Section 404(b) of the Sarbanes-Oxley Act of 2002, an attestation report of their independent auditor on internal control over financial reporting for fiscal years ending on or after December 15, 2009. The amendments will extend the compliance date for filing attestation reports, so that a non-accelerated filer will be required to file the auditor's attestation report on internal control over financial reporting when it files an annual report for a fiscal year ending on or after June 15, 2010.

EFFECTIVE DATE: This rule is effective [insert date 60 days after publication in the Federal Register]. The effectiveness of §§ 210.2-02T and 229.308T, which currently terminates on June 30, 2010, is extended through December 15, 2010.

FOR FURTHER INFORMATION CONTACT: Steven G. Hearne, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are amending the following forms and temporary rules to extend the compliance dates for companies that are non-accelerated filers to include an attestation report of their independent auditor on internal control over financial

reporting in their annual reports: Rule 2-02T of Regulation S-X,[1] Item 308T of Regulation S-K,[2] Item 4T of Form 10-Q,[3] Item 9A(T) of Form 10-K,[4] Item 15T of Form 20-F,[5] and Instruction 3T of General Instruction B.(6) of Form 40-F.[6]

I. BACKGROUND

On June 5, 2003,[7] the Securities and Exchange Commission adopted several amendments to its rules and forms implementing Section 404 of the Sarbanes-Oxley Act of 2002.[8] Among other things, these amendments require companies, other than registered investment companies, to include in their annual reports filed with us a report of management, and an accompanying auditor's attestation report, on the effectiveness of the company's internal control over financial reporting ("ICFR"). Subsequent to the adoption of those rules, the Commission took a number of steps to improve the effectiveness and efficiency of Section 404 implementation.[9] Among the steps taken, the Commission approved issuance by the PCAOB of Auditing Standard No. 5 ("AS No. 5"), which replaced Auditing Standard No. 2.[10] In addition, we issued interpretive guidance

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1 17 CFR 210.2-02T.

2 17 CFR 229.308T.

3 17 CFR 249.308a.

4 17 CFR 249.310.

5 17 CFR 249.220f.

6 17 CFR 249.240f.

7 See Management's Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release No. 33-8238 (June 5, 2003) [68 FR 36636].

8 15 U.S.C. 7262.

9 For a more complete discussion of the Commission's actions in this area, see Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers, Release No. 33-8934 (June 26, 2008) [73 FR 38094] (the "2008 Adopting Release").

10 See Order Approving Proposed Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements, a Related Independence Rule, and Conforming Amendments, Release No. 34-56152 (July 27, 2007) [72 FR 42141].

to assist management in complying with the ICFR evaluation and disclosure requirements.[11] The approval of PCAOB's AS No. 5 provided revised professional standards and related performance guidance for independent auditors to attest to, and report on, management's assessment of the effectiveness of ICFR. Our management guidance, in combination with AS No. 5, was intended to make ICFR audits and management evaluations of ICFR more cost-effective by being risk-based and scalable to a company's size and complexity.

In the Commission's most recent action, we postponed the Section 404(b) auditor attestation requirement for non-accelerated filers[12] for an additional year in order to allow time for the PCAOB to issue final staff guidance on auditing ICFR of smaller reporting companies and for the Commission staff to undertake a study to help determine whether AS No. 5 and our management guidance on evaluating ICFR are facilitating more cost-effective ICFR evaluations and audits for smaller public companies.[13] The PCAOB published staff guidance for auditors of smaller public companies on January 23, 2009 describing how auditors can apply the principles described in AS No. 5 and providing examples of approaches to particular issues that might arise in the audits of smaller, less complex public companies.[14]

The Commission directed the staff to conduct a study in order to help the Commission assess whether the new management guidance and AS No. 5 are having the intended effect of

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11 See Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Release No. 33-8810 (June 20, 2007) [72 FR 35324].

12 Although the term "non-accelerated filer" is not defined in our rules, we use it throughout this release to refer to an Exchange Act reporting company that does not meet the Rule 12b-2 [17 CFR 140.12b-2] definition of either an "accelerated filer" or a "large accelerated filer."

13 See the 2008 Adopting Release in note 9 above.

14 See "Staff Views - An Audit of Internal Control that is Integrated with an Audit of the Financial Statements: Guidance for Auditors of Smaller Public Companies," (Jan. 23, 2009), available at www.pcaobus.org. Topics discussed in the PCAOB's guidance include: entity-level controls, risk of management override, segregation of duties and alternative controls, information technology controls, financial reporting competencies, and testing controls with less formal documentation.

facilitating more cost-effective ICFR evaluations and audits for smaller reporting companies.[15] The study included a web-based survey of companies that are subject to ICFR requirements, as well as in-depth interviews with financial statement users, auditors of issuers, and a subset of companies eligible to participate in the web-based study. The study, analyzing the data provided by the survey, was recently completed by the staff and made public by the Commission on October 2, 2009.

Without today's amendments, a non-accelerated filer would be required to file the auditor's attestation report on ICFR when it files its annual report for a fiscal year ending on or after December 15, 2009. In light of the proximity in time of the publication of the staff study and the end of the year, and concerns that a significant number of smaller public companies may not have prepared to comply with Section 404(b) pending completion of the staff study, we are amending our rules to defer requiring the auditor's attestation report until a non-accelerated filer's annual report for its fiscal year ending on or after June 15, 2010.

The Commission believes that an auditor's attestation to a company's disclosure of its assessment on the effectiveness of the company's internal control is an important safeguard. The obligation of non-accelerated filers to comply with Section 404(b) has been deferred a number of times to more than five years after the date on which compliance was required of accelerated filers.[16] The Commission notes that all steps necessary to implement the requirements of Section 404 of the Sarbanes-Oxley Act have been completed, and non-accelerated filers should work with their auditors to comply with Section 404(b) for annual reports for fiscal years ending on or

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15 See "Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements," available at www.sec.gov.

16 Accelerated filers were initially expected to comply with the auditor attestation requirement in annual reports filed on or after June 15, 2004.

after June 15, 2010. The Commission does not expect to further defer the obligation of non-accelerated filers to comply with Section 404(b).

We believe at this point that only an immediate deferral of the current filing requirement for non-accelerated filers can address the uncertainty raised by the recent completion of the study and announcement of the new compliance date for the auditor attestation report requirement. In addition, because of the timing of the publication of the study, immediate implementation of Section 404(b) would require non-accelerated filers and their auditors to plan for the auditor attestation under compressed timeframes, resulting in higher costs than would be required with more deliberative planning. Due to the significance and importance of Section 404(b) implementation by non-accelerated filers, especially for the first time, it is critical to provide non-accelerated filers with certainty regarding the filing requirements as soon as possible. On the basis of the timing constraints discussed above and the limited nature of the extension, the Commission, for good cause, finds that notice and solicitation of comment regarding the amendments to defer the filing requirement is impracticable, unnecessary or contrary to the public interest, and the extension is necessary or appropriate in the public interest and consistent with the protection of investors.[17]

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[17] See Section 553(b)(3)(B) of the Administrative Procedure Act [5 U.S.C. 553(b)(3)(B)] (stating that an agency may dispense with prior notice and comment when it finds, for good cause, that notice and comment are "impracticable, unnecessary, or contrary to the public interest"). In addition, the Commission notes that the U.S. public companies subject to all of the requirements of Section 404 represent an overwhelming majority of the market capitalization of the U.S. equity securities market.

II. EXTENSION OF AUDITOR ATTESTATION COMPLIANCE DATE FOR NON-ACCELERATED FILERS

We are amending Item 308T of Regulation S-K, Rule 2-02T of Regulation S-X, and Forms 10-Q, 10-K, 20-F and 40-F to require non-accelerated filers to provide their auditor's attestation in their annual reports filed for fiscal years ending on or after June 15, 2010. Prior to that time, a non-accelerated filer continues to be required to state in its management report on ICFR that the company's annual report does not include an auditor attestation report.[18] In 2006, we adopted a temporary rule[19] that provided that the management report included in a non-accelerated filer's annual report that did not contain the auditor's attestation report would be deemed "furnished" rather than "filed" and not be subject to liability under Section 18 of the Exchange Act.[20] In 2008 we extended the temporary rule.[21] In light of our action to extend the date for compliance with Section 404(b) to fiscal years ending on or after June 15, 2010, we are likewise extending the temporary rule to treat the management report as "furnished" instead of "filed" for reports that do not include an auditor's attestation in reliance upon the extension of the compliance date.

The revised compliance dates for the Section 404 internal control requirements are presented in the table below:

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18 See Item 308T(a)(4) of Regulation S-K, Item 15T(b)(4) of Form 20-F and Instruction 3T to the Instructions to paragraphs (b), (c), (d), and (e) of General Instruction B.(6) of Form 40-F.

19 See Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies, Release No. 33-8760 (Dec. 15, 2006) [71 FR 76580].

20 Section 18 of the Exchange Act [15 U.S.C. 78r] imposes liability on any person who makes or causes to be made in any application or report or document filed under the Act, or any rule thereunder, any statement that "was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact." As a result of temporary Item 308T of Regulation S-K and the temporary amendments to Forms 20-F and 40-F, however, during the applicable periods, management's report would be subject to liability under this section only in the event that a non-accelerated filer specifically states that the report is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act.

21 See the 2008 Adopting Release in note 9 above.

Filer Status		Compliance Dates for the Internal Control Over Financial Reporting Requirements	
		Management report on ICFR	**Auditor attestation on management's report on ICFR**
U.S. Issuer	Non-accelerated filer (public float under $75 million)	Annual reports for fiscal years ending on or after December 15, 2007	Annual reports for fiscal years ending on or after June 15, 2010
U.S. Issuer	Large accelerated filer and accelerated filer (public float above $75 million)	Annual reports for fiscal years ending on or after November 15, 2004	Annual reports for fiscal years ending on or after November 15, 2004
Foreign private issuer	Non-accelerated filer (public float under $75 million)	Annual reports for fiscal years ending on or after December 15, 2007	Annual reports for fiscal years ending on or after June 15, 2010
Foreign private issuer	Accelerated filer (public float above $75 million and below $700 million)	Annual reports for fiscal years ending on or after July 15, 2006	Annual reports for fiscal years ending on or after July 15, 2007
Foreign private issuer	Large accelerated filer (public float above $700 million)	Annual reports for fiscal years ending on or after July 15, 2006	Annual reports for fiscal years ending on or after July 15, 2006
U.S. or Foreign private issuer	Newly public company	Second annual report	Second annual report

III. PAPERWORK REDUCTION ACT

In connection with our earlier proposal and adoption of the rules and amendments implementing the Section 404 requirements,[22] we submitted cost and burden estimates of the collection of information requirements of the amendments to the Office of Management and Budget ("OMB"). We published a notice requesting comment on the collection of information requirements in the proposing release for those rule amendments. We submitted these requirements to the OMB for review in accordance with the Paperwork Reduction Act of 1995 ("PRA")[23] and received approval of these estimates. We do not believe that the amendments will result in any change in the collection of information requirements of the amendments implementing Section 404 and we previously received no comments suggesting the amendments would result in any change. Therefore, we are not revising our PRA burden and cost estimates submitted to the OMB.

IV. COST-BENEFIT ANALYSIS

A. Benefits

The amendments postpone the date by which a non-accelerated filer would be required to include in its annual report an auditor attestation report on ICFR. As a result, non-accelerated filers will be required to complete only management's assessment of compliance with the Section 404 requirements during the deferral period. We believe that the additional time will benefit non-accelerated filers and could thereby indirectly benefit investors in non-accelerated filers by easing the burden on those companies as follows:

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22 See Release Nos. 33-8238 in Note 7 and 33-8760 in Note 19 above.

23 44 U.S.C. 3501 et seq. and 5 CFR 1320.11.

- Providing non-accelerated filers more time, in light of the uncertainty in the timing due to the recent completion of the study and the announcement, to better prepare for compliance with the Section 404(b) requirements; and
- Providing more time for the Section 404(b) audit to be properly planned, scoped and executed.

B. Costs

Investors in non-accelerated filers will have to wait longer than they would in the absence of the deferral for the assurances provided by the auditor's attestation report and the added investor confidence that could result from obtaining an independent Section 404(b) attestation. The amendments may extend the existing risk that, without the auditor's attestation report, some non-accelerated filers may erroneously conclude that the company's ICFR is effective, when an ICFR audit might reveal that it is not. In addition, some companies may continue to conduct an assessment that is not as thorough, careful and as appropriate to the company's circumstances as they would perform if the auditor were also conducting an audit of ICFR. Finally, the amendments may also extend the existing risk that weaknesses in a company's ICFR will go undetected for a longer period of time.

V. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 23(a)(2) of the Exchange Act[24] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. 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. In addition,

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[24] 15 U.S.C. 78w(a).

Section 2(b)[25] of the Securities Act and Section 3(f)[26] of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

We expect that this additional extension of the auditor attestation report requirement will promote capital formation and efficiency by making the implementation process more efficient and less costly for non-accelerated filers by:

- Providing non-accelerated filers more time to prepare for compliance with the Section 404(b) requirements; and
- Providing more time for the Section 404(b) audit to be properly planned, scoped and executed.

We acknowledge, however, that it is possible for the deferral of the auditor attestation requirement to cause some investors to have less confidence in the financial reports of non-accelerated filers, and that this could possibly make it more difficult for these companies to raise capital in the public markets.

The additional extension for non-accelerated filers should have no impact on competition between non-accelerated filers, as the extension is being provided to all non-accelerated filers. It is possible that a competitive impact could result from the differing treatment of non-accelerated filers and larger companies that already have been complying with the Section 404 requirements, but we have not received any information suggesting that this type of impact has occurred as a result of prior extensions.

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[25] 15 U.S.C. 77b(b).

[26] 15 U.S.C. 78c(f).

VI. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS

The amendments described in this release are made under the authority set forth in Section 19 of the Securities Act, Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, and Sections 3(a) and 404 of the Sarbanes-Oxley Act.

List of Subjects

17 CFR Part 210

Accountants, Accounting, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 229 and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF AMENDMENTS

For the reasons set out in the preamble, the Commission is amending title 17, chapter II, of the Code of Federal Regulations as follows:

PART 210 - FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j-1, 78l, 78m, 78n, 78o(d), 78q, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-20, 80a-29, 80a-30, 80a-31, 80a-37(a), 80b-3, 80b-11, 7202 and 7262, unless otherwise noted.

2. Section 210.2-02T is amended by:

a. Removing the date "December 15, 2009" in paragraph (a) and adding in its place "June 15, 2010"; and

b. Removing the date "June 30, 2010" in paragraph (b) and adding in its place "December 15, 2010".

PART 229 – STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 – REGULATION S-K

3. The authority citation for Part 229 continues to read, in part, as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

4. Section 229.308T is amended by:

a. Removing the date "December 15, 2009" in the "Note to Item 308T" and adding in its place "June 15, 2010"; and

b. Removing the date "June 30, 2010" in paragraph (c) and adding in its place "December 15, 2010".

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

6. Form 20-F (referenced in §249.220f), Part II, Item 15T is amended by:

a. Removing the date "December 15, 2009" in paragraph (2) to the "Note to Item 15T" and adding in its place "June 15, 2010"; and

b. Removing the date "June 30, 2010" in paragraph (d) and adding in its place "December 15, 2010".

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

7. Form 40-F (referenced in §249.240f) is amended by:

a. Removing the date "December 15, 2009" in "Instruction 3T(2)" to the "Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.(6)" and adding in its place "June 15, 2010"; and

b. Removing the date "June 30, 2010" in the paragraph following "Instruction 3T" to the "Instructions to paragraphs (b), (c), (d) and (e) of General Instruction B.(6)" and adding in its place "December 15, 2010".

Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

8. Form 10-Q (referenced in §249.308a) is amended by revising Item 4T to Part I to read as follows:

Note: The text of Form 10-Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10-Q

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PART I – FINANCIAL INFORMATION

* * * * *

Item 4T. Controls and Procedures.

(a) If the registrant is neither a large accelerated filer nor an accelerated filer as those terms are defined in §240.12b-2 of this chapter, furnish the information required by Items 307 and 308T(b) of Regulation S-K (17 CFR 229.307 and 229.308T(b)) with respect to a quarterly

report that the registrant is required to file for a fiscal year ending on or after December 15, 2007 but before June 15, 2010.

(b) This temporary Item 4T will expire on December 15, 2010.

* * * * *

9. Form 10-K (referenced in §249.310) is amended by:

a. Removing the date "December 15, 2009" in paragraph (a) to Item 9A(T) to Part II and adding in its place "June 15, 2010"; and

b. Removing the date "June 30, 2010" in paragraph (b) to Item 9A(T) to Part II and adding in its place "December 15, 2010".

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

October 13, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60821 / October 14, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13649

In the Matter of **Value America, Inc.,** **VDS Enterprises, Inc.,** **Versent Corp.,** **Viasource Communications, Inc.,** **Viatech Communications Group, Inc., and** **VideoFlicks.com, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Value America, Inc., VDS Enterprises, Inc., Versent Corp., Viasource Communications, Inc., Viatech Communications Group, Inc., and VideoFlicks.com, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Value America, Inc. (CIK No. 1049889) is a terminated Virginia corporation located in Charlottesville, Virginia with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Value America is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2000, which reported a net loss of $27,434,000 for the prior three months. On August 11, 2000, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Virginia, and the case was terminated on April 8, 2003. As of October 7, 2009, the company's stock (symbol "VUSAQ") was traded on the over-the-counter markets.

2. VDS Enterprises, Inc. (CIK No. 880640) is a delinquent Florida corporation located in Palm Beach Gardens, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). VDS Enterprises is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended May 31, 2000.

3. Versent Corp. (CIK No. 1007450) is an Ontario corporation located in Mississauga, Ontario, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Versent is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 1999, which reported a net loss of $18,464,246 (Canadian) for the prior year.

4. Viasource Communications, Inc. (CIK No. 1111789) is a New Jersey corporation located in Fort Lauderdale, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Viasource Communications is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2001, which reported a net loss of $32,591,986 for the prior six months. On November 15, 2001, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida, and the case was terminated on September 5, 2006. As of October 7, 2009, the company's stock (symbol "VVVVQ") was traded on the over-the-counter markets.

5. Viatech Communications Group, Inc. (CIK No. 1015190) is a void Delaware corporation located in Boca Raton, Florida with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). Viatech Communications is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB on November 4, 1996.

6. VideoFlicks.com, Inc. (CIK No. 1093573) is an Ontario corporation located in Brampton, Ontario, Canada with a class of equity securities registered with the Commission pursuant to Exchange Act Section 12(g). VideoFlicks.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended August 31, 1999, which reported a net loss of $1,032,000 for the prior year.

B. DELINQUENT PERIODIC FILINGS

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

8. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires certain foreign private issuers to furnish quarterly and other material reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

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

III.

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

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

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

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the

Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings
Value America, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Value America, Inc.					
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Value America, Inc.					
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	37				
VDS Enterprises, Inc.					
	10-K	08/31/00	11/29/00	Not filed	107
	10-Q	11/30/00	01/16/01	Not filed	105
	10-Q	02/28/01	04/16/01	Not filed	102
	10-Q	05/31/01	07/16/01	Not filed	99
	10-K	08/31/01	11/29/01	Not filed	95
	10-Q	11/30/01	01/14/02	Not filed	93
	10-Q	02/28/02	04/15/02	Not filed	90
	10-Q	05/31/02	07/15/02	Not filed	87
	10-K	08/31/02	11/29/02	Not filed	83
	10-Q	11/30/02	01/14/03	Not filed	81
	10-Q	02/28/03	04/14/03	Not filed	78
	10-Q	05/31/03	07/15/03	Not filed	75
	10-K	08/31/03	12/01/03	Not filed	70
	10-Q	11/30/03	01/14/04	Not filed	69
	10-Q	02/29/04	04/14/04	Not filed	66
	10-Q	05/31/04	07/15/04	Not filed	63
	10-K	08/31/04	11/29/04	Not filed	59
	10-Q	11/30/04	01/14/05	Not filed	57
	10-Q	02/28/05	04/14/05	Not filed	54
	10-Q	05/31/05	07/15/05	Not filed	51
	10-K	08/31/05	11/29/05	Not filed	47
	10-Q	11/30/05	01/17/06	Not filed	45
	10-Q	02/28/06	04/14/06	Not filed	42
	10-Q	05/31/06	07/17/06	Not filed	39
	10-K	08/31/06	11/29/06	Not filed	35
	10-Q	11/30/06	01/16/07	Not filed	33
	10-Q	02/28/07	04/16/07	Not filed	30
	10-Q	05/31/07	07/16/07	Not filed	27
	10-K	08/31/07	11/29/07	Not filed	23
	10-Q	11/30/07	01/14/08	Not filed	21
	10-Q	02/29/08	04/14/08	Not filed	18
	10-Q	05/31/08	07/15/08	Not filed	15
	10-K	08/31/08	12/01/08	Not filed	10

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
VDS Enterprises, Inc.					
	10-Q	11/30/08	01/14/09	Not filed	9
	10-Q	02/28/09	04/14/09	Not filed	6
	10-Q	05/31/09	07/15/09	Not filed	3
Total Filings Delinquent	36				
Versent Corp.					
	20-F	12/31/00	07/02/01	Not filed	99
	20-F	12/31/01	07/01/02	Not filed	87
	20-F	12/31/02	06/30/03	Not filed	76
	20-F	12/31/03	06/30/04	Not filed	64
	20-F	12/31/04	06/30/05	Not filed	52
	20-F	12/31/05	06/30/06	Not filed	40
	20-F	12/31/06	07/02/07	Not filed	27
	20-F	12/31/07	06/30/08	Not filed	16
	20-F	12/31/08	06/30/09	Not filed	4
Total Filings Delinquent	9				
Viasource Communications, Inc.					
	10-Q	09/29/01	11/13/01	Not filed	95
	10-K	12/29/01	03/29/02	Not filed	91
	10-Q	03/30/02	05/14/02	Not filed	89
	10-Q	06/29/02	08/13/02	Not filed	86
	10-Q	09/28/02	11/12/02	Not filed	83
	10-K	12/28/02	03/28/03	Not filed	79
	10-Q	03/29/03	05/13/03	Not filed	77
	10-Q	06/28/03	08/12/03	Not filed	74
	10-Q	09/27/03	11/11/03	Not filed	71
	10-K	01/03/04	04/02/04	Not filed	66
	10-Q	04/03/04	05/18/04	Not filed	65
	10-Q	07/03/04	08/17/04	Not filed	62
	10-Q	10/02/04	11/16/04	Not filed	59
	10-K	01/01/05	04/01/05	Not filed	54
	10-Q	04/02/05	05/17/05	Not filed	53
	10-Q	07/02/05	08/16/05	Not filed	50
	10-Q	10/01/05	11/15/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	04/01/06	05/16/06	Not filed	41
	10-Q	07/01/06	08/15/06	Not filed	38

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Viasource Communications, Inc.					
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/30/06	03/30/07	Not filed	31
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/29/07	11/13/07	Not filed	23
	10-K	12/29/07	03/28/08	Not filed	19
	10-Q	03/29/08	05/13/08	Not filed	17
	10-Q	06/28/08	08/12/08	Not filed	14
	10-Q	09/27/08	11/11/08	Not filed	11
	10-K	12/27/08	03/30/09	Not filed	7
	10-Q	03/28/09	05/12/09	Not filed	5
	10-Q	06/27/09	08/11/09	Not filed	2
Total Filings Delinquent	32				
Viatech Communications Group, Inc.					
	10-QSB	09/30/96	02/17/97	Not filed	152
	10-KSB	12/31/96	03/31/97	Not filed	151
	10-QSB	03/31/97	05/15/97	Not filed	149
	10-QSB	06/30/97	08/14/97	Not filed	146
	10-QSB	09/30/97	11/14/97	Not filed	143
	10-KSB	12/31/97	03/31/98	Not filed	139
	10-QSB	03/31/98	05/15/98	Not filed	137
	10-QSB	06/30/98	08/14/98	Not filed	134
	10-QSB	09/30/98	11/16/98	Not filed	131
	10-KSB	12/31/98	03/31/99	Not filed	127
	10-QSB	03/31/99	05/17/99	Not filed	125
	10-QSB	06/30/99	08/16/99	Not filed	122
	10-QSB	09/30/99	11/15/99	Not filed	119
	10-KSB	12/31/99	03/30/00	Not filed	115
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Viatech Communications Group, Inc.					
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**50**				
VideoFlicks.com, Inc.					
	20-F	08/31/00	02/28/01	Not filed	104
	20-F	08/31/01	02/28/02	Not filed	92
	20-F	08/31/02	02/28/03	Not filed	80

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
VideoFlicks.com, Inc.					
	20-F	08/31/03	03/01/04	Not filed	67
	20-F	08/31/04	02/28/05	Not filed	56
	20-F	08/31/05	02/28/06	Not filed	44
	20-F	08/31/06	02/28/07	Not filed	32
	20-F	08/31/07	02/28/08	Not filed	20
	20-F	08/31/08	03/02/09	Not filed	7

Total Filings Delinquent 9

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than $75 million in public equity float as of the end of its most recently completed second fiscal quarter) have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

[Release Nos. 33-9073; 34-60825; IC-28946; File No. S7-22-09]

RIN 3235-AK25

AMENDMENTS TO RULES REQUIRING INTERNET AVAILABILITY OF PROXY MATERIALS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing changes to the proxy rules under the Securities Exchange Act of 1934 to improve the notice and access model for furnishing proxy materials to shareholders. Specifically, we are proposing revisions to our rules to provide additional flexibility regarding the format of the Notice of Internet Availability of Proxy Materials that is sent to shareholders. We are also providing guidance about the current requirement for the Notice to identify the matters intended to be acted on at the shareholders' meeting. In addition to the proposed changes and guidance regarding the format of the Notice, we are proposing a new rule that will permit issuers and soliciting shareholders to include explanatory materials regarding the process of receiving and reviewing proxy materials and voting. Finally, we are proposing revisions to the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option.

DATES: Comments should be received on or before [insert date 30 days after publication in the Federal Register].

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-22-09 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 S7-22-09. 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 Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Steven G. Hearne, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, or with respect to registered investment companies, Sanjay Lamba, Senior Counsel, in the Office

of Disclosure Regulation, Division of Investment Management, at (202) 551-6784, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Rule 14a-16[1] under the Securities Exchange Act of 1934[2] and Rule 498[3] under the Securities Act of 1933.[4]

I. Background

As part of a continuing review of the proxy disclosure and solicitation process, we have been exploring ways to improve the disclosures shareholders receive when they are asked to make a voting decision and the process followed when those votes are solicited. In May 2009, we voted to propose changes to our proxy rules to require issuers to include shareholder nominated directors in issuer proxy statements if certain conditions are met.[5] We also recently proposed amendments to our proxy rules to enhance the compensation and corporate governance disclosures that issuers are required to make and to address certain proxy solicitation matters.[6] We also approved changes proposed by the New York Stock Exchange ("NYSE") to its Rule 452 that eliminated broker discretionary voting for uncontested elections of directors at shareholder meetings.[7]

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1 17 CFR 240.14a-16.

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

3 17 CFR 230.498.

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

5 See Facilitating Shareholder Director Nominations, Release No. 33-9046 (June 10, 2009) [74 FR 29024].

6 See Proxy Disclosure and Solicitation Enhancements, Release No. 33-9052 (July 10, 2009) [74 FR 35076].

7 See Order Approving Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452 and Corresponding Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting for the Election of Directors, Except for Companies Registered under the Investment Company Act of 1940, and to Codify Two Previously Published Interpretations that

One of the other ways we identified to improve the proxy solicitation process is to revise our notice and access proxy rules to further facilitate informed shareholder participation in the proxy voting process. In 2007 we amended the proxy rules by adopting a notice and access model that required all issuers and other soliciting persons to post their proxy materials on an Internet Web site and furnish notice of the materials' availability to shareholders.[8] The notice and access model was intended to establish procedures that would promote use of the Internet as a reliable and cost-efficient means of making proxy materials available to shareholders. Even though we recently adopted these requirements, we believe based on our experience that it is important to propose these limited modifications in order to advance the regulatory goals of the notice and access model.

Under the notice and access model, an issuer or other soliciting person may choose to provide proxy materials to shareholders under either of two options, the "notice-only option" and the "full set delivery option."[9] An issuer or other soliciting

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Do Not Permit Broker Discretionary Voting for Material Amendments to Investment Advisory Contracts with an Investment Company, Release No. 34-60215 (July 1, 2009) [74 FR 33293].

8 See Internet Availability of Proxy Material, Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148] ("Internet Availability of Proxy Material Adopting Release") and Shareholder Choice Regarding Proxy Materials, Release No. 34-56135 (July 26, 2007) [72 FR 42221]. The rules were phased-in over a two year period. Large accelerated filers, not including registered investment companies, were required to use the model with respect to proxy solicitations commencing on or after January 1, 2008. All other companies (including registered investment companies), and soliciting persons, were required to use the model for proxy solicitations commencing on or after January 1, 2009.

9 The process of distributing proxy materials to beneficial owners differs from the process for direct delivery of the materials by an issuer to its record holders. Beneficial owners are owners whose names do not appear directly in issuers' stock registers because they hold their securities through a broker, bank, trustee, or similar intermediary. The proxy rules, specifically Exchange Act Rule 14a-13, Rule 14b-1 and Rule 14b-2 [17 CFR 240.14a-13, 240.14b-1 and 240.14b-2], impose obligations on issuers and intermediaries to ensure that beneficial owners receive proxy materials and are given the opportunity to participate in the shareholder voting process. Under the proxy rules, intermediaries are required to forward the proxy materials, other than the proxy card, along with a request for voting instructions. The request for voting instructions is prepared by the intermediary and the beneficial owner returns the voting instructions to the intermediary. The intermediary is required to vote the beneficial owners' shares in accordance with each owner's

person is permitted to provide proxy materials to some shareholders via the notice-only option and to other shareholders via the full set delivery option. Under both options, the issuer or other soliciting person must make its proxy materials available on an Internet Web site.

The notice-only option permits the issuer or other soliciting person to send only a Notice of Internet Availability of Proxy Materials ("Notice") to shareholders. The Notice must include, among other things, the Internet Web site address where shareholders can access the proxy materials and a description of the means by which a shareholder can request paper or electronic copies of the materials.[10] Under this option, an issuer must send the Notice to shareholders at least 40 days prior to the shareholder meeting to which the proxy materials relate.[11] A soliciting person other than the issuer must send the Notice to shareholders by the later of 40 days prior to the meeting or 10 days after the issuer first sends its Notice or proxy materials to shareholders.[12] An issuer or other soliciting person must then provide copies of the proxy materials upon the request of shareholders receiving the Notice.[13] The full set delivery option permits an issuer or other soliciting person to send the traditional full set of proxy materials in paper to shareholders accompanied by the Notice, or to include the information required in the Notice in the proxy materials.[14]

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voting instructions when formally executing the proxy card. In the absence of voting instructions from the beneficial owner, the intermediary may vote the beneficial owner's shares in its own discretion under certain circumstances. See NYSE Rule 452.

10 See Exchange Act Rule 14a-16(b) and (d) [17 CFR 240.14a-16(b) and (d)].

11 See Exchange Act Rule 14a-16(a) [17 CFR 240.14a-16(a)].

12 See Exchange Act Rule 14a-16(l) [17 CFR 240.14a-16(l)].

13 See Exchange Act Rule 14a-16(j) [17 CFR 240.14a-16(j)].

14 See Exchange Act Rule 14a-16(n) [17 CFR 240.14a-16(n)].

According to Broadridge Financial Solutions, Inc. ("Broadridge"), 1,312 corporate issuers used the notice-only option for distribution to some portion of their beneficial owners under the notice and access model in the 2009 proxy season.[15] While issuers may enjoy significant cost savings using the notice-only option under the notice and access model, we are concerned by statistics indicating lower shareholder response rates to proxy solicitations when the notice-only option is used.[16] According to Broadridge, the percentage of "retail" shares[17] voted by shareholders in issuers using the notice-only option for distribution to some portion of their beneficial owners is lower than the percentage in issuers that exclusively use the full-set delivery option to provide proxy materials to their shareholders.[18] In addition, when comparing between

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15 See Broadridge Notice & Access, Statistical Overview of Use with Beneficial Shareholders (as of May 31, 2009) at http://www.broadridge.com/notice-and-access/NAStatsStory.pdf ("Broadridge Statistical Overview"). Broadridge is the largest provider of brokerage processing services with respect to beneficial owners holding through a broker or similar intermediary and has provided detailed statistical information on the use of the notice and access model. The Broadridge Statistical Overview is generally limited to comparisons between issuers that have used the notice-only option for distribution to some portion of their beneficial owners and issuers that exclusively used the full set delivery option and comparisons between the first and second years of use of the notice-only option. The data that is currently publicly available and directly comparable to the data in the May 31, 2009 Broadridge Statistical Overview does not provide a comparison to an issuer's experience in the year prior to using the notice-only option for distribution.

16 The Commission has long had an interest in facilitating shareholder participation in corporate governance and in fair corporate suffrage. See, for example, the testimony of Chairman Ganson Purcell in 1943, Securit[ies] and Exchange Commission Proxy Rules: Hearings on H.R. 1493, H.R. 1821, and H.R. 2019 Before the House Comm. on Interstate and Foreign Commerce, 78th Cong., 1st Sess., at 17-19 (1943) and more recently Security Holder Director Nominations, Release No. 34-48626 (Oct. 14, 2003) [68 FR 60784], Shareholder Proposals Relating to the Election of Directors, Release No. 34-56161 (July 27, 2007) [72 FR 43488], and Release No. 33-9046 in note 5 above.

17 The term "retail," as used in the Broadridge Statistical Overview, does not refer to shares or accounts that are managed by an advisor and that have previously consented to the electronic delivery of their proxy materials. See Broadridge Statistical Overview at 1. When not referring specifically to the Broadridge statistics, this release uses the term individual shareholders to more broadly refer to non-institutional shareholders generally.

18 According to the Broadridge Statistical Overview, when comparing the 11-month period from July 1, 2008 to May 31, 2009, response rates were 4.11% less for retail shares voted in issuers that used the notice-only option for distribution to some portion of their beneficial owners (27.69%) compared to issuers that exclusively used the full set delivery option (31.8%).

shareholders in issuers that used both the notice-only and full set delivery options, the response rates of retail shares voted by shareholders that received notice-only was half that of shareholders that received full set delivery.[19] With regard to the effect on voting by retail account holders, rather than retail shares voted, statistics provided by Broadridge indicate even lower voting response rates for retail accounts that received notice-only instead of full-set delivery.[20] The available data do not necessarily exclude the possibility that factors other than requirements of our notice and access rules may contribute to the different voting response rates, although the available data do not identify them.

We are exploring the reasons for the difference in retail share and account voting response rates and whether our rules are creating difficulties or affecting voting rates. We note that there appears to have been some confusion among shareholders regarding the operation of the notice and access model.[21] The legend required to be put on the

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19 According to the Broadridge Statistical Overview, for companies that used a mixed approach – using the notice-only option for some retail shareholders and the full set delivery option for the remaining shareholders - the percentage of retail shares voted by shareholders that received notice-only was 13.48% during the 11-month period from July 1, 2008 to May 31, 2009. In comparison, the percentage of retail shares voted by shareholders of the same set of issuers that received full set delivery during the same period was 28.63%.

20 The percentage of retail accounts that responded when receiving notice-only under the mixed approach during the 11-month period from July 1, 2008 to May 31, 2009 was only 4.10%. In comparison, for companies that used a mixed approach, the percentage of retail accounts that responded after receiving full-set delivery during the same period was 21.44%. To the extent that retail account data represent individual shareholders, the data indicates a large difference in voting by individual shareholders that receive full-set delivery as opposed to those that receive notice only. It is important to note, however, that issuers (absent specific instructions from a shareholder) have the flexibility under the notice and access model to determine which shareholders will receive notice-only or full set delivery of proxy materials. As a result, when making such determinations, it is possible that consideration is given to the historical response rates of particular shareholders or certain similarly situated shareholders. Consequently, the subset of retail investors that only receive the Notice may be stratified to include those shareholders that are least likely to respond to the materials. Among the other potential reasons for the difference in these response rates may be an issuer's consideration of the number of shares held in an account (e.g., all accounts holding 500 shares or more will receive a full set of proxy materials) when deciding whether to furnish notice-only or full set delivery of proxy materials.

21 Our Office of Investor Education and Advocacy has received complaints about the notice and access model and members of our staff have heard about the experience of some issuers with the notice and access model from informal meetings with Broadridge and issuer representatives.

Notice does not appear to have provided clear guidance for some shareholders as to how those shareholders could access the proxy materials online or request a paper copy of the proxy materials and vote their shares. For example, the Commission's staff has received reports of some shareholders attempting to indicate their voting instructions by returning a marked copy of the Notice.[22] Disclosing the matters to be acted on in the Notice in the same format as the matters listed in the proxy may have resulted in some shareholders misunderstanding the purpose of the Notice. There may be other reasons why shareholder participation under the notice and access model, especially by individual shareholders, is lower, and we are soliciting comment on why the participation rates are lower and how best to advance the Commission's regulatory interest in informed shareholder participation.

We are proposing revisions to remove regulatory impediments that may be reducing shareholder response rates to proxy solicitations. The revisions are intended to permit issuers and other soliciting persons to more effectively use the notice and access model. The proposed amendments are described below. We are also soliciting comment on ways to improve the mechanics of the notice and access model and other ways to increase informed shareholder participation in the proxy solicitation process.[23] We intend to continue monitoring implementation of the notice and access rules and may propose additional revisions in order to achieve greater shareholder participation.

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22 Id.

23 For example, when the amendments to NYSE Rule 452 were approved, we noted our support for the establishment of an Investor Education Sub-Committee of the NYSE Proxy Working Group to develop and encourage the NYSE and its member firms to implement an investor education effort to inform investors about the amendments to NYSE Rule 452, the proxy voting process, and the

II. Proposed Amendments

A. Improving Clarity of the Notice

Exchange Act Rule 14a-16(d)[24] currently imposes strict requirements regarding the content of the Notice, and requires the Notice to be presented in a prescribed format.[25] The rule requires the Notice to contain a prominent legend indicating that the document is an important notice regarding the Internet availability of proxy materials for a specified shareholder meeting. Among other things, the Notice also must indicate that it presents only an overview of the more complete proxy materials available to the shareholders on the Internet and must include a statement encouraging shareholders to access and review the proxy materials at a specified Web site address. In addition, the Notice must explain how a shareholder may request a paper or email copy of the proxy materials. Rule 14a-16(d)(3) further requires the Notice to contain "[a] clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendations regarding those matters, but no supporting statements."[26] The intent behind the specific Notice requirements was to inform shareholders of the availability of proxy materials and to notify them of the matters to be considered and voted on at the meeting. The specific limitations on the type of information that can be included in the Notice were included because we do not intend the Notice to become a means of persuading shareholders how to vote or to deliver marketing or other materials that may distract shareholders from the Notice.

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importance of voting. See Release No. 34-60215 in Note 7 above. Our Office of Investor Education and Advocacy is also considering ways to educate investors about these matters.

[24] 17 CFR 240.14a-16(d).

[25] 17 CFR 240.14a-16(d)(1).

[26] 17 CFR 240.14a-16(d)(3).

Exchange Act Rule 14a-16(f) imposes a strict prohibition on the types of materials that may accompany the Notice when an issuer or other soliciting person elects to follow the notice-only option. Specifically, for companies other than registered investment companies, the Notice under this option must be sent separately from other types of shareholder communications and may not accompany any other document or materials, except for a pre-addressed, postage-paid reply card for requesting a copy of the proxy materials and a copy of a notice of shareholder meeting required by state law.[27] Therefore, a soliciting person may not include additional materials to explain why the shareholder is receiving only a Notice instead of the proxy materials.

In light of our serious concerns regarding shareholder confusion and the potential that our rules may be causing a reduction in shareholder voting, we propose to revise our rules to provide issuers and other soliciting persons with additional flexibility in formatting and selecting the language to be used in the Notice. Rather than requiring the soliciting person to include a detailed legend that may seem like boilerplate language to shareholders, we are proposing to require that the information appearing on the Notice address certain topics, without specifying the exact language to be used.[28] We hope the flexibility will allow issuers and other soliciting persons to develop a more effective explanation of the importance and effect of the Notice, including to provide clearer

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27 Registered investment companies may also include a prospectus or a report that is required to be transmitted to shareholders by Section 30(c) of the Investment Company Act (15 U.S.C. 80a-29(e)) and the rules thereunder. See Exchange Act Rule 14a-16(f)(2)(iii) [17 CFR 240.14a-16(f)(2)(iii)].

28 See proposed Exchange Act Rule 14a-16(d), which would limit the required legend to the line "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]" and would require the other information currently required in the legend to be included in the Notice, but not as part of a specified legend.

guidance for shareholders as to how to access the proxy materials online, request a paper copy of the proxy materials, and vote their shares.

In addition, we have been informed that certain issuers are interpreting Rule 14a-16(d)(3) to require them to comply with the specific Exchange Act Rule 14a-4[29] formatting and content requirements for disclosure of matters on the proxy card when identifying in the Notice each separate matter to be acted on at the meeting.[30] Rule 14a-16(d)(3) provides for more flexibility regarding the design of the Notice. It is not necessary that the Notice directly mirror the proxy card. Rather, the rule simply requires that the Notice identify each matter that will be considered at the meeting (e.g., election of directors; ratification of auditors; approval of a stock option plan, etc.).

Further, in order to mitigate confusion about the Notice and to allow issuers and other soliciting persons to better engage shareholders, we propose to revise our rules to permit issuers and other soliciting persons to accompany the Notice with an explanation of the notice and access model.[31] The exception provided would be limited to the process of receiving or reviewing the proxy materials and voting. Materials designed to persuade shareholders to vote in a particular manner, change the method of delivery, or explain the basis for sending only a Notice to shareholders would not be permitted under the exception.[32] With this increased flexibility, issuers could better educate shareholders about the notice and access model. While issuers would be permitted to provide their

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29 17 CFR 240.14a-4.

30 See note 21 above.

31 See proposed Exchange Act Rule 14a-16(f)(2)(iv).

32 As we explained in the Internet Availability of Proxy Material Adopting Release, "The Notice is intended merely to make shareholders aware that these proxy materials are available on an Internet Web site; it is not intended to serve as a stand-alone basis for making a voting decision." See note 8 above.

own explanation of the process of receiving and reviewing the proxy materials and the process of voting, we expect that many issuers will use standardized materials prepared for this purpose.[33]

In addition to proposing to amend our rules to reduce possible confusion about the Notice, the Office of Investor Education and Advocacy, in consultation with the Division of Corporation Finance, has been directed to develop a program designed to educate and inform shareholders, especially individual shareholders, about the notice and access model; explain how shareholders may participate through this model; and explain shareholders' rights under this model. Although the proposed amendments to our rules would permit, rather than require, issuers and other soliciting persons to include explanatory information about the Notice, the Commission strongly encourages issuers and other soliciting persons who use the notice-only option to better inform shareholders about the notice and access model. Issuers who have experienced significant cost savings, but may also have experienced a significant decrease in participation rates, may wish to consider using those cost savings in educational efforts designed to increase informed participation by shareholders.

We are also proposing technical amendments to our rules for registered investment companies. Rule 14a-16(f)(2)(iii) currently permits a registered investment company to accompany the Notice with a prospectus or report to shareholders.[34] The

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33 Through informal meetings with the staff, issuer representatives, intermediaries and proxy distribution service providers have expressed interest in developing standardized educational materials to be included with the Notice.

34 17 CFR 240.14a-16(f)(2)(iii). Unless otherwise specified or the context otherwise requires, the term "prospectus" means a prospectus meeting the requirements of Section 10(a) of the Securities Act [15 U.S.C. 77j(a)]. See 17 CFR 240.0-1(d).

Commission recently adopted rule amendments that permit mutual funds[35] to satisfy their prospectus delivery obligations by sending or giving investors key information in the form of a summary prospectus.[36] Consistent with permitting mutual funds to use a summary prospectus to satisfy their delivery obligations, we propose to revise our rules to permit mutual funds to accompany the Notice with a summary prospectus.[37]

Request for Comment

- Has use of the notice and access model made proxy materials more or less accessible to shareholders? The Commission is concerned by reports that indicate there has been a drop in shareholder response rates to proxy solicitations by individual shareholders under the notice and access model, especially when the notice-only option has been used. We are proposing changes to the Notice requirements intended to make the Notice clearer and encourage efforts to better inform shareholders about participation under the notice and access model. Do the proposed changes help in enabling issuers and other soliciting persons to make the Notice clearer? Will these changes help address concerns about confusion and other

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35 We use the term "mutual fund" to mean a registered investment company that is an open-end management company as defined in Section 5(a)(1) of the Investment Company Act of 1940 [15 U.S.C. 80a-5(a)].

36 See Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8998 (Jan. 13, 2009) [74 FR 4546]. Although the summary prospectus is not a Section 10(a) prospectus, it may be used to satisfy any prospectus delivery obligations under Section 5(b)(2) of the Securities Act [15 U.S.C. 77e(b)(2)]. 17 CFR 230.498(c).

37 See proposed amendment to Exchange Act Rule 14a-16(f)(2)(iii). We are also proposing a conforming amendment to Rule 498 under the Securities Act [17 CFR 230.498], which permits mutual funds to use a summary prospectus to satisfy their prospectus delivery obligations. Rule 498(f)(2) provides that a fund's summary prospectus shall be given greater prominence than any accompanying materials. We are proposing to amend Rule 498 to provide that a summary prospectus need not be given greater prominence than an accompanying Notice. See proposed amendment to Rule 498(f)(2).

factors that may be reducing shareholder participation? What other changes to the notice and access model should we consider to address these concerns?

- What factors have caused the lower shareholder response rates by individual shareholders to proxy solicitations when the notice-only option is used under the notice and access model? If the lower shareholder response rates result primarily from the notice and access model itself, would requiring issuers to deliver paper copies of proxy materials to some subset of individual shareholders, such as shareholders that own over a certain threshold of shares or that have received paper copies of proxy materials and voted in the past, affect voting rates? Does permitting issuers to choose to which shareholders to provide notice-only and full set delivery affect voting rates? If so, how are issuers exercising their discretion over full set delivery and are they doing so appropriately? Would additional requirements affect an issuer's ability to implement the notice and access model? Are there other alternatives that would increase the voting rates under the notice and access model?
- Should we consider adding requirements that would limit an issuer's ability to use the notice-only option where the issuer has experienced a decrease in shareholder participation as a result of using the notice-only option for distribution to some portion of its shareholders? For example, should we only allow an issuer to continue to use the notice-only option if the shares voted or the voting response rate has not decreased from the

most recent issuer's meeting when they provided all of their shareholders with full set delivery? Would some decrease, such as 10% or 20% be acceptable? Should we instead consider requiring shareholder participation to increase from prior years in order for an issuer to continue to use the notice-only option? Are there other participation-level conditions that we should consider?

- Will shareholders find the Notice more confusing if we do not prescribe how to describe the matters to be acted on at the meeting? Should we prescribe minimum standards for formatting? Should we instead require a legend to the effect that the Notice should not be used for voting on matters, and that a separate proxy card or Vote Instruction Form should be used for voting?
- Should we permit the Notice to be accompanied by materials to explain the process of receiving and reviewing the proxy materials and voting as proposed? Should we require that explanatory materials be included? Should we allow these explanatory materials to include any additional information? For example, should an issuer or other soliciting person be permitted to explain what the benefits of using the notice and access model would be? Should we specify by rule the topics that cannot be included? Should we include the level of detail in the explanation in this section in the text of the rule? For example, should the rule specifically provide that the explanation in the Notice may not contain materials designed to persuade shareholders to vote in a particular manner, change

the methods of delivery or explain the basis for sending the Notice? Should a soliciting person be permitted to explain why it has decided to use the notice-only option?

- The Commission is aware that there has been some confusion relating to the Notice and that some shareholders have attempted to indicate their voting instructions by returning a marked copy of the Notice. What changes can we make to help shareholders better understand the Notice? Should the Commission amend its rules to prohibit issuers and other soliciting persons from including voting recommendations in the Notice as permitted under Rule 14a-16(d)(3)? Would removing recommendations increase the likelihood that a shareholder will access the proxy materials through the Internet? Does the Notice currently look too similar to a proxy card or Vote Instruction Form? Would possible confusion in the Notice be reduced if the Commission amended its rules to require identification of matters to be voted on by topic rather than identifying the specific matters as they appear on the proxy card, so that the Notice looks less like a proxy card or Vote Instruction Form?
- Has the notice and access model lowered costs for issuers and other soliciting persons resulting from the proxy solicitation process? Have any costs increased? In your response, please quantify the costs and savings of using the notice and access model, and provide supporting data where possible.

- It is our understanding from informal conversations our staff has had with issuers and proxy distribution service providers that a number of issuers were discouraged from using the notice and access model due to the difficulty of meeting the 40-day Notice mailing requirement. Would a 30-day deadline for delivery of the Notice still allow sufficient time for shareholders who prefer paper proxy materials to request and receive them through the mail? Would changing to a 30-day deadline encourage use and improve implementation of the notice and access model? If the Notice mailing requirement for the issuer were shortened, would any changes be necessary to the filing and mailing requirements for soliciting persons other than the issuer?
- Some issuers have expressed concern regarding the fees charged by proxy distribution service providers. Have the fees charged by proxy distribution service providers affected use rates of the notice and access model? Should the Commission address fees charged by service providers relating to the implementation of the notice and access model? If so, how?
- Should the Commission consider proposing suspension of the notice and access rules until a later date to provide more time for shareholders to understand and be better prepared for the notice and access model? If so, how much time would be appropriate? Would additional educational efforts be sufficient to inform shareholders about the notice and access model, or would other efforts, such as development of an on-line disclosure and voting infrastructure, be needed? If so, why?

B. Proposed Amendment to Notice Deadlines for Soliciting Persons Other Than the Issuer

Under Rule 14a-16, if a soliciting person other than the issuer chooses to use the notice-only option, the soliciting person must send its Notice to shareholders by a date that is the later of:

- 40 calendar days before the shareholder meeting to which the proxy materials relate, or
- 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders. [38]

We created this 10-day period to provide soliciting persons other than the issuer desiring to rely on the notice-only option sufficient time to respond to an issuer's mailing of proxy materials and still allow shareholders receiving a Notice from the soliciting person enough time to request paper copies of the soliciting person's proxy materials.[39]

The current 10-calendar-day requirement for soliciting persons to send the Notice to shareholders can create potential compliance issues for soliciting persons. Under current practice, the staff of the Division of Corporation Finance reviews and provides comments on preliminary proxy materials filed by soliciting shareholders in a contested solicitation. While the staff makes great effort to review filings and address comments as quickly as possible, there may continue to be outstanding comments on a soliciting person's preliminary proxy statement more than 10 calendar days after the soliciting person has initially filed. Consequently, a soliciting person may not be in a position to

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38 17 CFR 240.14a-16(l)(2)(i) and (ii).

39 See Internet Availability of Proxy Materials, Release No. 34-52926 (Dec. 8, 2005) [70 FR 74597] ("Internet Availability of Proxy Materials Proposing Release").

send its Notice within 10 calendar days after the issuer first sends its Notice or proxy statement to shareholders.

Thus, because a soliciting person is required to send its Notice within 10 days after the issuer first sends its Notice or proxy statement, the practical effect of Rule 14a-16, as currently written, is to limit that person's ability to use the notice-only option. This is because Rule 14a-16(b)(4) requires the soliciting person to make a means to execute a proxy available to shareholders at the time the Notice is first sent to shareholders. Rule 14a-4(f), however, prohibits a person from providing a form of proxy unless it is accompanied, or preceded, by a definitive proxy statement. Because the soliciting person may not have finished revising its proxy statement and may not have filed its definitive proxy statement with the Commission by that time, the notice and access rules, combined with current staff review practice, may, in many circumstances, prevent a soliciting person other than the issuer from using the notice-only option for a proxy contest if that soliciting person's initial proxy statement filing is made in response to the issuer's definitive proxy statement filing.

To improve implementation of the notice and access model, we propose to amend Rule 14a-16(l)(2)(ii) to require the soliciting shareholder relying on this alternative to file a preliminary proxy statement within 10 days after the issuer files its definitive proxy statement and to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the Commission. We believe that this proposed time period would provide sufficient time for a soliciting person to prepare its proxy statement and respond to any staff comments, while still permitting the soliciting person to use the notice and access model. While the proposed rule does not provide for a specific period

of time before the meeting by which a soliciting person would need to mail the Notice, the soliciting person should make the Notice and proxy materials available to shareholders with sufficient time for shareholders to review the materials and make an informed voting decision.

Request for Comment

- We are proposing to revise one of the two alternative Notice deadlines applicable to soliciting persons other than the issuer to reconcile Rule 14a-16(b)(4) with Rule 14a-4(f) and better coordinate the timing requirements with the Commission staff's review process. Is there a preferable way to revise the rule to address this issue? If so, how should we revise the rule?
- The proposed rule would require a soliciting person to send its Notice to shareholders no later than the date on which it files its definitive proxy statement with the Commission. The soliciting person, however, has control over the date that it files a definitive proxy statement. Is it necessary to impose a specific time period by which a soliciting person other than the issuer must send its Notice? If so, should we impose a specific time period after the filing of the preliminary proxy by which a soliciting shareholder must send its Notice?

III. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- the proposed amendments that are the subject of this release;

- other ways to reduce regulatory impediments to shareholder participation and thereby improve shareholder response rates to proxy solicitations using the notice and access model or otherwise improve the notice and access model;
- additional or different changes; or
- other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of issuers, investors, and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. Paperwork Reduction Act

A. Background

Certain provisions of the proposed rule amendments contain a "collection of information" within the meaning of the Paperwork Reduction Act of 1995.[40] The Commission is submitting this proposed amendment to the Office of Management and Budget for review in accordance with the PRA. An agency may not conduct or sponsor, and a person is not required to comply with, a collection of information unless it displays a currently valid control number. Compliance with the rules as they are proposed to be amended would be mandatory, however certain information collections under these rules are required and some are voluntary. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

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[40] 44 U.S.C. 3501 et seq.; 5 CFR 1320.11.

The proposed revision to Rule 14a-16 would permit issuers and other soliciting persons to include explanatory materials about the notice and access model along with the Notice. The proposed revision would still require a legend in the Notice, but would allow more flexibility in how prescribed topics are described in the legend.[41] The proposed explanatory materials would be a relatively short and straight-forward explanation of the notice and access model that could accompany the Notice. Finally, the proposed change to the filing deadline for soliciting persons other than the issuer is not expected to affect the burden estimates.

B. Regulation 14A and 14C

The titles for the collections of information for operating companies are:[42]

- Regulation 14A (OMB Control No. 3235-0059); and
- Regulation 14C (OMB Control No. 3235-0057).

We previously revised these collections of information in the release that proposed the notice and access model as a voluntary model for disseminating proxy materials[43] and the release in which we adopted amendments requiring issuers and other soliciting persons to follow the model.[44] We submitted the revisions in both releases to the OMB for review in accordance with the PRA. We received approval for the revised

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41 We anticipate no change in the burden estimates for the change in the legend requirement. The proposed rule would require essentially the same information as is currently required in the legend to continue to be conveyed creating no additional burden.

42 The paperwork burden from Regulation S-K is imposed through the forms that are subject to the requirements in those regulations and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens and for administrative convenience, we assign a one-hour burden to Regulation S-K.

43 See Internet Availability of Proxy Materials Proposing Release in note 39 above.

44 See the Internet Availability of Proxy Material Adopting Release in note 8 above.

information collections and now propose a further revision which we will submit to OMB.

Under the proposed amendments, an issuer or other soliciting person will be permitted, but not required, to include explanatory materials with the Notice. We expect that this information will generally consist of approximately one or two paragraphs of text. For purposes of the PRA, we estimate the annual burden if a soliciting person chooses to prepare the explanatory materials would be approximately 0.5 reporting hours per issuer or other soliciting person.[45] We estimate that 75% of the burden would be borne by the soliciting person and that 25% of the burden would be borne by outside counsel retained by the soliciting person at an average cost of approximately $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

The following table summarizes the proposed PRA burden estimates for Schedules 14A and 14C:

Table 1: Calculation of Incremental Paperwork Reduction Act Burden Estimates for Proxy and Information Statements

Form	Annual Responses	Incremental Hours/Form	Incremental Burden	75% Issuer	25% Professional	$400 Professional Cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.75	(E)=(C)*0.25	(F)=(E)*$400
Schedule 14A	7300	0.5	3650	2737.5	912.5	$365,000
Schedule 14C	680	0.5	340	255	85	$34,000
Total	7980		3990	2992.5	997.5	$399,000

[45] As we have previously indicated, according to Broadridge, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries. See the Internet Availability of Proxy Materials Adopting Release in note 8 above. We believe that issuers likely will rely on proxy distribution service providers to provide the explanatory materials and that issuers and intermediaries would provide explanatory materials that are substantially the same to the beneficial owners that hold through intermediaries, creating no additional annual burden to prepare an intermediary's Notice.

C. Rule 20a-1

Certain provisions of the current notice and access model contain "collection of information" requirements within the meaning of the PRA, including preparation of Notices, maintaining Web sites, maintaining records of shareholder preferences, and responding to requests for copies. Those provisions increase the current burden for the existing collection of information entitled "Rule 20a-1 under the Investment Company Act of 1940,[46] Solicitation of Proxies, Consents and Authorizations" (OMB Control No. 3235-0158). Rule 20a-1 under the Investment Company Act[47] requires that the solicitation of a proxy, consent, or authorization with respect to a security issued by an investment company be in compliance with Regulation 14A,[48] Schedule 14A,[49] and all other rules and regulations adopted under Section 14(a) of the Exchange Act.[50] It also requires a fund's investment adviser, or a prospective adviser, to transmit to the person making a proxy solicitation the information necessary to enable that person to comply with the rules and regulations applicable to the solicitation.

The notice and access model requires all registered investment companies to post their proxy materials on an Internet Web site and furnish Notice of the materials' availability to shareholders.[51] The Notices, the proxy materials posted on the Web site, and copies of the proxy materials sent in response to shareholder requests are not kept confidential.

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46 15 U.S.C. 80a-1 et seq.

47 17 CFR 270.20a-1.

48 17 CFR 240.14a-1 et seq.

49 17 CFR 240.14a-101.

50 15 U.S.C. 78n(a).

51 See the Internet Availability of Proxy Material Adopting Release in note 8 above.

For purposes of the PRA, we estimate that the annual burden required to prepare and transmit a Notice to be approximately 1.5 reporting hours. This estimate is based on the PRA burden for issuers other than investment companies to prepare and transmit a Notice. We estimate that 75% of the burden is prepared by the investment company and that 25% of the burden is prepared by outside counsel retained by the investment company at an average cost of approximately $400 per hour. Based on the number of proxy filings from registered investment companies received by the Commission during 2008, we would expect approximately 1,225 Notices to be filed annually. We estimate that the total annual reporting burden for rule 20a-1 should be increased by approximately 1,378 hours[52] and that the annual cost would be increased by approximately $735,000[53] for the services of outside professionals to comply with the disclosure provisions of the existing notice and access model.

In addition, registered investment companies must permit shareholders to make permanent elections to receive proxy materials in paper or by e-mail. An investment company issuer must maintain records as to which of its shareholders have made such an election. We believe that many investment company issuers already maintain similar records to keep track of their shareholders who have affirmatively consented to electronic delivery consistent with past Commission guidance,[54] as well as their shareholders who have consented to householding of proxy materials pursuant to Rule 14a-3(e).[55] For

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52 1,225 Notices x 1.5 hours per Notice x .75 = 1,378 hours.

53 1,225 Notices x $400 per hour x 1.5 hours per Notice x .25 = $735,000.

54 Use of Electronic Media for Delivery Purposes, Release No. 33-7233 (Oct. 6, 1995) [60 FR 53458] provided guidance on electronic delivery of prospectuses, annual reports to security holders and proxy solicitation materials under the Securities Act, the Exchange Act, and the Investment Company Act.

55 17 CFR 240.14a-3(e).

purposes of the PRA, we estimate that a typical investment company issuer will spend an additional five hours per year, or a total of 6,125 hours, to maintain these records.[56] Because this is an internal recordkeeping requirement, we do not expect a cost for hiring outside counsel.

Further, the notice and access model also requires an intermediary to prepare its own Notice and provide it to beneficial owners. We expect that all of the factual information required to appear in the Notice will become available as part of the ordinary preparations for a shareholder meeting. This Notice would be substantially the same as a registered investment company's Notice, but will be modified by the intermediaries to provide information that is relevant to beneficial owners rather than registered holders. According to Broadridge, it processes more than 95% of proxy materials that are sent to beneficial owners on behalf of intermediaries, reducing the need to create multiple intermediary Notices. In addition, the investment company issuer or other soliciting person will provide the majority of information required in the intermediary's Notice. Therefore, we estimate that the additional burden to prepare an intermediary's Notice will be approximately one hour, or a total annual burden of 1,225 hours for all investment company proxy solicitations.[57]

Finally, intermediaries must also maintain records to keep track of which beneficial owners have made a permanent election to receive proxy materials in paper or

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56 1,225 filings with an estimated one filing per issuer or soliciting person x 5 hours = 6,125 hours. This estimate is based on the PRA burden for issuers other than investment companies to maintain these records.

57 1,225 notices x 1 hour per Notice = 1,225 hours. We do not include a cost to intermediaries for hiring outside counsel because we expect that the substantive contents of an intermediary's Notice would be provided by the issuer or other soliciting person. The estimates assume that Broadridge will continue to process over 95% of the proxy solicitations on behalf of intermediaries, thereby eliminating the need for each intermediary to prepare a separate Notice.

by e-mail. Like registered investment companies, intermediaries already maintain records of shareholders' affirmative consents to electronic delivery and householding of proxy materials. In addition, intermediaries maintain records as to whether their beneficial owner customers have objected, or not objected, to disclosure of their identities to the investment company issuer. Like investment company issuers, we believe this will result in an additional annual burden of five hours, or a total of 6,125 hours, for intermediaries.[58]

We estimate that the total annual PRA reporting burden for Rule 20a-1 should be increased by 14,853 hours and $735,000 in professional costs to reflect compliance with the existing notice and access model. We request comment and supporting empirical data on the burden and cost of sending copies of proxy materials under the notice and access model for registered investment companies.

Under the proposed amendments to the notice and access model, a registered investment company or other soliciting person will be permitted, but not required, to include explanatory materials with the Notice. We expect that this information will generally consist of approximately one or two paragraphs of text. For purposes of the PRA, we estimate the annual burden if a soliciting person chooses to prepare the explanatory materials would be approximately 0.5 reporting hours per investment company. We estimate that 75% of the burden would be borne by the investment company and that 25% of the burden would be borne by outside counsel retained by the investment company at an average cost of approximately $400 per hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the

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[58] This estimate is based on the PRA burden for intermediaries for issuers other than investment companies to maintain records.

burden carried by the issuer internally is reflected in hours. We estimate that the proposed amendments will increase the PRA burden estimates under Rule 20a-1 by approximately 459 hours and $61,250 in professional costs.

D. Solicitation of Comments

We request comments in order to evaluate: (1) whether the proposed revision to the collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of our estimate of the burden of the proposed revisions to the collection of information; (3) whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.[59]

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-22-09. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-22-09, and be submitted to the Securities and Exchange Commission, Office

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[59] 44 U.S.C. 3506(c)(2)(B).

of Investor Education and Advocacy, 100 F Street, NE, Washington, DC 20549-0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

A. Proposed Amendments

The proposed amendments are designed to improve implementation of the notice and access model. The proposed amendments to Exchange Act Rule 14a-16 would revise the legend requirements in the rule to make them more flexible, revise the deadline applicable to soliciting persons other than the issuer to reconcile the rules and better coordinate them with the Commission staff's review process, and permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting.[60]

We expect that the economic effect of the proposed amendments, if adopted, would be to:

- Facilitate participation by shareholders who may be confused by the operation of the notice and access model;
- Provide flexibility to soliciting persons in describing the notice and access model; and
- Facilitate participation by some soliciting persons who may currently be effectively precluded from using the notice-only option.

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[60] We do not expect our proposed conforming amendment, which would permit mutual funds to accompany the Notice with a summary prospectus, to have a substantive impact on a mutual fund's decision otherwise permitted under Rule 498 of the Securities Act to provide a summary prospectus instead of a statutory prospectus to its shareholders.

B. Benefits

As discussed above, by permitting some additional flexibility in designing the Notice and permitting explanatory materials regarding the process of receiving and reviewing the proxy materials and voting to accompany the Notice, we expect that the proposal would improve understanding of the notice and access model for participating shareholders. Improved understanding of the model would reduce confusion and may thereby improve the efficiency and effectiveness of the proxy voting system. However, to the extent that issuers send notices to shareholders that are less likely to respond, these benefits may be limited.

Revising one of the two alternative Notice deadlines applicable to soliciting persons other than issuers to reconcile the rules' timing requirements with the Commission staff's review process would facilitate use of the notice-only option by soliciting persons who may otherwise be precluded from using the notice-only option because of their inability to meet the deadline for sending the Notice. This would help lower costs for those persons by reducing impediments for certain soliciting persons to participate in the proxy process.

C. Costs

Eliminating the specific limitations of the legend requirement may result in some soliciting persons providing a more confusing notice or seeking to include soliciting, marketing or other materials that may distract shareholders from the Notice. These activities would increase the cost of shareholder participation in the proxy process, and could distort votes and outcomes.[61] In addition, an issuer or other soliciting person that

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[61] Since intermediaries and their agents already have systems to prepare and deliver proxy materials and the nature of the proposed changes are relatively small, we do not expect the intermediaries'

chooses to include explanatory materials in the same mailing with the Notice would incur the cost of preparing that information. We expect that this information generally would be no more than a few paragraphs long. For purposes of the PRA, we estimate that the proposal would cause an annual increase in the compliance burden for issuers and other soliciting persons preparing explanatory materials of approximately 3,450 hours of in-house personnel time and approximately $460,000 for the services of outside professionals.

D. Request for Comments

We request comment on all aspects of the cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendments. We also request that those submitting comments provide, to the extent possible, empirical data and other factual support for their views.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a) of the Exchange Act[62] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act,[63] Section 3(f) of the

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role in sending explanatory material to beneficial owners to affect their costs associated with the rule. In any event, since soliciting persons reimburse intermediaries for their reasonable expenses forwarding proxy materials, we do not expect intermediaries to incur costs associated with the rule.

62 15 U.S.C. 78w(a).

63 15 U.S.C. 77b(b).

Exchange Act[64] and Section 2(c) of the Investment Company Act[65] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to also consider whether the action would promote efficiency, competition, and capital formation.

The amendments would permit some additional flexibility in designing the Notice, permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting, and revise one of the two deadlines applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the timing requirements with the Commission staff's review process. The proposed amendments are designed to reduce regulatory impediments and thereby increase shareholder participation, improve implementation of the notice and access model, and enhance investor understanding of the operation of the notice and access model. These changes are intended to improve the efficiency and effectiveness of the proxy process.

We do not anticipate any effect on competition or capital formation as a result of these proposed revisions.

The Commission solicits comment on whether the proposed amendment, if adopted, would affect efficiency, competition, and capital formation.

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64 15 U.S.C. 78c(f).

65 15 U.S.C. 80a-2(c).

VII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed revisions to Exchange Act Rule 14a-16 that would permit some additional flexibility in designing the Notice, permit issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the process of receiving and reviewing the proxy materials and voting, and revise one of the timing requirements applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the requirement with the Commission staff's review process.

A. Reasons for, and Objectives of, the Proposed Action

The proposed amendments are designed to improve implementation of the notice and access model. Based on our monitoring of the effects of the notice and access model on the proxy solicitation process and the experiences that issuers and shareholders have had with the notice and access model to date, we believe that several revisions to the existing rules would improve the operation of the model without adversely affecting soliciting persons or shareholders' abilities to effectively participate in the proxy process.

Improved notice design and shareholder education should help to mitigate the difference in shareholder participation in the proxy voting process observed in the use of the notice and access model to the extent the difference was caused by our regulations. The proposed amendment to the timing requirements for soliciting persons other than the issuer to file their preliminary proxy statements is designed to better enable soliciting shareholders other than the issuer to use the notice-only option.

B. Legal Basis

We are proposing amendments to the forms and rules under the authority set forth in Sections 6, 7, 10, and 19 of the Securities Act of 1933, as amended, Sections 3(b), 13, 14, 15, and 23(a) of the Exchange Act, as amended, and Sections 8, 20(a), 24(a), 24(g), 30, and 38 of the Investment Company Act, as amended.

C. Small Entities Subject to the Proposed Rules

The proposals would affect issuers that are small entities. Exchange Act Rule 0-10(a)[66] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 public companies, other than investment companies, that may be considered small entities.

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[67] Approximately 178 registered investment companies meet this definition. Moreover, approximately 34 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0-10 under the Exchange Act[68] states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were

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66 17 CFR 240.0-10(a).

67 17 CFR 270.0-10.

68 17 CFR 240.0-10(c)(1).

prepared pursuant to §240.17a-5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. The Commission has estimated that there were approximately 910 broker-dealers that qualified as small entities as defined above.[69] Small Business Administration regulations define "small entities" to include banks and savings associations with total assets of $165 million or less.[70] The Commission estimates that the rules might apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less. The proposals may affect these entities because they are intermediaries that are required under the Commission's proxy rules to forward proxy materials, including the Notice or any explanatory materials, on to shareholders who beneficially own their shares through the intermediaries.[71]

We request comment on the number of small entities that would be impacted by our proposals, including any available empirical data.

D. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments would allow soliciting persons more time to use the notice-only model before a shareholder meeting and permit, but do not require, issuers to include additional, explanatory material in their Notice.

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69 These numbers are based on a review by the Commission's Office of Economic Analysis of 2005 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

70 13 CFR 121.201.

71 An intermediary is not required to forward proxy materials to beneficial owners unless the issuer or other soliciting person provides assurance of reimbursement of the intermediary's reasonable expenses incurred in connection with forwarding those materials. 17 CFR 240.14b-2(c)(2)(i). Therefore, any costs imposed on intermediaries by the rules will be borne by the issuer or other soliciting person.

E. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- The clarification, consolidation or simplification of disclosure for small entities;
- The use of performance standards rather than design standards; and
- An exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives.

The proposed amendments, if adopted, would apply to all issuers and other soliciting persons, including small entities, that choose to rely on the notice-only option. The amendments are intended to improve the operation of the notice and access model by providing additional flexibility in designing the Notice, permitting issuers and other soliciting persons to accompany the Notice with explanatory materials regarding the notice and access model, and revising one of the timing requirements applicable to soliciting persons other than the issuer to reconcile our rules and better coordinate the requirement with the Commission staff's review process.

We considered the use of performance standards rather than design standards in the proposed rules. The proposal contains both performance standards and design standards. We are proposing revising existing design standards, such as the deadline applicable to soliciting persons other than the issuer, to the extent that we believe necessary. However, to the extent possible, we are proposing rules that impose performance standards to provide issuers, other soliciting persons and intermediaries with the flexibility to devise the means through which they can comply with such standards. For example, the proposed amendments regarding explanatory materials do not specify the content of such information.

We are requesting comment on whether separate requirements for small entities would be appropriate. The purpose of the amendments is to improve the implementation of the notice and access model based on our experience with the model to date. Exempting small entities would not be consistent with this goal. The establishment of any differing compliance or reporting requirements or timetables or any exemptions for small business issuers may not be in keeping with the objectives of the proposed rules.

G. Solicitation of Comment

We encourage comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposals are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[72] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments to Exchange Act Rule 14a-16 would be a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

IX. Statutory Authority and Text of Rule and Form Amendments

We are proposing the amendments pursuant to Sections 6, 7, 10, and 19 of the Securities Act of 1933, as amended, Sections 3(b), 13, 14, 15, and 23(a) of the Securities Exchange Act of 1934, as amended, and Sections 8, 20(a), 24(a), 24(g), 30, and 38 of the Investment Company Act of 1940, as amended.

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[72] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

List of Subjects

17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulation is proposed to be amended as follows.

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Amend §230.498 by revising paragraph (f)(2) to read as follows:

§230.498 Summary Prospectuses for open-end management investment companies.

* * * * *

(f) * * *

(2) Greater prominence. If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund's Summary Prospectus shall be given greater prominence than any materials that accompany the Fund's Summary Prospectus, with the exception of other Summary Prospectuses, Statutory Prospectuses, or a Notice of Internet Availability of Proxy Materials under §240.14a-16 of this chapter.

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PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l , 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll , 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 et seq.; and 18 U.S.C. 1350; unless otherwise noted.

* * * * *

4. Amend §240.14a-16 by:

a. Revising paragraph (d)(1).

b. Redesignating paragraphs (d)(2) through (d)(8) as paragraphs (d)(5) through (d)(11);

c. Adding new paragraphs (d)(2) through (d)(4);

d. Removing the word "and" at the end of paragraph (f)(2)(ii);

e. Revising paragraph (f)(2)(iii);

f. Adding paragraph (f)(2)(iv); and

g. Revising paragraph (l)(2)(ii).

The revisions and additions read as follows:

§240.14a-16 Internet availability of proxy materials.

* * * * *

(d) * * *

(1) A prominent legend in bold-face type that states "Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting To Be Held on [insert meeting date]";

(2) An indication that the communication presents only an overview of the more complete proxy materials, which contain important information and are available on the Internet or by mail and encouraging a security holder to access and review the proxy materials before voting;

(3) The Internet Web site address where the proxy materials are available;

(4) Instructions regarding how a security holder may request a paper or email copy of the proxy materials at no charge, including the date by which they should make the request to facilitate timely delivery, and an indication that they will not otherwise receive a paper or email copy;

* * * * *

(f) * * *

(2) * * *

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company's prospectus, a summary prospectus that satisfies the requirements of §230.498(b) of this chapter, or a report that is required to be transmitted to stockholders by section 30(e) of the Investment Company Act (15 U.S.C. 80a-29(e)) and the rules thereunder; and

(iv) An explanation of the process of receiving and reviewing the proxy materials and voting as detailed in this section.

* * * * *

(l) * * *

(2) * * *

(ii) The date on which it files its definitive proxy statement with the Commission, provided its preliminary proxy statement is filed no later than 10 calendar days after the date that the registrant files its definitive proxy statement.

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: October 14, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60830 / October 15, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13651

In the Matter of **Altiva Financial Corp.,** **Atlantic Gulf Communities Corp.,** **CFI Mortgage, Inc.,** **Commodore Holdings Ltd.,** **Conversion Technologies International, Inc.,** **Cyntech Technologies, Inc.,** **Diversified Senior Services, Inc.,** **Dyersburg Corp.,** **Flour City International, Inc.,** **Gerald Stevens, Inc.,** **Leisure Time Casinos & Resorts, Inc., and** **Platinum Entertainment, Inc.** **(n/k/a Vidalia Gichner Holdings, Inc.),** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Altiva Financial Corp., Atlantic Gulf Communities Corp., CFI Mortgage, Inc., Commodore Holdings Ltd., Conversion Technologies International, Inc., Cyntech Technologies, Inc., Diversified Senior Services, Inc., Dyersburg Corp., Flour City International, Inc., Gerald Stevens, Inc., Leisure Time Casinos & Resorts, Inc., and Platinum Entertainment, Inc. (n/k/a Vidalia Gichner Holdings, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Altiva Financial Corp. ("ATVA")[1] (CIK No. 1023334) is a void Delaware corporation located in Atlanta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ATVA is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended February 29, 2000. On April 19, 2000, ATVA announced that it was pursuing an orderly winding up of its business activities and seeking an arrangement with its creditors. As of October 13, 2009, the common stock of ATVA was quoted on the Pink Sheets, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Atlantic Gulf Communities Corp. ("AGLFQ") (CIK No. 771934) is a forfeited Delaware corporation located in Sunrise, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AGLFQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 2000, which reported a net loss of $22,422,000 for the prior nine months. On May 1, 2001, AGLFQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was converted to a Chapter 7 proceeding, and was still pending as of October 13, 2009. As of October 13, 2009, the common stock of AGLFQ was quoted on the Pink Sheets, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. CFI Mortgage, Inc. ("CFIM") (CIK No. 1036071) is a delinquent Delaware corporation located in Largo, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CFIM is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001, which reported a net loss of $3,018,320 for the prior nine months. On March 10, 1999, CFIM filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida, which was terminated on August 10, 2001. As of October 13, 2009, the common stock of CFIM was quoted on the Pink Sheets, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Commodore Holdings Ltd. ("CCLNQ") (CIK No. 945524) is a Bermuda corporation located in Hollywood, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CCLNQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 2000, which reported a net loss of $15,712,000 for the prior nine months. On December 27, 2000, CCLNQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida, which was terminated on February 29, 2008. As of October 13, 2009, the common stock of CCLNQ was quoted on the Pink Sheets, had two market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Conversion Technologies International, Inc. ("CVTL") (CIK No. 923978) is a void Delaware corporation located in St. Augustine, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CVTL is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form

[1]The short form of each issuer's name is also its stock symbol.

10-KSB for the period ended June 30, 2000, which reported a net loss of $479,223 for the prior year. On April 11, 2001, CVTL filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Middle District of Florida, which was terminated on December 12, 2003. As of October 13, 2009, the common stock of CVTL was quoted on the Pink Sheets, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Cyntech Technologies, Inc. ("CYNT") (CIK No. 869293) is an expired Utah corporation located in Conyers, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CYNT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended July 31, 2002, which reported a net loss of $2,004,000 for the prior year, and included a "going concern" opinion based on the company's working capital deficit, stockholder's deficit, significant losses since inception, and default on its licensing agreement. As of October 13, 2009, the common stock of CYNT was quoted on the Pink Sheets, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Diversified Senior Services, Inc. ("DISS") (CIK No. 1042323) is a North Carolina corporation located in Winston-Salem, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DISS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001, which reported a net loss of $1,352,506 for the prior nine months. As of October 13, 2009, the common stock of DISS was quoted on the Pink Sheets, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Dyersburg Corp. ("DBGC") (CIK No. 884999) is an inactive Tennessee corporation located in Charlotte, North Carolina with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DBGC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2001, which reported a net loss of $12,923,000 for the prior six months. On September 25, 2000, DBGC filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was converted to a Chapter 7 petition, and was still pending as of October 13, 2009. As of October 13, 2009, the common stock of DBGC was quoted on the Pink Sheets, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

9. Flour City International, Inc. ("FCIN") (CIK No. 1049049) is a revoked Nevada corporation located in Kingsport, Tennessee with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FCIN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 31, 2001, which reported a net loss of $16,685,000 for the prior nine months. As of October 13, 2009, the common stock of FCIN was quoted on the Pink Sheets, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

10. Gerald Stevens, Inc. ("GSVE") (CIK No. 37525) is a dissolved Florida corporation located in Fort Lauderdale, Florida with a class of securities registered with the

Commission pursuant to Exchange Act Section 12(g). GSVE is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended November 30, 2000, which reported a net loss of $5,188,000 for the prior three months. On April 23, 2001, GSVE filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida, which was terminated on November 15, 2007. As of October 13, 2009, the common stock of GSVE was quoted on the Pink Sheets, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

11. Leisure Time Casinos & Resorts, Inc. ("LTCR") (CIK No. 907093) is a dissolved Colorado corporation located in Norcross, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). LTCR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended June 30, 2000, which reported a net loss of $27,701,000 for the prior year. On March 14, 2002, LTCR filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Georgia, which was converted into a Chapter 7 petition, and was still pending as of October 13, 2009. As of October 13, 2009, the common stock of LTCR was quoted on the Pink Sheets, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

12. Platinum Entertainment, Inc. (n/k/a Vidalia Gichner Holdings, Inc.) ("PTETQ") (CIK No. 883558) is a Delaware corporation located in Alpharetta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PTETQ is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2000, which reported a loss a of $5,215,000 for the prior three months. On July 26, 2000, PTETQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of Illinois, which was terminated on February 6, 2003. On December 15, 2001, the company changed its name in the records of the Delaware Secretary of State to Compendia Media Group. On December 14, 2004, the company changed its name in the records of the Delaware Secretary of State to Vidalia Gichner Holdings, Inc. PTETQ failed to notify the Commission of these name changes. As of October 13, 2009, the common stock of PTETQ was quoted on the Pink Sheets, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings

In the Matter of Altiva Financial Corp., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Altiva Financial Corp.					
	10-Q	05/31/00	07/17/00	Not filed	111
	10-K	08/31/00	11/29/00	Not filed	107
	10-Q	11/30/00	01/16/01	Not filed	105
	10-Q	02/28/01	04/16/01	Not filed	102
	10-Q	05/31/01	07/16/01	Not filed	99
	10-K	08/31/01	11/29/01	Not filed	95
	10-Q	11/30/01	01/14/02	Not filed	93
	10-Q	02/28/02	04/15/02	Not filed	90
	10-Q	05/31/02	07/15/02	Not filed	87
	10-K	08/31/02	11/29/02	Not filed	83
	10-Q	11/30/02	01/14/03	Not filed	81
	10-Q	02/28/03	04/14/03	Not filed	78
	10-Q	05/31/03	07/15/03	Not filed	75
	10-K	08/31/03	12/01/03	Not filed	70
	10-Q	11/30/03	01/14/04	Not filed	69
	10-Q	02/29/04	04/14/04	Not filed	66
	10-Q	05/31/04	07/15/04	Not filed	63
	10-K	08/31/04	11/29/04	Not filed	59
	10-Q	11/30/04	01/14/05	Not filed	57
	10-Q	02/28/05	04/14/05	Not filed	54
	10-Q	05/31/05	07/15/05	Not filed	51
	10-K	08/31/05	11/29/05	Not filed	47
	10-Q	11/30/05	01/17/06	Not filed	45
	10-Q	02/28/06	04/14/06	Not filed	42
	10-Q	05/31/06	07/17/06	Not filed	39
	10-K	08/31/06	11/29/06	Not filed	35
	10-Q	11/30/06	01/16/07	Not filed	33
	10-Q	02/28/07	04/16/07	Not filed	30
	10-Q	05/31/07	07/16/07	Not filed	27
	10-K	08/31/07	11/29/07	Not filed	23
	10-Q	11/30/07	01/14/08	Not filed	21
	10-Q	02/29/08	04/14/08	Not filed	18
	10-Q	05/31/08	07/15/08	Not filed	15

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Altiva Financial Corp. (continued)	*10-K*	08/31/08	12/01/08	Not filed	10
	10-Q	11/30/08	01/14/09	Not filed	9
	10-Q	02/28/09	04/14/09	Not filed	6
	10-Q	05/31/09	07/15/09	Not filed	3
Total Filings Delinquent	37				
Atlantic Gulf Communities Corp.					
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Atlantic Gulf Communities Corp. (continued)	*10-Q*	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	36				
CFI Mortgage, Inc.					
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	31				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Commodore Holdings Ltd.					
	10-K	09/30/00	12/29/00	Not filed	106
	10-Q	12/31/00	02/14/01	Not filed	104
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-K	09/30/01	12/31/01	Not filed	94
	10-Q	12/31/01	02/14/02	Not filed	92
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-K	09/30/02	12/30/02	Not filed	82
	10-Q	12/31/02	02/14/03	Not filed	80
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-K	09/30/03	12/29/03	Not filed	70
	10-Q	12/31/03	02/17/04	Not filed	68
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-K	09/30/04	12/29/04	Not filed	58
	10-Q	12/31/04	02/14/05	Not filed	56
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-K	09/30/05	12/29/05	Not filed	46
	10-Q	12/31/05	02/14/06	Not filed	44
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-K	09/30/06	12/29/06	Not filed	34
	10-Q	12/31/06	02/14/07	Not filed	32
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-K	09/30/07	12/31/07	Not filed	22
	10-Q	12/31/07	02/14/08	Not filed	20
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-K	09/30/08	12/29/08	Not filed	10
	10-Q	12/31/08	02/17/09	Not filed	8
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	35				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Conversion Technologies International, Inc.					
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-QSB	12/31/00	02/14/01	Not filed	104
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-KSB	06/30/01	09/28/01	Not filed	97
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-QSB	12/31/01	02/14/02	Not filed	92
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-KSB	06/30/02	09/30/02	Not filed	85
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-QSB	12/31/02	02/14/03	Not filed	80
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-KSB	06/30/03	09/29/03	Not filed	73
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-QSB	12/31/03	02/17/04	Not filed	68
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-KSB	06/30/04	09/28/04	Not filed	61
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-QSB	12/31/04	02/14/05	Not filed	56
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-KSB	06/30/05	09/28/05	Not filed	49
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-QSB	12/31/05	02/14/06	Not filed	44
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-KSB	06/30/06	09/28/06	Not filed	37
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-QSB	12/31/06	02/14/07	Not filed	32
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-KSB	06/30/07	09/28/07	Not filed	25
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-QSB	12/31/07	02/14/08	Not filed	20
	10-QSB	03/31/08	05/15/08	Not filed	17
	10-KSB	06/30/08	09/29/08	Not filed	13
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-Q**	12/31/08	02/17/09	Not filed	8
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-K**	06/30/09	09/28/09	Not filed	1
Total Filings Delinquent	36				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Cyntech Technologies, Inc.					
	10-QSB	10/31/02	12/16/02	Not filed	82
	10-QSB	01/31/03	03/17/03	Not filed	79
	10-QSB	04/30/03	06/16/03	Not filed	76
	10-KSB	07/31/03	10/29/03	Not filed	72
	10-QSB	10/31/03	12/15/03	Not filed	70
	10-QSB	01/31/04	03/16/04	Not filed	67
	10-QSB	04/30/04	06/14/04	Not filed	64
	10-KSB	07/31/04	10/29/04	Not filed	60
	10-QSB	10/31/04	12/15/04	Not filed	58
	10-QSB	01/31/05	03/17/05	Not filed	55
	10-QSB	04/30/05	06/14/05	Not filed	52
	10-KSB	07/31/05	10/31/05	Not filed	48
	10-QSB	10/31/05	12/15/05	Not filed	46
	10-QSB	01/31/06	03/17/06	Not filed	43
	10-QSB	04/30/06	06/14/06	Not filed	40
	10-KSB	07/31/06	10/30/06	Not filed	36
	10-QSB	10/31/06	12/15/06	Not filed	34
	10-QSB	01/31/07	03/19/07	Not filed	31
	10-QSB	04/30/07	06/14/07	Not filed	28
	10-KSB	07/31/07	10/29/07	Not filed	24
	10-QSB	10/31/07	12/17/07	Not filed	22
	10-QSB	01/31/08	03/17/08	Not filed	19
	10-QSB	04/30/08	06/16/08	Not filed	16
	10-KSB	07/31/08	10/29/08	Not filed	12
	*10-Q**	10/31/08	12/15/08	Not filed	10
	*10-Q**	01/31/09	03/17/09	Not filed	7
	*10-Q**	04/30/09	06/16/09	Not filed	4
Total Filings Delinquent	27				
Diversified Senior Services, Inc.					
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Diversified Senior Services, Inc. (continued)	*10-KSB*	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	31				
Dyersburg Corp.					
	10-Q	06/30/01	08/14/01	Not filed	98
	10-K	09/30/01	12/31/01	Not filed	94
	10-Q	12/31/01	02/14/02	Not filed	92
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-K	09/30/02	12/30/02	Not filed	82
	10-Q	12/31/02	02/14/03	Not filed	80
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-K	09/30/03	12/29/03	Not filed	70
	10-Q	12/31/03	02/17/04	Not filed	68
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-K	09/30/04	12/29/04	Not filed	58

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Dyersburg Corp. (continued)	*10-Q*	12/31/04	02/14/05	Not filed	56
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-K	09/30/05	12/29/05	Not filed	46
	10-Q	12/31/05	02/14/06	Not filed	44
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-K	09/30/06	12/29/06	Not filed	34
	10-Q	12/31/06	02/14/07	Not filed	32
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-K	09/30/07	12/31/07	Not filed	22
	10-Q	12/31/07	02/14/08	Not filed	20
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-K	09/30/08	12/29/08	Not filed	10
	10-Q	12/31/08	02/17/09	Not filed	8
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	33				
Flour City International, Inc.					
	10-K	10/31/01	01/29/02	Not filed	93
	10-Q	01/31/02	03/18/02	Not filed	91
	10-Q	04/30/02	06/14/02	Not filed	88
	10-Q	07/31/02	09/16/02	Not filed	85
	10-K	10/31/02	01/29/03	Not filed	81
	10-Q	01/31/03	03/17/03	Not filed	79
	10-Q	04/30/03	06/16/03	Not filed	76
	10-Q	07/31/03	09/15/03	Not filed	73
	10-K	10/31/03	01/29/04	Not filed	69
	10-Q	01/31/04	03/16/04	Not filed	67
	10-Q	04/30/04	06/14/04	Not filed	64
	10-Q	07/31/04	09/14/04	Not filed	61
	10-K	10/31/04	01/31/05	Not filed	57
	10-Q	01/31/05	03/17/05	Not filed	55
	10-Q	04/30/05	06/14/05	Not filed	52
	10-Q	07/31/05	09/14/05	Not filed	49
	10-K	10/31/05	01/30/06	Not filed	45
	10-Q	01/31/06	03/17/06	Not filed	43

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Flour City International, Inc. (continued)	*10-Q*	04/30/06	06/14/06	Not filed	40
	10-Q	07/31/06	09/14/06	Not filed	37
	10-K	10/31/06	01/29/07	Not filed	33
	10-Q	01/31/07	03/19/07	Not filed	31
	10-Q	04/30/07	06/14/07	Not filed	28
	10-Q	07/31/07	09/14/07	Not filed	25
	10-K	10/31/07	01/29/08	Not filed	21
	10-Q	01/31/08	03/17/08	Not filed	19
	10-Q	04/30/08	06/16/08	Not filed	16
	10-Q	07/31/08	09/15/08	Not filed	13
	10-K	10/31/08	01/29/09	Not filed	9
	10-Q	01/31/09	03/17/09	Not filed	7
	10-Q	04/30/09	06/15/09	Not filed	4
	10-Q	07/31/09	09/14/09	Not filed	1
Total Filings Delinquent	32				
Gerald Stevens, Inc.					
	10-Q	02/28/01	04/16/01	Not filed	102
	10-Q	05/31/01	07/16/01	Not filed	99
	10-K	08/31/01	11/29/01	Not filed	95
	10-Q	11/30/01	01/14/02	Not filed	93
	10-Q	02/28/02	04/15/02	Not filed	90
	10-Q	05/31/02	07/15/02	Not filed	87
	10-K	08/31/02	11/29/02	Not filed	83
	10-Q	11/30/02	01/14/03	Not filed	81
	10-Q	02/28/03	04/14/03	Not filed	78
	10-Q	05/31/03	07/15/03	Not filed	75
	10-K	08/31/03	12/01/03	Not filed	70
	10-Q	11/30/03	01/14/04	Not filed	69
	10-Q	02/29/04	04/14/04	Not filed	66
	10-Q	05/31/04	07/15/04	Not filed	63
	10-K	08/31/04	11/29/04	Not filed	59
	10-Q	11/30/04	01/14/05	Not filed	57
	10-Q	02/28/05	04/14/05	Not filed	54
	10-Q	05/31/05	07/15/05	Not filed	51
	10-K	08/31/05	11/29/05	Not filed	47
	10-Q	11/30/05	01/17/06	Not filed	45
	10-Q	02/28/06	04/14/06	Not filed	42
	10-Q	05/31/06	07/17/06	Not filed	39
	10-K	08/31/06	11/29/06	Not filed	35

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Gerald Stevens, Inc. (continued)	*10-Q*	11/30/06	01/16/07	Not filed	33
	10-Q	02/28/07	04/16/07	Not filed	30
	10-Q	05/31/07	07/16/07	Not filed	27
	10-K	08/31/07	11/29/07	Not filed	23
	10-Q	11/30/07	01/14/08	Not filed	21
	10-Q	02/29/08	04/14/08	Not filed	18
	10-Q	05/31/08	07/15/08	Not filed	15
	10-K	08/31/08	12/01/08	Not filed	10
	10-Q	11/30/08	01/14/09	Not filed	9
	10-Q	02/28/09	04/14/09	Not filed	6
	10-Q	05/31/09	07/15/09	Not filed	3
Total Filings Delinquent	27				
Leisure Time Casinos & Resorts, Inc.					
	10-Q	09/30/00	11/14/00	Not filed	107
	10-Q	12/31/00	02/14/01	Not filed	104
	10-Q	03/31/01	05/15/01	Not filed	101
	10-K	06/30/01	09/28/01	Not filed	97
	10-Q	09/30/01	11/14/01	Not filed	95
	10-Q	12/31/01	02/14/02	Not filed	92
	10-Q	03/31/02	05/15/02	Not filed	89
	10-K	06/30/02	09/30/02	Not filed	85
	10-Q	09/30/02	11/14/02	Not filed	83
	10-Q	12/31/02	02/14/03	Not filed	80
	10-Q	03/31/03	05/15/03	Not filed	77
	10-K	06/30/03	09/29/03	Not filed	73
	10-Q	09/30/03	11/14/03	Not filed	71
	10-Q	12/31/03	02/17/04	Not filed	68
	10-Q	03/31/04	05/17/04	Not filed	65
	10-K	06/30/04	09/28/04	Not filed	61
	10-Q	09/30/04	11/15/04	Not filed	59
	10-Q	12/31/04	02/14/05	Not filed	56
	10-Q	03/31/05	05/16/05	Not filed	53
	10-K	06/30/05	09/28/05	Not filed	49
	10-Q	09/30/05	11/14/05	Not filed	47
	10-Q	12/31/05	02/14/06	Not filed	44
	10-Q	03/31/06	05/15/06	Not filed	41
	10-K	06/30/06	09/28/06	Not filed	37
	10-Q	09/30/06	11/14/06	Not filed	35

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Leisure Time Casinos & Resorts, Inc. (continued)	*10-Q*	12/31/06	02/14/07	Not filed	32
	10-Q	03/31/07	05/15/07	Not filed	29
	10-K	06/30/07	09/28/07	Not filed	25
	10-Q	09/30/07	11/14/07	Not filed	23
	10-Q	12/31/07	02/14/08	Not filed	20
	10-Q	03/31/08	05/15/08	Not filed	17
	10-K	06/30/08	09/29/08	Not filed	13
	10-Q	09/30/08	11/14/08	Not filed	11
	10-Q	12/31/08	02/17/09	Not filed	8
	10-Q	03/31/09	05/15/09	Not filed	5
	10-K	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	36				
Platinum Entertainment, Inc. (n/k/a Vidalia Gichner Holdings, Inc.)					
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Platinum Entertainment, Inc. (n/k/a Vidalia Gichner Holdings, Inc.) **(continued)**	*10-Q*	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	37				

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than $75 million in public equity float as of the end of its most recently completed second fiscal quarter) have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60829 / October 15, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13650

In the Matter of **Western Fidelity Funding, Inc.,** **Western Real Estate Fund, Inc.,** **Willamette Valley, Inc. Microbreweries Across America,** **Windsor Energy Corp.,** **Wireless Billboards Technologies Corp., and** **WPB Financiers Ltd.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Western Fidelity Funding, Inc., Western Real Estate Fund, Inc., Willamette Valley, Inc. Microbreweries Across America, Windsor Energy Corp., Wireless Billboards Technologies Corp., and WPB Financiers Ltd.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Western Fidelity Funding, Inc. (CIK No. 891276) is a delinquent Colorado corporation located in Denver, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Western Fidelity is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 1996, which reported a net loss of over $9.9 million for the year ended December 31, 1996. As of October 14, 2009, the company's stock (symbol "WFFI") was traded on the over-the-counter markets.

2. Western Real Estate Fund, Inc. (CIK No. 806187) is a void Delaware corporation located in Carbondale, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Western Real Estate is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended September 30, 1994.

3. Willamette Valley, Inc. Microbreweries Across America (CIK No. 917467) is an inactive Oregon corporation located in Portland, Oregon with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Willamette is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 1997, which reported no assets, revenue, or net income for the prior six months.

4. Windsor Energy Corp. (CIK No. 1019986) is an Alberta corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Windsor is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 40-FR for the period ended December 31, 1997.

5. Wireless Billboards Technologies Corp. (CIK No. 1133268) is a revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wireless is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1994, which reported a net loss of $45,023 for the period from December 31, 1988 to September 30, 1994.

6. WPB Financiers Ltd. (CIK No. 1177146) is a forfeited Delaware corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). WPB is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2003, which reported no assets and a net loss of $824 for the prior fifteen months.

B. DELINQUENT PERIODIC FILINGS

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

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings
Western Fidelity Funding, Inc. et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Western Fidelity Funding, Inc.					
	10-QSB	03/31/97	05/15/97	Not filed	149
	10-QSB	06/30/97	08/14/97	Not filed	146
	10-QSB	09/30/97	11/14/97	Not filed	143
	10-KSB	12/31/97	03/31/98	Not filed	139
	10-QSB	03/31/98	05/15/98	Not filed	137
	10-QSB	06/30/98	08/14/98	Not filed	134
	10-QSB	09/30/98	11/16/98	Not filed	131
	10-KSB	12/31/98	03/31/99	Not filed	127
	10-QSB	03/31/99	05/17/99	Not filed	125
	10-QSB	06/30/99	08/16/99	Not filed	122
	10-QSB	09/30/99	11/15/99	Not filed	119
	10-KSB	12/31/99	03/30/00	Not filed	115
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Western Fidelity Funding, Inc.					
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	50				
Western Real Estate Fund, Inc.					
	10-Q	12/31/94	02/14/95	Not filed	176
	10-Q	03/31/95	05/15/95	Not filed	173
	10-Q	06/30/95	08/14/95	Not filed	170
	10-K	09/30/95	12/29/95	Not filed	166
	10-Q	12/31/95	02/14/96	Not filed	164
	10-Q	03/31/96	05/15/96	Not filed	161
	10-Q	06/30/96	08/14/96	Not filed	158
	10-K	09/30/96	12/30/96	Not filed	154
	10-Q	12/31/96	02/14/97	Not filed	152
	10-Q	03/31/97	05/15/97	Not filed	149
	10-Q	06/30/97	08/14/97	Not filed	146
	10-K	09/30/97	12/29/97	Not filed	142
	10-Q	12/31/97	02/17/98	Not filed	140
	10-Q	03/31/98	05/15/98	Not filed	137

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Western Real Estate Fund, Inc.					
	10-Q	06/30/98	08/14/98	Not filed	134
	10-K	09/30/98	12/29/98	Not filed	130
	10-Q	12/31/98	02/16/99	Not filed	128
	10-Q	03/31/99	05/17/99	Not filed	125
	10-Q	06/30/99	08/16/99	Not filed	122
	10-K	09/30/99	12/29/99	Not filed	118
	10-Q	12/31/99	02/14/00	Not filed	116
	10-Q	03/31/00	05/15/00	Not filed	113
	10-Q	06/30/00	08/14/00	Not filed	110
	10-K	09/30/00	12/29/00	Not filed	106
	10-Q	12/31/00	02/14/01	Not filed	104
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-K	09/30/01	12/31/01	Not filed	94
	10-Q	12/31/01	02/14/02	Not filed	92
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-K	09/30/02	12/30/02	Not filed	82
	10-Q	12/31/02	02/14/03	Not filed	80
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-K	09/30/03	12/29/03	Not filed	70
	10-Q	12/31/03	02/17/04	Not filed	68
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-K	09/30/04	12/29/04	Not filed	58
	10-Q	12/31/04	02/14/05	Not filed	56
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-K	09/30/05	12/29/05	Not filed	46
	10-Q	12/31/05	02/14/06	Not filed	44
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-K	09/30/06	12/29/06	Not filed	34
	10-Q	12/31/06	02/14/07	Not filed	32
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-K	09/30/07	12/29/07	Not filed	22

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Western Real Estate Fund, Inc.					
	10-Q	12/31/07	02/14/08	Not filed	20
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-K	09/30/08	12/29/08	Not filed	10
	10-Q	12/31/08	02/17/09	Not filed	8
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	59				
Willamette Valley, Inc. Microbreweries Across America					
	10-QSB	09/30/97	11/14/97	Not filed	143
	10-KSB	12/31/97	03/31/98	Not filed	139
	10-QSB	03/31/98	05/15/98	Not filed	137
	10-QSB	06/30/98	08/14/98	Not filed	134
	10-QSB	09/30/98	11/16/98	Not filed	131
	10-KSB	12/31/98	03/31/99	Not filed	127
	10-QSB	03/31/99	05/17/99	Not filed	125
	10-QSB	06/30/99	08/16/99	Not filed	122
	10-QSB	09/30/99	11/15/99	Not filed	119
	10-KSB	12/31/99	03/30/00	Not filed	115
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Willamette Valley, Inc. Microbreweries Across America					
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**48**				
Windsor Energy Corp.					
	20-F	12/31/98	06/30/99	Not filed	124
	20-F	12/31/99	06/30/00	Not filed	112
	20-F	12/31/00	07/02/01	Not filed	99
	20-F	12/31/01	07/01/02	Not filed	87
	20-F	12/31/02	06/30/03	Not filed	76
	20-F	12/31/03	06/30/04	Not filed	64
	20-F	12/31/04	06/30/05	Not filed	52
	20-F	12/31/05	06/30/06	Not filed	40

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Windsor Energy Corp.					
	20-F	12/31/06	07/02/07	Not filed	27
	20-F	12/31/07	06/30/08	Not filed	16
	20-F	12/31/08	06/30/09	Not filed	4
Total Filings Delinquent	**11**				
Wireless Billboards Technologies Corp.					
	10-KSB	12/31/94	03/31/95	Not filed	175
	10-QSB	03/31/95	05/15/95	Not filed	173
	10-QSB	06/30/95	08/14/95	Not filed	170
	10-QSB	09/30/95	11/14/95	Not filed	167
	10-KSB	12/31/95	04/01/96	Not filed	162
	10-QSB	03/31/96	05/15/96	Not filed	161
	10-QSB	06/30/96	08/14/96	Not filed	158
	10-QSB	09/30/96	11/14/96	Not filed	155
	10-KSB	12/31/96	03/31/97	Not filed	151
	10-QSB	03/31/97	05/15/97	Not filed	149
	10-QSB	06/30/97	08/14/97	Not filed	146
	10-QSB	09/30/97	11/14/97	Not filed	143
	10-KSB	12/31/97	03/31/98	Not filed	139
	10-QSB	03/31/98	05/15/98	Not filed	137
	10-QSB	06/30/98	08/14/98	Not filed	134
	10-QSB	09/30/98	11/16/98	Not filed	131
	10-KSB	12/31/98	03/31/99	Not filed	127
	10-QSB	03/31/99	05/17/99	Not filed	125
	10-QSB	06/30/99	08/16/99	Not filed	122
	10-QSB	09/30/99	11/15/99	Not filed	119
	10-KSB	12/31/99	03/30/00	Not filed	115
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Wireless Billboards Technologies Corp.					
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**59**				
WPB Financiers Ltd.					
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
WPB Financiers Ltd.					
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2

Total Filings Delinquent 23

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than $75 million in public equity float as of the end of its most recently completed second fiscal quarter) have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

October 16, 2009

In the Matter of

Altiva Financial Corp.,
Atlantic Gulf Communities Corp.,
CFI Mortgage, Inc.,
Commodore Holdings Ltd.,
Conversion Technologies International, Inc.,
Cyntech Technologies, Inc.,
Diversified Senior Services, Inc.,
Dyersburg Corp.,
Flour City International, Inc.,
Gerald Stevens, Inc.,
Leisure Time Casinos & Resorts, Inc., and
Platinum Entertainment, Inc.
(n/k/a Vidalia Gichner Holdings, Inc.),

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Altiva Financial Corp. because it has not filed any periodic reports since the period ended February 29, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Atlantic Gulf Communities Corp. because it has not filed any periodic reports since the period ended September 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of CFI Mortgage, Inc. because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Commodore Holdings Ltd. because it has not filed any periodic reports since the period ended June 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Conversion Technologies International, Inc. because it has not filed any periodic reports since the period ended June 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Cyntech Technologies, Inc. because it has not filed any periodic reports since the period ended July 31, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Diversified Senior Services, Inc. because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Dyersburg Corp. because it has not filed any periodic reports since the period ended March 31, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Flour City International, Inc. because it has not filed any periodic reports since the period ended July 31, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gerald Stevens, Inc. because it has not filed any periodic reports since the period ended November 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Leisure Time Casinos & Resorts, Inc. because it has not filed any periodic reports since the period ended June 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Platinum Entertainment, Inc. (n/k/a Vidalia Gichner Holdings, Inc.) because it has not filed any periodic reports since the period ended March 31, 2000.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on October 16, 2009, through 11:59 p.m. EDT on October 29, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

Commissioner Casey and Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2935 / October 16, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13652

In the Matter of

MICHAEL C. REGAN,

Respondent.

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

I.

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

II.

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

III.

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

1. From at least 1998 to 2008, Regan, a self-described "portfolio manager," acted as an unregistered investment adviser to the River Stream Fund ("River Stream"), an unregistered fund that Regan founded in 1998. At all times relevant hereto, Regan had sole trading authority and control over River Stream and was the president of Regan & Company, an unincorporated d/b/a name used by Regan in connection with River Stream. Regan is not registered with the Commission in any capacity. Regan, 65 years old, is a resident of Wayland, Massachusetts.

2. On October 6, 2009, a final judgment was entered by consent against Regan, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. Regan & Company and Michael C. Regan, Civil Action Number 09-CV-03727-ILG, in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleged, among other things, that in connection with the offer or sale of securities, Regan made materially false and misleading statements to investors, orchestrated a Ponzi scheme, misappropriated investor funds for his personal use, made misrepresentations to investors concerning their investment performance and the risks associated with their investments, prepared and issued phony account statements to investors that purportedly showed lofty, but false, investment returns, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors. From at least 2001 to 2008, Regan fraudulently obtained at least $15.9 million from investors and caused investors to incur significant losses.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Regan 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

Chairman Schapiro and Commissioner Casey not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2936 / October 16, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13653

In the Matter of **TOBIAS BROS. INC.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTIONS 203(e) 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) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Tobias Bros. Inc. ("Tobias Bros." or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) 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 Respondent's Offer, the Commission finds[1] that

Summary

These proceedings concern unauthorized trading by Ethan Kass ("Kass") who caused and concealed at least $8.4 million in losses to investors in five investment advisory accounts managed by Tobias Bros. ("Circle T"). Between February and May 2005 while employed by Tobias Bros. as an order processing clerk, Kass executed and concealed at least 24 unauthorized trades resulting in multi-million dollar trading losses to Circle T investors. In July 2005, Seth Tobias, the principal and the sole owner of Tobias Bros., fully reimbursed all injured investors for these losses.

Despite Kass's attempts to conceal his unauthorized conduct, Tobias Bros. and Seth Tobias failed to perform their supervisory functions and missed a number of red flags that should have alerted them to Kass's unauthorized trading. For example, each day Tobias Bros. generated internal risk reports which were provided to Tobias Bros. supervisors. This report listed Circle T's securities holdings and profit and loss as of the prior trading day, including, on certain dates, Kass's unauthorized trades. However, Tobias Bros. supervisors, including Seth Tobias, at times, failed to even review these reports and therefore missed an opportunity to detect Kass's unauthorized trading and protect Circle T from the resulting losses. Tobias Bros. supervisors also missed other opportunities to detect Kass's unauthorized trading. They routinely failed to review reports that captured Kass's deletions and re-entries of his unauthorized trades from Tobias Bros.'s portfolio management system. Moreover, Tobias Bros. failed to monitor Kass's activities at the firm in accordance with the procedures set forth in its own compliance manuals.

Respondent

1. **Tobias Bros. Inc.**, is a Delaware corporation established in December 1995. It is an investment adviser registered with the Commission since 2004 and reportedly has approximately $68 million under management currently. It also was a broker-dealer registered with the Commission from 1998 until February 2, 2008. Tobias Bros.'s main office is located in New York, New York, and during the relevant period, it had branch offices in Pennsylvania and Florida. Seth Tobias owned Tobias Bros. until his death in September 2007.

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

Other Relevant Persons

2. **Kass**, age 28, resides in New York, New York. Kass began working as an intern at Tobias Bros. in 2002. He was promoted to an order processing clerk in 2004. Kass does not hold any securities licenses. Tobias Bros. terminated Kass's employment in June 2005.

3. **Seth Tobias**, resided in New York, New York until his death on September 4, 2007. Seth Tobias held Series 7, 24, and 63 licenses, and was the sole owner and principal of Tobias Bros. and other related entities since 1996. He was not an investment adviser registered with the Commission, but acted as the investment adviser to the five unregistered investment funds that suffered the losses from Kass's unauthorized trading.

Background

4. Between February and May 2005 (the "Relevant Period"), Kass executed at least 24 unauthorized trades that caused the Circle T funds to incur approximately $8,474,325 in losses. Kass concealed his unauthorized trades in at least two ways. First, Kass did not enter these trades in Circle T's handwritten trade blotter. Second, Kass disguised his trading activity by manipulating the related trade data that he did enter into Tobias Bros.'s internal portfolio management system. Neither Kass nor Tobias Bros. profited from Kass's unauthorized trading. In July 2005, Seth Tobias fully reimbursed these investors out of his own pocket for these losses.

Failure Reasonably to Supervise Kass

5. As a supervisor at Tobias Bros., Seth Tobias oversaw regulatory compliance and daily operations at the firm. He was directly responsible for supervising Kass with regard to the processing of trades on behalf of Circle T. Yet, Seth Tobias and Tobias Bros. ignored its own compliance procedures, missed numerous red flags and otherwise unreasonably failed to detect Kass's unauthorized trading and concealment scheme. For example, Tobias Bros. failed to review numerous trade reconciliation reports created independently by its prime broker, as well as internal Tobias Bros. reports, which often included evidence of Kass's unauthorized trades.

6. During the Relevant Period, Tobias Bros. identified both Seth and Samuel Tobias, Seth's brother and another portfolio manager, as "supervisors" and designated Samuel Tobias as the supervisor of, among other things, "error reports...trade confirmations...and trade reporting, generally." Similarly, in connection with the investment advisory business, Tobias Bros. identified Seth and Samuel Tobias as "managers" who were "responsible for supervising the activities of all associated persons," and stated that "[g]enerally, Sam[uel] Tobias will be responsible for correcting trading errors...." In practice however, Samuel Tobias's supervisory responsibilities were limited to those accounts that he managed - not the Circle T funds, which were the responsibility of Seth Tobias.

7. Tobias Bros. maintained a proprietary internal portfolio management system to track its trades and transmit those trades to its prime broker. This portfolio system captured, among other things, real time position information, purchases and sales, and profits and losses

("P&L"). Once the clerk entered the trade into the portfolio system, the trade is instantaneously viewable on the portfolio manager's computer screen, and reflected in the portfolio system's P&L.

8. At the end of each trading day, Kass used this portfolio system to transmit Circle T's daily trading data to its prime broker. The prime broker also received trade confirmations from other brokers reflecting trades executed by Tobias Bros., and confirmed those trades with the executing broker. The prime broker provided by fax a "trade break report" to Tobias Bros. at the start of each trading day. This report reflected any discrepancies noted by the prime broker based on its comparison between trades reported by Circle T and trades reported by executing brokers purportedly done on behalf of Circle T.

9. Tobias Bros.'s procedures required certain designated personnel to review the trade break and similar reports and reconcile any discrepancy with the prime broker. Trades that could not be reconciled would continue to appear on the trade break report until the prime broker and Tobias Bros. reached a resolution. The prime broker also made available online a report which showed each trade reported and executed on behalf of Circle T.

10. In February 2005, upon the retirement of the operations manager for Tobias Bros., Seth Tobias gave Kass additional assignments to review trade discrepancies as reported by the prime broker and to resolve those discrepancies directly with the prime broker, functions previously performed by the retired operations manager. Kass's dual functions relating to order entry and order reconciliation allowed him to make unauthorized trades and to conceal those trades from inattentive supervisors, a significant internal control flaw that he routinely exploited to the detriment of the Circle T funds.

11. As part of his fraudulent scheme, Kass entered his unauthorized trades into the portfolio system for transmission to Tobias Bros.'s prime broker after the market closed and subsequently deleted the trades from the system before trading commenced the next day.[1] Portfolio managers, who relied on the information to manage Circle T's P&L during the trading day, would therefore be ignorant of any trade discrepancies, unless they scrutinized and compared the prime broker's trade records against those generated by the portfolio system – both of which Tobias Bros. assigned Kass to reconcile.

12. In addition, the portfolio system created a report called the "deletion report" that listed all changes made to any trading information, including additions to, or deletions from, existing positions. The deletion reports show Kass's additions and subsequent deletions of his unauthorized trades. Tobias Bros. supervisors could have identified instances of Kass's unauthorized trading had they reviewed the deletion reports. However, certain Tobias Bros. supervisors claimed that they were unaware that the deletion report even existed until after Kass's unauthorized trades had come to light.

13. Tobias Bros. and Seth Tobias also failed to properly review daily reports generated internally by Tobias Bros. to manage risk and P&L exposure in the Circle T and other managed accounts. Tobias Bros. prepared these reports daily, based on information maintained by the prime broker, and emailed them at the start of each trading day to Seth Tobias and other Tobias Bros.

portfolio managers. These daily risk reports provided the portfolio managers with various statistics, including P&L information, securities holdings, and year-to-date valuation, among other trade-related information. In a section entitled "Portfolio Statistics," the daily risk reports clearly showed instances of Kass's unauthorized trades because the report reflected the trading that Kass reported to the prime broker, but which Kass later deleted from certain of Tobias Bros's internal books and records. Seth Tobias admitted that he did not review the daily reports at all on certain days, although he received them. He confirmed that had he reviewed the reports he would have noticed the "red flag" caused by Kass's unauthorized trading, especially if that trading significantly increased Circle T's holdings of certain securities.

14. As a result of the conduct described above, Tobias Bros. failed reasonably to supervise Kass, within the meaning of Section 203(e)(6) of the Advisers Act, with a view to detecting and preventing Kass's violations of Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder, and aiding and abetting violations of Sections 206(2) and 204 of the Advisers Act, and Rule 204-2 thereunder.

Failure to Maintain Books & Records

15. Section 204 of the Advisers Act and Rule 204-2 thereunder require an investment adviser to make and keep true, accurate and current certain books and records relating to its investment advisory business. During the Relevant Period, Tobias Bros. failed to maintain accurate books and records.

16. Tobias Bros.'s books and records were inaccurate as to its investment advisory business due to Kass's unauthorized trading. Tobias Bros.'s books and records, including trade blotters and portfolio management system, did not accurately reflect Kass's unauthorized trades and subsequent deletions.

17. In addition, Tobias Bros. failed to preserve instant messages which contained Kass's unauthorized trades as it was required to do by the Advisers Act and its own compliance procedures. Tobias Bros.'s investment adviser procedures at the relevant time stated that: "[a]ll electronic communications are viewed as written communications, and the SEC has publicly indicated its expectation that investment advisers retain all electronic communications for the required retention periods. If a method of communication, such as e-mail or instant messaging, lacks a retention method, then it must be prohibited from use by the Firm."

18. Despite these prohibitions, in early June 2005 Tobias Bros. discovered that Kass used instant messages to place unauthorized trades with a broker-dealer on behalf of Circle T. Tobias Bros. failed to archive such communications and none of Kass's supervisors ever monitored his use of instant messages to route the orders, even though Seth Tobias admitted that he knew certain Tobias Bros. personnel used instant messages for business purposes.

19. As a result, Tobias Bros. willfully violated Section 204 of the Advisers Act and Rules 204-2(a)(3) and 204-2(a)(7) thereunder.

Tobias Bros.'s Remedial Efforts

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

IV.

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

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

A. Respondent Tobias Bros. is censured.

B. Respondent Tobias Bros. cease and desist from committing or causing any violations and any future violations of Section 204 of the Advisers Act and Rules 204-2(a)(3) and 204-2(a)(7) promulgated thereunder.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

Commissioner Casey not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2937 / October 16, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13654

In the Matter of

Philip G. Barry,

Respondent.

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

I.

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

II.

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

III.

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

1. From at least 1978 to 2008, Barry acted as an unregistered investment adviser. Barry operated the Leverage Group, an unregistered entity, and North American Financial Services d/b/a Leverage Option Management Co., which was registered as an investment adviser from 1979 until the Commission cancelled its registration in 1987 (together "Leverage"). The Leverage entities purported to operate investment funds. At all times relevant, Barry had sole trading authority and control over Leverage. Barry is not registered with the Commission in any capacity. Barry, 51 years old, is a resident of Brooklyn, New York.

2. On September 23, 2009, a final judgment was entered by consent against Barry, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. Philip G. Barry, et al., Civil Action Number 09-CV-03860, in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleged, among other things, that in connection with the offer or sale of securities, Barry made materially false and misleading statements to investors, orchestrated a Ponzi scheme, misappropriated investor funds for his personal use, made misrepresentations to investors concerning their investment performance and the risks associated with their investments, prepared and issued phony account statements to investors that purportedly showed lofty, but false, investment returns, and otherwise engaged in a variety of conduct which operated as a fraud and deceit on investors. From at least 1978 to 2008, Barry fraudulently obtained at least $40.2 million from investors and caused investors to incur significant losses.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant Section 203(f) of the Advisers Act, that Respondent Barry 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

Commissioner Casey not participating
Commissioner Paredes Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60837 / October 19, 2009

INVESTMENT ADVISERS RELEASE ACT
Release No. 2938 / October 19, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13655

In the Matter of **THEODORE W. URBAN** **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**

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 Theodore W. Urban ("Urban" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

Respondent

1. Urban, age 58, resides in Silver Spring, Maryland. Urban holds series 4, 7, 14, 24, 31, 53, and 63 licenses. During the relevant time period, Urban was the General Counsel of Ferris Baker Watts, Inc. ("Ferris"), and a member of Ferris' Board of Directors and Credit Committee. Urban also supervised Ferris' Compliance Department. Urban formerly worked on the Commission staff, and from 1978 to 1979 he was an Assistant Director in what was then the Division of Market Regulation.

Other Relevant Entities and Individuals

2. At all times relevant, Ferris was a Delaware corporation headquartered in Washington, D.C. that was both a registered broker-dealer and a registered investment adviser. Ferris has over 600 employees, including over 250 registered representatives working in over forty branch offices in eight states and the District of Columbia. On February 10, 2009, the Commission issued an order finding that Ferris failed reasonably to supervise registered representative Stephen Glantz ("Glantz") with a view to detecting and preventing Glantz's 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, and that Ferris willfully violated Section 17(a) of the Exchange Act and Rule 17a-8 thereunder by failing to file Suspicious Activity Reports ("SARs") regarding Glantz's misconduct.

3. Glantz, age 55, was formerly a resident of Chagrin Falls, Ohio. He was a registered representative associated with various broker-dealers from 1997 through 2005. During the period January 2003 through November 2005, Glantz was associated with Ferris. On September 4, 2007, Glantz pled guilty to one count of securities fraud and one count of making false statements to law enforcement officials. On December 14, 2007, Glantz was sentenced to 33 months in prison and ordered to pay $110,000 in restitution. On February 10, 2009, the Commission issued an order barring Glantz from association with any broker, dealer, or investment adviser.

4. Louis Akers ("Akers"), age 57, resides in Reisterstown, Maryland. He was a registered representative associated with certain broker-dealers from 1985 to 2007. From October 1998 until December 2001, Akers was associated with Ferris Baker Watts, Inc. ("Ferris") as the firm's Chief Executive Officer. During the period January 2003 through November 2005, Akers was associated with Ferris as the firm's Vice Chairman, a member of Ferris' Board of Directors, and Ferris' Private Client Group Director.

5. Patrick J. Vaughan ("Vaughan"), age 54, resides in Cockeysville, Maryland. He was a registered representative associated with various broker-dealers from 1983 through the present. During the period January 2003 through November 2005, Vaughan was associated with Ferris as the firm's Director of Retail Sales. In that position, he reported directly to Akers. On February 10, 2009, the Commission issued an order finding that Vaughan failed reasonably to supervise Glantz with a view to detecting and preventing Glantz's violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

6. IPOF Fund ("IPOF") is an Ohio limited partnership, not registered with the Commission in any capacity. IPOF was formed by David A. Dadante ("Dadante") in 1999. Dadante operated IPOF as an investment company and solicited funds from investors purportedly to purchase stock in initial public offerings. Dadante caused IPOF to raise $50 million from at least 100 investors in unregistered securities offerings and used some of the proceeds to fund his lavish lifestyle and to make Ponzi scheme-type payments. Dadante deposited the remaining investor funds into brokerage accounts that he controlled in the names of IPOF and other entities at several broker-dealers, including Ferris. Glantz served as the registered representative for the Ferris accounts controlled by Dadante. On April 20, 2007 IPOF was permanently enjoined from violating Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Section

10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 7(a) of the Investment Company Act of 1940 in SEC v. David A. Dadante et. al., Case No. 1:06-cv-0938 (N.D. Ohio).

7. Dadante, age 54, was formerly a resident of Gates Mills, Ohio. Dadante was the founder and general partner of IPOF. He was not registered with the Commission in any capacity. On August 6, 2007, Dadante pled guilty to two counts of securities fraud. On November 1, 2007, Dadante was permanently enjoined from violating Sections 5(a), 5(c), and 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1) and 206(2) of the Advisers Act in SEC v. David A. Dadante et. al., Case No. 1:06-cv-0938 (N.D. Ohio). On November 29, 2007, the Commission barred Dadante from association with any investment adviser. On December 14, 2007, Dadante was sentenced to 156 months in prison and ordered to pay over $28 million in restitution.

8. Innotrac is a Georgia corporation with its principal place of business in Duluth, Georgia. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is traded under the symbol "INOC" on NASDAQ. Innotrac provides order processing, order fulfillment, and call center services to large corporations that outsource these functions.

Background

9. From at least August 2002 through November 2005, Glantz, Dadante, and a registered representative at another brokerage firm, all participated in a scheme to manipulate the market for the stock of Innotrac, the funds for which used from the $50 million offering fraud and Ponzi scheme that he orchestrated through IPOF. All three pled guilty to violations of Section 10(b) of the Exchange Act and in their plea agreements, they all admitted that they artificially inflated and maintained the price for Innotrac stock. Glantz also admitted in his plea agreement that he engaged in unauthorized and unsuitable trading in his customers' accounts. During the period from August 2002 through November 2005, Dadante used IPOF to acquire more than 30% of the outstanding common stock of Innotrac, and through IPOF and other accounts controlled by him, controlled on average approximately 35% of the public float for Innotrac and typically accounted for between 35% and 50% of the approximate 11,000 share average daily trading volume in Innotrac. Dadante acquired a substantial portion of his Innotrac holdings during the period January 2003 through February 2004 in the IPOF account at Ferris for which Glantz was the registered representative. During the scheme, Glantz purchased Innotrac stock for certain of his other customers at Ferris, and, through their accounts, controlled approximately an additional 25% of Innotrac's public float. Acting in concert, Glantz, Dadante, and the other registered representative employed a variety of manipulative trading practices, including marking the closing price for Innotrac stock, engaging in matched and wash trades, and attempting to artificially create downbids to suppress short selling of Innotrac. To perpetrate the manipulative scheme, and to generate income for himself, Glantz also engaged in unauthorized and unsuitable trading in Innotrac and certain other securities in the accounts of customers other than IPOF.

Urban Failed Reasonably to Supervise Glantz

10. Akers and Vaughan recruited and hired Glantz, and Urban approved his hire. They all had the requisite degree of responsibility, ability or authority at Ferris to affect the conduct of Glantz.

11. When Glantz was hired, Urban, Akers, and Vaughan knew that Glantz had ten customer complaints on his Form U-4. Several employees of the firm's Beachwood, Ohio office had also warned them that Glantz had a questionable reputation in the industry.

12. Despite Glantz's history, Urban, Akers and Vaughan permitted Glantz to work under a special arrangement which allowed him greater freedom of action than other registered representatives at Ferris. Glantz, a retail broker, was permitted to manage both retail and institutional accounts. Akers and Vaughan permitted Glantz, a retail broker assigned to Ferris' Beachwood, Ohio branch office, to work at Ferris' Institutional Trading Desk in Baltimore several days a week. The special arrangement under which Glantz was permitted to work was extremely unusual at Ferris. After Akers and Vaughan approved this arrangement, Urban learned of it at some time prior to May 2003, did not object to it, and allowed it to continue. Glantz took advantage of that special arrangement to evade Ferris' supervisory procedures.

13. Glantz began working for Ferris on January 2, 2003, and problems with his conduct arose very shortly after he started.

14. In or about April 2003, a Ferris compliance officer initiated a review of the trading in the accounts for which Glantz was the registered representative and discovered that IPOF was accumulating a large position in Innotrac by making purchases in small lots at incrementally higher prices throughout the trading day. In April 2003, this compliance officer discussed her concerns with Ferris' Compliance Director. The Compliance Director, in turn, told Urban that she and the compliance officer believed Dadante was manipulating the price of Innotrac. In April and May 2003, this compliance officer also discovered that several other Glantz customer accounts were accumulating large positions in Innotrac. She could not think of any legitimate reason why so many of Glantz's accounts had similar trading patterns, especially because Glantz had marked the majority of the trades as unsolicited. This compliance officer then raised these concerns with Urban.

15. On May 23, 2003, this same compliance officer sent a memorandum (the "May 23 Memo") to certain Ferris senior executives, including Urban and Vaughan. The May 23 Memo reported, among other things, that a number of Glantz customer accounts held large positions in Innotrac, that Ferris customers owned approximately 40% of the total float and 19% of the outstanding shares of Innotrac, and that IPOF owned approximately 31% of the total float and 15% of the outstanding shares. This memorandum warned that there might be manipulative and unsuitable trading in Innotrac and that Glantz was not being properly supervised. This memorandum stated that "[w]hile the price of [Innotrac] has been in an up-trend, I believe this is largely due to the IPOF's accumulation of the shares in small lots on almost a daily basis driving the price higher." The May 23 Memo also noted that Glantz was accumulating Innotrac shares in a

similar manner in some of his other customer accounts, that IPOF was a "control person" of Innotrac but had not made the necessary filings with the Commission, and that the IPOF account had a margin debit of $9.381 million. The memorandum further reported that the trading in the IPOF account was not consistent with its investment objective of "growth and income." The May 23 Memo also contained a chart showing a high concentration of Innotrac stock and significant margin debts in other Glantz accounts, the majority of which were individual accounts or profit sharing plans whose investment objectives were reported as "growth and income." The May 23 Memo further stated that "without question, there is and has been a breakdown of supervisory responsibilities and who shares or owns supervisory responsibilities over the activity in the account and Mr. Glantz."

16. Ferris' Credit Committee responded to the size of IPOF's margin debt by raising the margin requirements for the account. Within approximately a week or two, Ferris' Compliance Director, the author of the May 23 Memo, and Urban had a conference call with Akers and Vaughan to discuss the May 23 Memo. Akers and Vaughan failed to take any action to address the issues raised in the May 23 Memo as a result of the conversation. Urban did not take additional steps to address the red flags regarding Glantz that were reflected in the May 23 Memo. For example, Urban did not follow-up with Akers or Vaughan to determine whether they were taking the steps they said they would take to address Glantz's conduct.

17. In late May 2003, the Compliance Director informed Urban that Ferris' senior institutional trader believed that Dadante and IPOF were manipulating the market for Innotrac by buying in small lots in order to simulate the appearance of demand for the stock and drive up the price. A few days later Urban met with the senior institutional trader, and the senior institutional trader told Urban that he believed that Dadante and IPOF were manipulating the market for Innotrac's stock. On June 5, 2003, the compliance officer who authored the May 23 Memo sent Urban another memorandum reiterating her concerns about Glantz's supervision and concluded this memorandum by stating that "I strongly ask that you consider placing Mr. Glantz under special supervision." Urban disregarded this recommendation, notwithstanding that Ferris' written supervisory procedures called for a registered representative to be placed under special supervision when conduct by that registered representative raised concerns about his or her business practices or adherence to rules.

18. On June 9, 2003, Urban met with Glantz in Beachwood and told Glantz that IPOF would be restricted from buying Innotrac until it complied with the filing requirements of Section 13(d) of the Exchange Act. He, however, failed reasonably to address Glantz's lack of supervision or the other issues regarding Glantz's handling of the trading activity in his customers' accounts. Urban did restrict IPOF from purchasing Innotrac until IPOF made its Schedule 13D filing on June 25, 2003, after which the restriction was lifted. Dadante and Glantz then continued and escalated their market manipulation scheme.

19. In July and August 2003, Glantz and Dadante implemented a strategy to preclude short selling in Innotrac. At that time, the NASD's (n/k/a FINRA) bid test imposed restrictions on short selling on a downbid. Dadante acted to take advantage of this prohibition by placing two limit orders to buy Innotrac shares, one at a price incrementally higher than the other, without any

intention to honor the higher bid. He would then promptly cancel the higher bid, in an attempt to create a downbid and thereby prevent short selling.

20. On July 29, 2003, Ferris' Head NASDAQ Trader contacted the compliance department after discovering what Dadante was doing. A Ferris compliance officer informed Dadante that the practice of playing with the bid was manipulative and violated both Ferris' policies as well as securities rules and regulations. The Head NASDAQ Trader then told the traders he supervised to refrain from honoring any customer requests to upbid and then immediately downbid Innotrac. This compliance officer alerted Urban that the IPOF account was manipulating the bid for Innotrac stock.

21. On August 4, 2003, the Compliance Director met with the author of the May 23 Memo and Urban, in part, to discuss a plan of action to deal with the IPOF account and Glantz's lack of supervision. During the meeting, they also discussed several other Glantz accounts mentioned in the May 23 Memo, including one that held an abnormally large concentration of Innotrac stock. Urban failed to reasonably address these red flags.

22. At around the same time as the August 4, 2003 meeting, Dadante's accumulation of Innotrac had caused him to trigger Innotrac's poison pill provision. To circumvent the poison pill and avoid the margin restrictions that had been placed on the IPOF account, Dadante and Glantz opened a new account at Ferris, with Glantz as the registered representative, using the name of a fictitious partnership, GSGI, so that Dadante could continue to manipulate the price of Innotrac. Dadante and Glantz then placed wash trades between the GSGI and IPOF accounts. On August 25, 2003, a margin clerk at Ferris noticed that the GSGI account appeared on a free riding report for a 43,700-share trade in Innotrac on August 21. The clerk reported it to his supervisor, who in turn, notified the author of the May 23 Memo. On August 25, 2003, she emailed the Compliance Director and Urban that Dadante had opened another account at Ferris and had started buying Innotrac in this new account. Three days later, the Operations Director emailed Urban that the GSGI account belonged to Dadante and had started purchasing Innotrac shares. She also noted that Glantz's customers now owned over 25% of Innotrac and that another account referenced in the May 23 Memo was 92% concentrated in Innotrac. Urban failed to reasonably address the red flags relating to Glantz and his customer accounts.

23. In late August 2003, Urban had a conversation with Akers, in which they discussed the compliance department's continued concerns regarding Glantz's supervision. Akers said that he was going to officially transfer Glantz from the Beachwood office to the Baltimore branch office.

24. On September 4, 2003, Urban met with Glantz and Akers and Vaughan, and they all discussed IPOF and the significant and unusual accumulation of Innotrac shares in IPOF and another Glantz customer account. However, Urban, Akers, and Vaughan did not take any action to follow-up with Glantz regarding the concentration of Innotrac stock in his customer accounts.

25. On January 29, 2004, a compliance officer emailed Urban that the margin debit in the IPOF account had grown to $16.1 million and that the non-Innotrac securities in the account

were valued at only $13.2 million. This compliance officer further noted that several of the non-Innotrac securities held in the IPOF account were illiquid and highly concentrated and that Ferris could not sell them at their current market value. Thereafter, Urban unilaterally restricted Glantz from accepting or placing any customer orders for Innotrac and he personally conveyed this restriction to Glantz. By February 4, 2004, the margin balance in the IPOF account had grown to $18.1 million and the account posed a significant credit risk for Ferris. That same day, Urban wrote a memorandum to the Credit Committee, which he sent to certain other senior executives, including Vaughan, stating, among other things, that there continued to be "a lack of clear definition as to who has day to day supervisory responsibilities for Steve Glantz." Ferris' Credit Committee subsequently restricted the IPOF account by prohibiting the use of margin for any future purchases of Innotrac.

26. On February 5, 2004, a compliance officer sent Urban an email stating that Ferris' Innotrac market maker had received an order from another brokerage firm to buy 10,000 shares of Innotrac and they were "99% certain" that the order was related to IPOF. That same day, Glantz sent an email to Akers and Vaughan that he did not want to worry about "taking the fall for a situation that is absolutely not my fault," and that he did not want to leave Ferris. On February 9, 2004, Akers met with Glantz, Dadante, and an attorney who represented both of them, to discuss the new restrictions being placed on the IPOF account. Urban, Akers and Vaughan, however, all failed reasonably to respond to Glantz's lack of supervision and the other problems that had previously been brought to their attention with regard to Glantz's handling of his customer accounts.

27. Following the February 9, 2004 meeting, neither Dadante nor IPOF purchased any more Innotrac stock through Ferris. Glantz, however, continued to engage in manipulative, unsuitable and unauthorized trading in other customer accounts. Among other things, Glantz utilized excessive margin to make unauthorized purchases of speculative stocks for customer accounts. Glantz's use of margin and the nature and concentration of the stocks he purchased were unsuitable for his customers. Glantz did not disclose these facts, or the risks involved, to his customers. Glantz effected such trades deliberately for the purpose of increasing his own income.

28. In March 2004, many months after Glantz began splitting his time between Ferris' Baltimore office and the Beachwood office and eight months after Urban and Akers discussed transferring Glantz from the Beachwood office to the Baltimore branch office, he was officially transferred to Ferris' Baltimore branch office. No one informed the Baltimore branch manager ("Baltimore manager") of any issues involving Glantz or his handling of his customers' accounts.

29. In the spring and summer of 2004, Ferris had a great deal of turnover in its Compliance Department, including the departures of the Compliance Director and the author of the May 23 Memo. Urban hired a new Compliance Director ("Compliance Director No. 2") and several other compliance officers. Urban, however, never briefed any of these new compliance employees regarding Glantz, Dadante, or IPOF.

30. In September 2004, two of the new Ferris compliance officers conducted the annual compliance audit for the Baltimore branch. When they reviewed Glantz's customer accounts, they

became concerned that Glantz was engaging in unsuitable trading and was orchestrating transactions in his customers' accounts that were designed to artificially support the price of Innotrac. During the audit, the Baltimore manager told the compliance officers, among other things, that he was unable to supervise Glantz and that Glantz needed to be terminated. The compliance officers subsequently wrote a memorandum to Urban detailing their findings regarding Glantz. The memorandum discussed several Glantz customer accounts other than IPOF, the majority of which had been previously discussed in the May 23 Memo. This memorandum reported that all of these accounts had stated investment objectives of "growth and income" and had appeared on Ferris' "active account" report for the month of September 2004, and that most of the accounts had engaged in frequent, short-term trading during this period. The memorandum further stated that these accounts had a "preponderance for large share quantity, low-priced, speculative investments." The memorandum also reported that on September 30, 2004, Glantz cross traded 50,000 shares of Innotrac worth over $400,000 by selling these shares from one of his customer's accounts to four other customers' accounts, and that these trades were a "cause for concern." This memorandum concluded that "the appropriate supervisory oversight is currently not in place for Mr. Glantz." Urban failed reasonably to respond to the red flags discussed in this memorandum at that time.

31. On December 1, 2004, Dadante received a margin call in one of his accounts at another brokerage firm. Glantz agreed to help Dadante by purchasing Innotrac shares from Dadante's non-Ferris account for the accounts of Glantz's other customers at Ferris. In accordance with their scheme, by December 7, 2004, Glantz had bought 105,700 additional Innotrac shares worth approximately $927,000 from Dadante for certain of Glantz's other customers at Ferris.

32. On December 8, 2004, a Ferris compliance officer discovered these trades and told Urban about them. At Urban's direction, the compliance officer called three of the customers whose accounts were involved in the trades. He learned from the customers that they had no knowledge of the trades. He also learned that two of the three customers did not even know their accounts were utilizing margin, even though they both had significant margin debits. Around this same time, Compliance Director No. 2 told Urban that he believed that Glantz was manipulating the price of Innotrac stock and recommended that Glantz be fired immediately.

33. On December 15, 2004, Urban wrote a memorandum to Akers and Vaughan detailing his concerns about Glantz and recommending that Glantz be terminated (the "Termination Memo"). He emailed the Termination Memo to them in the early morning hours of December 16, 2004.

34. In the Termination Memo, Urban stated, among other things, that Glantz's investments and use of margin for the accounts of one of his individual customers was "clearly unsuitable" and that the trading in these accounts exposed Glantz and Ferris to "claims of churning." The Termination Memo also reported that the compliance department had contacted the customers for whose accounts Innotrac had been purchased in December 2004, that none of the customers had initiated the trades, that they did not know that the purchases had been made, and that there was no written discretionary authority for these accounts. The Termination Memo also stated that Glantz had structured the December trades to avoid disrupting the market for Innotrac.

The Termination Memo further stated that Glantz had been "essentially unsupervised" during his tenure at Ferris and concluded by recommending that Glantz be terminated.

35. Urban and Compliance Director No. 2 met with Akers and Vaughan to discuss the issues raised in the Termination Memo. Akers challenged the recommendation that Glantz be terminated and suggested that Glantz instead be placed on special supervision. At the end of the meeting, Urban retracted his recommendation that Glantz be fired and agreed with Akers to allow Glantz to be placed on special supervision. Vaughan acquiesced in that decision.

36. Urban caused Ferris to file a Form RE-3 with the NYSE. However, he only included on the Form RE-3 information about Glantz's trading without written authorization. He did not disclose in the Form RE-3 filing any of the other concerns that he included in the Termination Memo.

37. Pursuant to the memorandum outlining the details of Glantz's special supervision, Akers became Glantz' supervisor. Urban approved the special supervision memorandum. After being placed on special supervision, Glantz was assigned to work out of Ferris' Hunt Valley, Maryland branch. Akers, however, was Glantz's supervisor, not the Hunt Valley branch manager. Thus, Akers was responsible for supervising Glantz in accordance with the special supervision memorandum and Ferris' routine supervisory procedures. While under Akers' supervision, Glantz continued to engage in unauthorized, unsuitable and manipulative trading in his customers' accounts. Akers did not discover Glantz's continuing fraud, because he was not reasonably performing his duties as Glantz's supervisor. If Akers had followed Ferris' routine supervisory procedures and the special supervisory procedures in the special supervision memorandum, he would have been able to detect and prevent Glantz's unsuitable, unauthorized, and manipulative trading. Moreover, Urban did not follow-up with anyone, including Akers, to determine whether Akers or others had addressed the concerns regarding Glantz's conduct and his supervision.

38. Soon after being placed on special supervision, Glantz received a stock tip from an individual in Canada that positive news would soon be released about a company called ATC Healthcare, Inc. ("ATC Healthcare"). Based on this tip, on Friday, February 4, 2005, Glantz bought a total of 500,000 shares of ATC Healthcare for himself and for certain customers' accounts without their authorization. Glantz, however, did not allocate these shares at the time of the purchases. At the end of the day, Glantz allocated 480,000 shares among six customer accounts, and allocated 20,000 to his personal account. The next Monday and Tuesday, Glantz purchased an additional 480,000 shares of ATC Healthcare for his customers' accounts. Although no positive news was released about ATC Healthcare during this period, Glantz's purchases caused the stock price to increase from $0.30 to $0.46 a share in just a few days time. Glantz subsequently sold his 20,000 shares at a profit, but did not sell the remaining 960,000 shares that he purchased without authorization for his customers' accounts. Akers did not discover these and other manipulative and unauthorized transactions, because he was not reasonably performing his duties as Glantz's supervisor.

39. Ferris' Anti-money Laundering Officer ("AML Officer") discovered these ATC Healthcare trades and emailed Urban on February 23, 2005, because he was concerned that the

trades "could create the appearance of manipulative market practices." In the email, he asked Urban to request that retail sales management provide an explanation for the trades. Urban never responded to this email, and never asked retail sales management for an explanation. On April 5, 2005, the AML Officer sent Urban a follow-up email, with the original email attached. In this second email, he asked if the trades discussed in his original email were suspicious because, if so, he was obligated to file a Suspicious Activity Report ("SAR"). Urban again failed to respond. On May 13, 2005, Compliance Director No. 2 sent an email, with the AML Officer's two emails attached, telling Urban that they needed to get an explanation for the ATC Healthcare trades. Again, Urban failed to respond. The AML Officer then followed-up in person with Urban several times to attempt to discuss the trades and the possible need to file a SAR. Finally, in June 2005, the AML Officer stood in Urban's office doorway and refused to leave until he received an answer. Urban finally told the AML Officer that Ferris would not be filing a SAR for these ATC Healthcare trades. Urban failed to respond reasonably to these red flags.

40. On April 4, 2005, a compliance officer emailed Urban that through his review of certain Innotrac Form 4 filings, he had discovered that IPOF was on the other side of the December 2004 trades that had triggered the Termination Memo. Urban responded that "I find it highly unlikely that Glantz did not know who . . . was selling when he placed those shares in his customers' account." He concluded his email by stating that they needed to have another talk with Glantz. However, Urban did not speak with Glantz or reasonably respond to these red flags.

41. In June 2005, the Compliance Department's audit report for the Hunt Valley branch identified 18 Glantz customer accounts as requiring monitoring of their trading activity and suitability, stating that Ferris should monitor and review those 18 accounts "in regard to their investment objective(s), client profile, portfolio holdings, margin debit, gain/loss analysis...and commissions generated." Urban and Akers received this audit report but again failed reasonably to respond to these red flags.

42. On June 29, 2005, Dadante called the Ferris trading desk and told one of the traders that he was going to place a large order to buy Innotrac through his accounts at another brokerage firm. Dadante told the trader that he did not want to buy any shares from any of Glantz's customers. Despite this instruction, the trader matched Dadante's buy order with certain Glantz customers who had placed sell orders, as was appropriate under the circumstances. The trader relayed all of this information to the Head NASDAQ Trader, who that same day sent Urban and a compliance officer an email summarizing what had transpired and concluding the email by stating that the "approach to this order raises warning flags that could point to attempted price manipulation." Only a few minutes later, this compliance officer emailed Urban that the transaction entails "more manipulation concerns." Urban responded an hour later that he "agreed" and that he would provide directions to the trading desk.

43. Glantz remained an employee of Ferris until November 2005, at which time several IPOF investors filed a lawsuit and named Ferris as one of the defendants.

Violations

44. As a result of the conduct described above, Urban failed reasonably to supervise Glantz with a view to detecting and preventing Glantz's violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

III.

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

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

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

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

IV.

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

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

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

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 232

[RELEASE NO. 33-9074; File No. S7-23-09]

RIN 3235-AK44

EXTENSION OF FILING ACCOMMODATION FOR STATIC POOL INFORMATION IN FILINGS WITH RESPECT TO ASSET-BACKED SECURITIES

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Commission proposes to amend Rule 312 of Regulation S-T which provides a temporary filing accommodation for filings with respect to asset-backed securities that allows static pool information required to be disclosed in a prospectus to be provided on an Internet Web site under certain conditions. Under Rule 312, such information is deemed to be included in the prospectus included in the registration statement for the asset-backed securities. Rule 312 currently applies to filings with respect to asset-backed securities filed on or before December 31, 2009. We propose to amend Rule 312 to extend its application for one year. Under the proposed extension, the rule would apply to filings with respect to asset-backed securities filed on or before December 31, 2010.

DATES: Comments should be received on or before [insert date 30 days after publication in the Federal Register].

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-23-09 on the subject line; or
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-23-09. 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/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Harrington, Attorney-Adviser, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing an amendment to Rule 312[1] of Regulation S-T.[2]

I. BACKGROUND AND DISCUSSION OF THE PROPOSED AMENDMENT

In December, 2004, we adopted new and amended rules and forms to address the registration, disclosure and reporting requirements for asset-backed securities ("ABS") under the Securities Act of 1933[3] (the "Securities Act") and the Securities Exchange Act of 1934[4] (the "Exchange Act").[5] As part of this rulemaking, we adopted Regulation AB,[6] a new principles-based set of disclosure items forming the basis for disclosure with respect to ABS in both Securities Act registration statements and Exchange Act reports. Compliance with the revised rules was phased in; full compliance with the revised rules became effective January 1, 2006. One of the significant features of Regulation AB is Item 1105, which requires, to the extent material, static pool information to be provided in the prospectus included in registration statements for ABS offerings.[7] While the disclosure required by Item 1105 depends on factors such as the type of underlying asset and materiality, the information required to be disclosed can be extensive. For example, a registrant may be required to disclose multiple performance metrics in periodic

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1 17 CFR 232.312.

2 17 CFR 232.10 et seq.

3 15 U.S.C. 77a et seq.

4 15 U.S.C. 78a et seq.

5 See Asset-Backed Securities, Release No. 33-8518 (December 22, 2004) [70 FR 1506] (adopting release related to Regulation AB and other new rules and forms related to asset-backed securities) (hereinafter, the "Adopting Release").

6 17 CFR 229.1100 et seq.

7 See Form S-1 and Form S-3 under the Securities Act. Static pool information indicates how groups, or static pools, of assets, such as those originated at different intervals, are performing over time. By presenting comparisons between originations at similar points in the assets' lives, the data allows the detection of patterns that may not be evident from overall portfolio numbers and thus may reveal a more informative picture of material elements of portfolio performance and risk.

increments for prior securitized pools of the sponsor for the same asset type in the last five years.[8]

As described in the Adopting Release, in response to the Commission's proposal to require material static pool information in prospectuses for ABS offerings, many commenters representing both asset-backed issuers and investors requested flexibility in the presentation of such information. In particular, commenters noted that the required static pool information could include a significant amount of statistical information that would be difficult to file electronically on EDGAR as it existed at that time and difficult for investors to use in that format. Commenters accordingly requested the flexibility for asset-backed issuers to provide static pool information on an Internet Web site rather than as part of an EDGAR filing.[9] In response to these comments, we adopted Rule 312 of Regulation S-T, which permits, but does not require, the posting of the static pool information required by Item 1105 on an Internet Web site under the conditions set forth in the rule.[10] We recognized at the time that a Web-based approach might allow for the provision of the required information in a more efficient, dynamic and useful format than was currently feasible on the EDGAR system. At the same time, we explained that we continued to believe at some point for future transactions the information should also be submitted with the Commission in some fashion, provided investors continue to receive the information in the form they have requested. Accordingly, we adopted Rule 312 as a temporary filing accommodation applicable to filings filed on or before December 31,

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8 17 CFR 229.1105.

9 See Adopting Release, Section III.B.4.b.

10 17 CFR 232.312(a). Instead of relying on Rule 312, an issuer can include information required by Item 1105 of Regulation AB physically in the prospectus or, if permitted, through incorporation by reference from an Exchange Act report.

2009.[11] We explained that we were directing our staff to consult with the EDGAR contractor, EDGAR filing agents, issuers, investors and other market participants to consider how static pool information could be filed with the Commission in a cost-effective manner without undue burden or expense that still allows issuers to provide the information in a desirable format. We also noted, however, that it might be necessary, among other things, to extend the accommodation.[12]

We are proposing to extend the temporary filing accommodation set forth in Rule 312 of Regulation S-T for one year so that it would apply to filings with respect to ABS filed on or before December 31, 2010. During the proposed extension, the existing requirements of Rule 312 would continue to apply. Pursuant to these requirements, the registrant must disclose its intention to provide static pool information through a Web site in the prospectus included in the registration statement at the time of effectiveness and provide the specific Internet address where the static pool information is posted in the prospectus filed pursuant to Rule 424.[13] The registrant must maintain such information on the Web site unrestricted and free of charge for a period of not less than five years, indicate the date of any updates or changes to the information, undertake to provide any person without charge, upon request, a copy of the information as of the date of the prospectus if a subsequent update or change is made to the information and retain all versions of the information provided on the Web site for a period of not less than five years in a form that permits delivery to an investor or the Commission. In addition, the registration statement for the ABS must contain an undertaking pursuant to Item 512(l) of

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11 17 CFR 232.312(a); see also Adopting Release, Section III.B.4.b.

12 Adopting Release, Section III.B.4.b.

13 17 CFR 230.424.

Regulation S-K[14] that the information provided on the Web site pursuant to Rule 312 is deemed to be part of the prospectus included in the registration statement.[15]

We believe that it is appropriate to extend the filing accommodation provided by Rule 312 before its expiration after December 31, 2009. Based on the staff's experience since Rule 312 became effective in 2006, the vast majority of residential mortgage-backed security issuers and a significant portion of ABS issuers in other asset classes have relied on the accommodation provided by the rule to disclose static pool information on an Internet Web site. Furthermore, we believe that it remains the case that it could be difficult to file the information electronically on EDGAR as it exists today and difficult for investors to use in that format.

Since the adoption of Rule 312 in December, 2004, technological advances and expanded use of the Internet have enabled the Commission to adopt additional rules incorporating electronic communications. The Commission continues to recognize that, in certain circumstances and under certain conditions, the Internet can present a reliable and cost-effective alternative or supplement to traditional disclosure methods.[16] On the

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[14] 17 CFR 229.512(l).

[15] 17 CFR 232.312. As we indicated in the Adopting Release, if the conditions of Rule 312 are satisfied, then the information will be deemed to be part of the prospectus included in the registration statement and thus subject to all liability provisions applicable to prospectuses and registration statements, including Section 11 of the Securities Act [15 U.S.C. 77k]. Adopting Release, Section III.B.4.b.

[16] See, e.g., Internet Availability of Proxy Materials, Release No. 34-55146 (Jan. 22, 2007) [72 FR 4148] (adopting release for voluntary E-Proxy rules) and Internet Availability of Proxy Materials, Release No. 34-52926 (December 8, 2005) [70 FR 74598] (proposing release for voluntary E-Proxy rules). See also Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8998, Section III.A.4.c (Jan. 13, 2009) [74 FR 4546] (adopting Item 11(g)(2) of Form N-1A under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] which allows exchange-traded funds to provide premium/discount information on a Web site rather than in a prospectus or annual report) and Securities Offering Reform, Release No. 33-8591, SectionVI.B.1 (July 19, 2005) [70 FR 44722] (adopting "access equals delivery" model for final prospectus delivery).

other hand, we are mindful of the benefit of having information filed on the EDGAR system.

The staff of the Division of Corporation Finance is currently engaged in a broad review of the Commission's regulation of ABS including disclosure, offering process, and reporting of asset-backed issuers. Along with this review, the staff of the Division of Corporation Finance is continuing to explore whether a filing mechanism for static pool information that fulfills the objectives identified above is feasible. As the staff considers this issue further, we believe it is appropriate to extend the temporary filing accommodation for one year. We believe a proposal for a long-term solution for providing static pool disclosure would be better considered together with other possible proposals to revise the regulations governing the offer and sale of ABS. The proposed one-year extension of Rule 312 is intended to provide time to enable us to proceed in this manner.

We are soliciting comments in this release about current practice and potential alternatives for providing static pool disclosure and will consider the responses we receive in determining whether to extend Rule 312 or to address the issue more broadly as part of a package of ABS proposals.

Request for Comment:

We request and encourage any interested person to submit comments regarding the proposed amendment described above. In particular, we solicit comment on the following questions:

- Is an extension of the filing accommodation appropriate? What would be the consequences if the accommodation lapsed on December 31, 2009 and static pool information was required in an EDGAR filing beginning January 1, 2010?
- How could static pool information be filed with the Commission in a cost-effective manner that continues to allow the information to be provided in a format that promotes utility and functionality? Are there alternative filing mechanisms that could replace or supplement Rule 312?
- Have investors or other market participants had any difficulties with locating, accessing, viewing or analyzing static pool information posted on an Internet Web site pursuant to the filing accommodation provided by Rule 312 of Regulation S-T? Has the information remained on the Web site for the required duration and have updates and changes been appropriately reflected?
- Have issuers found that the Internet Web site posting accommodation provided by Rule 312 has enabled them to provide the required static pool information in a cost-effective, efficient and useful manner? Have issuers encountered any issues or problems with Internet Web site posting pursuant to Rule 312? How should we address those issues or problems?
- Would the proposed one-year extension present particular problems for investors? Would a shorter or more narrowly tailored extension ameliorate those concerns?
- Should the filing accommodation be extended for longer than one year, for example, two, three or five years, or made permanent? If so, are there any revisions to the rule that should be made?

- Are there any other changes we should consider making to Rule 312 of Regulation S-T?

II. PAPERWORK REDUCTION ACT

Rule 312 of Regulation S-T was adopted along with other new and amended rules and forms to address the registration, disclosure and reporting requirements for ABS under the Securities Act and the Exchange Act. In connection with this prior rulemaking, we submitted a request for approval of the "collection of information" requirements contained in the amendments and rules to the Office of Management and Budget ("OMB") in accordance with the Paperwork Reduction Act of 1995 ("PRA").[17] OMB approved these requirements.[18]

Item 1105 of Regulation AB[19] requires certain static pool information, to the extent material, to be provided in prospectuses included in registration statements for ABS offerings.[20] Rule 312 is a temporary filing accommodation that permits the posting of the static pool information required by Item 1105 on an Internet Web site under the conditions set forth in the rule.[21] The proposed amendment to Rule 312 extends the existing temporary filing accommodation provided by the rule for one additional year. As is the case today, issuers may choose whether or not to take advantage of the accommodation. The conditions of Rule 312 remain otherwise unchanged. The disclosure requirements themselves, which are contained in Forms S-1 and S-3 under the

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17 44 U.S.C. 3501 et seq.

18 The collections of information to which Rule 312 of Regulation S-T relates are "Form S-1" (OMB Control No. 3235-0065) and "Form S-3" (OMB Control No. 3235-0073).

19 17 CFR 229.1105.

20 See Form S-1 and Form S-3 under the Securities Act.

21 17 CFR 232.312(a).

Securities Act and require the provision of the information set forth in Item 1105 of Regulation AB, also remain unchanged. Therefore, the proposed amendment, if adopted, will not result in an increase or decrease in the costs and burdens imposed by the "collection of information" requirements previously approved by the OMB.

III. COST-BENEFIT ANALYSIS

In this section, we examine the benefits and costs of our proposed amendment. We request that commenters provide views and supporting information as to the benefits and costs associated with the proposal. We seek estimates of these costs and benefits, as well as any costs and benefits not already identified.

A. Benefits

We adopted the filing accommodation provided by Rule 312 of Regulation S-T because commenters requested flexibility in the presentation of required static pool information. Given the large amount of statistical information involved, commenters argued for a Web-based approach that would allow issuers to present the information in an efficient manner and with greater functionality and utility than might be available if an EDGAR filing was required. We believe this greater functionality and utility has enhanced an investor's ability to access and analyze the static pool information and also removed the burden on issuers of duplicating the information in each prospectus as well as easing the burdens of updating such information.[22] As we discussed in the Adopting Release, since the information is deemed to be part of the prospectus included in the registration statement, the rule is designed to give investors access to accurate and reliable information.

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22 See Section I above and Adopting Release, Section V.D.

By extending the accommodation provided by Rule 312, these benefits to both issuers and investors would continue to apply. As discussed above, many ABS issuers rely on Rule 312 to provide static pool information on an Internet Web site rather than in an EDGAR filing.[23] We do not believe we can implement an alternative filing mechanism by the end of 2009 that would meet the objectives of both issuers and investors to present static pool information in an efficient, cost-effective form that would provide investors utility and functionality in terms of accessing and analyzing that information. Therefore, if we do not amend Rule 312 to extend its application, static pool information would be required in EDGAR filings beginning on January 1, 2010. We believe this would result in costs for issuers as they attempt to adjust their procedures in a short period of time in order to present the information in a format acceptable to the EDGAR system and could result in costs to investors if the information filed on EDGAR was presented in a less useful format.

By extending Rule 312, we seek to avoid these potentially negative effects for issuers and investors as we continue to explore the best format in which to require the filing of static pool information. As indicated above, the staff of the Division of Corporation Finance is considering this issue along with other proposals addressing the disclosure, offering process and reporting of asset-backed issuers.

B. Costs

We do not believe a one-year extension of the Rule 312 accommodation would impose any new or increased costs on issuers. In the Cost-Benefit Analysis section of the Adopting Release, we noted that asset-backed issuers electing the Web-based accommodation provided by Rule 312 would incur costs related to the maintenance and

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[23] See Section I above.

retention of static pool information posted on a Web site and might also incur start-up costs.[24] While it is likely that certain of those costs would continue to impact asset-backed issuers that elect the Web-based approach during the extension period, we do not believe our proposed amendment would impose any new or increased costs for asset-backed issuers because it does not change any other conditions to the accommodation or the underlying filing and disclosure obligations. As a result of the proposed extension of the accommodation, asset-backed issuers would be able to continue their current practices for an additional year.

For investors, there may be costs associated with the static pool information not being electronically filed with the Commission. For example, when information is electronically filed with the Commission, investors and staff can access the information from a single, centralized location, the EDGAR Web site. We think these costs are mitigated by the fact that ABS issuers relying on the Rule 312 accommodation must ensure that the prospectus for the offering contains the Internet Web site address where the static pool information is posted, the Web site must be unrestricted and free of charge, such information must remain on the Internet Web site for five years with any changes clearly indicated and the issuer must undertake to provide the information to any person free of charge, upon request, if a subsequent update or change is made. Furthermore, because the information is deemed included in the prospectus under Rule 312, it is subject to all liability provisions applicable to prospectuses and registration statements.

Investors and issuers may have incurred costs to adjust their processes in anticipation of the lapse of the Rule 312 accommodation and potential reversion to a

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[24] See Adopting Release, Section V.D.

requirement to file static pool information on EDGAR. In this case, benefits to investors or issuers of not having to change their procedures regarding static pool reporting in a short time frame would be diminished by any costs already incurred in anticipation of the change. We believe such anticipatory action and any associated costs are minimal.

We request comment on the amount of any additional costs issuers or investors may incur as a result of the proposed amendment.

IV. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[25] we solicit data to determine whether the proposal constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendment on the U.S. economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views if possible.

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[25] 5 U.S.C. 603.

V. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 2(b) of the Securities Act requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

As discussed in greater detail above, Rule 312 of Regulation S-T was adopted as a temporary filing accommodation so that issuers of ABS could present static pool information on an Internet Web site. The proposed amendment to Rule 312 of Regulation S-T extends its application for one year. We are not proposing changes to the conditions of Rule 312 or to the disclosure obligations to which it applies. We do not believe that a one-year extension would impose a burden on competition. We also believe the extension of the filing accommodation would continue to promote efficiency and capital formation by permitting ABS issuers to disclose static pool information in a format that is more useful to investors and cost-effective and not unduly burdensome for asset-backed issuers.

We request comment on whether the proposed amendment, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VI. REGULATORY FLEXIBILITY ANALYSIS CERTIFICATION

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed amendment contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposal relates to the disclosure

requirements for ABS in Securities Act registration statements. Securities Act Rule 157[26] defines an issuer, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. In 2004, when we proposed the new and amended rules and forms to address the registration, disclosure and reporting requirements for ABS, we certified that the proposals would not have a significant economic impact on a substantial number of small entities. As the depositor and issuing entity are most often limited purpose entities in an ABS transaction, we focused on the sponsor in analyzing the potential impact of the proposals under the Regulatory Flexibility Act. The staff analyzed sponsors that conducted registered public offerings of ABS during 2003. No sponsor had total assets of $5 million or less.[27] Based on staff experience, we continue to believe that few, if any, sponsors are small entities. In addition, even if some sponsors are small entities, the proposed amendment to Rule 312 would not have a significant economic impact on any such entities because it only extends a temporary filing accommodation that is currently in effect. As discussed above in Section III, we do not believe the proposed extension would impose any new or increased costs on ABS issuers. Accordingly, we do not believe that the extension, if adopted, would have a significant economic impact on a substantial number of small entities.

We solicit written comments regarding this certification. We request comment on whether the proposals could have an effect that we have not considered. We request that

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26 17 CFR 230.157.

27 Asset-Backed Securities, Release No. 33-8419 (May 3, 2004) [69 FR 26650] (proposing release related to Regulation AB and other new rules and forms related to asset-backed securities).

commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

VII. STATUTORY AUTHORITY AND TEXT OF THE PROPOSED AMENDMENT

The amendment described is being proposed under the authority set forth in Sections 6, 7, 10, 19 and 28 of the Securities Act of 1933 (15 U.S.C. 77f, 77g, 77j, 77s and 77z-3).

List of Subjects

17 CFR Part 232

Reporting and recordkeeping requirements, Securities.

TEXT OF THE PROPOSED AMENDMENT

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 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), 77z–3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

2. Amend §232.312 by removing "December 31, 2009" and in its place adding "December 31, 2010" in the first sentence of paragraph (a).

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

October 19, 2009

Chairman Schapiro and Commissioner Casey not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60843 / October 20, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2939 / October 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13657

In the Matter of **PERCEPTIVE ADVISORS LLC,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(e) 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 administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Perceptive Advisors LLC ("Perceptive" or "Respondent").

II.

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

21C of the Securities Exchange Act of 1934 and Section 203(e) 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 the Respondent's Offer, the Commission finds that:

Respondent

1. Perceptive Advisors LLC is a Delaware limited liability corporation, based in New York, New York, and is the investment manager for the Perceptive Life Sciences Master Fund ("Perceptive Fund").

Summary

2. From January 2005 through December 2005, Perceptive violated Rule 105 of Regulation M with respect to five repeat securities offerings. In each case, Perceptive sold securities short within five business days before the pricing of the offering, and then covered the short position, in whole or in part, with shares purchased in the offering. As a result, Perceptive obtained unlawful profits of $245,902.34.

Legal Framework

3. Rule 105 of Regulation M, "Short Selling in Connection with a Public Offering," at the time of the conduct described in this Order, prohibited covering a short sale with securities obtained in a public offering if the short sale occurred within the shorter of the period five business days before pricing and ending with pricing, or the period beginning with the initial filing of the registration statement or notification on Form 1-A and ending with pricing. In pertinent part, Rule 105 provided:

> In connection with an offering of securities for cash pursuant to a registration statement...filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the...period beginning five business days before the pricing of the offered securities and ending with such pricing.

17 C.F.R. § 242.105.

Perceptive's Trades

4. On January 24 and 25, 2005, Perceptive sold short a total of 107,342 shares of Telik Inc. in an account it managed for the Perceptive Fund, at prices ranging from $18.8376 to $19.2402. After the market closed on January 27, 2005, a repeat offering of Telik shares was priced at $18.75. The Perceptive Fund account received a total of 378,000 shares in the offering and used 107,342 of the shares to cover the restricted period short position. As a result of these transactions, Perceptive Fund realized a profit of $15,195.06.

5. On September 15, 2005, Perceptive sold short 107,100 shares of Geron Corp. in an account it managed for the Perceptive Fund, at a price of $10.4283. After the market closed on September 15, 2005, a repeat offering of Geron shares was priced at $9.00. The Perceptive Fund account received a total of 107,100 shares in the offering and used the shares to cover the restricted period short position. As a result of these transactions, Perceptive Fund realized a profit of $152,970.93.

6. On October 5, 2005, Perceptive sold short 12,300 shares of Cotherix Inc. in an account it managed for the Perceptive Fund, at $14.1937. On October 6, 2005 a repeat offering of Cotherix shares was priced at $13.00. The Perceptive Fund account received a total of 45,000 shares in the offering and used the shares to partially cover the restricted period short position. As a result of these transactions, Perceptive Fund realized a profit of $8,236.53.

7. On November 2, 2005, Perceptive sold short 18,000 shares of Hythiam Inc. in an account it managed for the Perceptive Fund, at $5.1496. After the market closed on November 2, 2005 a repeat offering of Hythiam shares was priced at $4.75. The Perceptive Fund account received a total of 22,500 shares in the offering and used the shares to partially cover the restricted period short position. As a result of these transactions, Perceptive Fund realized a profit of $1,798.20.

8. From November 30 through December 6, 2005, Perceptive sold short 202,500 shares of Dendreon Corp. in an account it managed for the Perceptive Fund, at prices between $5.1366 and $5.9059. After the market closed on December 6, 2005 a repeat offering of Dendreon shares was priced at $4.50. The Perceptive Fund account received a total of 135,000 shares in the offering and used the shares to partially cover the restricted period short position. As a result of these transactions, Perceptive Fund realized a profit of $67,701.62.

Violations

9. As a result of the conduct described above, Perceptive willfully[1] violated Rule 105 of Regulation M.

Remedial Efforts

10. In determining to accept the Offer, the Commission considered remedial acts undertaken by Perceptive and cooperation it afforded the Commission staff.

IV.

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

Accordingly, pursuant to Section 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Perceptive shall cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M.

B. Perceptive is censured.

C. IT IS FURTHER ORDERED THAT Perceptive shall, within thirty (30) days of the entry of this Order, pay disgorgement of $245,902.34 and prejudgment interest of $68,852.92, for a total of $314,755.26, to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. 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 Perceptive as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew M. Calamari, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281.

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[1] For purposes of jurisdiction and assessing the sanctions enumerated herein, 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)).

D. IT IS FURTHER ORDERED THAT Perceptive shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $125,000.00 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. 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, Suite 400, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Perceptive as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew M. Calamari, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, New York, NY 10281.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro and Commissioner Casey not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60842 / October 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13656

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

I.

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

II.

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

III.

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

Respondent

1. First New York is a limited liability company organized under the laws of New York and headquartered in New York, New York. It has been registered with the Commission as a broker-dealer since April 23, 1985.

Summary

2. In September 2005 and January 2007, First New York violated Rule 105 of Regulation M with respect to two repeat securities offerings. On both occasions, in connection with the offering, First New York sold securities short within five business days before the pricing of the offering, and then covered the short position, in whole or in part, with shares purchased in the offering. As a result, First New York obtained unlawful profits of $39,544.35.

Legal Framework

3. Rule 105 of Regulation M, "Short Selling in Connection with a Public Offering," at the time of the conduct described in this Order, prohibited covering a short sale with securities obtained in a public offering if the short sale occurred within the shorter of the period five business days before pricing and ending with pricing, or the period beginning with the initial filing of the registration statement or notification on Form 1-A and ending with pricing. In pertinent part, Rule 105 provided:

> In connection with an offering of securities for cash pursuant to a registration statement . . . filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the . . . period beginning five business days before the pricing of the offered securities and ending with such pricing.

17 C.F.R. § 242.105.

First New York's Trades

4. On September 26 and 27, 2005, First New York sold short a total of 25,000 shares of Cemex, S.A. de C.V. in two proprietary accounts, at prices ranging from $50.3229 to $51.3019. After the market closed on September 27, 2005, a repeat offering of Cemex shares was priced at $49.50. On September 28, 2005, these two First New York accounts received a total of 20,000 shares in the offering and used those shares to partially

cover the restricted period short position. As a result of these transactions, First New York realized a profit of $25,044.

5. On January 19 and 22, 2007, First New York sold short a total of 15,000 shares of AMR Corp. in a proprietary account, at prices of $39.28 and $39.86, respectively. On January 23, 2007, a repeat offering of AMR shares was priced at $38.70. On the same day, First New York received in this account an allocation of 20,000 shares in the offering, and used 15,000 of those shares to cover its restricted period short position. As a result of these transactions, First New York realized a profit of $14,500.

Violations

6. As a result of the conduct described above, First New York willfully[1] violated Rule 105 of Regulation M.

Remedial Efforts

7. In determining to accept the Offer, the Commission considered remedial acts undertaken by First New York and cooperation it afforded the Commission staff.

IV.

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

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

A. First New York shall cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M.

B. First New York is censured.

C. IT IS FURTHER ORDERED THAT First New York shall, within thirty (30) days of the entry of this Order, pay disgorgement of $39,544.35 and prejudgment interest of $9,464.37, for a total of $49,008.72, to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by United States postal money order, certified check, bank

[1] For purposes of jurisdiction and assessing the sanctions enumerated herein, 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)).

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 First New York as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew M. Calamari, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281.

D. IT IS FURTHER ORDERED THAT First New York shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of $20,000.00 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. 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 First New York as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Andrew M. Calamari, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Suite 400, New York, NY 10281.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60844 / October 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13658

In the Matter of **PETER MOULINOS, ESQ.** **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 Peter Moulinos ("Respondent" or "Moulinos") 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 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.

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, paragraph 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. Moulinos, age 40, is and has been an attorney licensed to practice law in the State of New York. During 1999 and 2000, Moulinos acted as outside legal counsel for Syndicated Food Service International, Inc. ("Syndicated").

2. Syndicated was, at all relevant times, a Florida corporation with its principal place of business in Virginia. Syndicated operated family-style Italian restaurants in New York and Florida. At all relevant times, Syndicated'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 OTC Bulletin Board.

3. On March 29, 2004, the Commission filed a complaint in the United States District Court for the Eastern District of New York against Moulinos in Securities and Exchange Commission v. Syndicated Food Service International, Inc. et. al, Civil Action Number 04-CV-1303 (NGG)(E.D.N.Y.). On October 6, 2009, the Court entered a final judgment by consent against Moulinos, 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. Moulinos was also ordered to pay a $50,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Moulinos prepared Syndicated's periodic filings with the Commission that contained material misrepresentations and omitted material facts. For example, Moulinos prepared Syndicated's Form 10-KSB for the period ending December 31, 1999, and knew or recklessly disregarded that the Form 10-KSB contained material misrepresentations and omitted material facts.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Moulinos is suspended from appearing or practicing before the Commission as an attorney for five years. Furthermore, after five years from the date of this order, Respondent has the right to apply for reinstatement by submitting an affidavit to the Commission's Office of the General Counsel truthfully stating, under penalty of perjury, that he has complied with this Order, that he is not subject to any suspension or

disbarment as an attorney by a court of the United States or of any state territory, district, commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice.

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. 60846 / October 20, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3059 / October 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13659

In the Matter of **ECO_2 Plastics, 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 ECO_2 Plastics, Inc. ("ECO_2" 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 that:

1. ECO_2 is a Delaware corporation located in San Francisco, California. The company's common stock (symbol "EOPI") is quoted on the OTC Bulletin Board and the Pink Sheets operated by Pink OTC Markets Inc. According to EDGAR, it appears that ECO_2 has never registered a class of securities under the Exchange Act but has registered offerings of securities under the Securities Act of 1933. Therefore, at all relevant times, ECO_2 has been subject to the reporting requirements of Section 15(d) of the Exchange Act.

2. ECO_2 failed to comply with Items 307 and 308T of Regulation S-B in its Form 10-KSB report filed on April 15, 2008 for the fiscal year ended December 31, 2007, as a result of which the Respondent violated Exchange Act Section 15(d) and Rules 15d-1 and 15d-15 thereunder.

3. ECO_2 failed to comply with Item 307 of Regulation S-K in its Form 10-K report filed on April 14, 2009 for the fiscal year ended December 31, 2008, as a result of which the Respondent violated Exchange Act Section 15(d) and Rules 15d-1 and 15d-15 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent ECO_2's Offer.

Accordingly, it is hereby ORDERED that:

Pursuant to Section 21C of the Exchange Act, Respondent ECO_2 cease and desist from committing or causing any violations and any future violations of Section 15(d) of the Exchange Act and Rules 15d-1 and 15d-15 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. 60847 / October 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13660

In the Matter of **M.G. Products, Inc.,** **Masstor Systems Corp.,** **Matrix Concepts, Inc. (n/k/a Global Media Group Holdings, Inc.),** **MCB Financial Corp.,** **Media888, Inc. (f/k/a DIT Ventures, Inc.),** **Medical Properties, Inc.,** **Medtrak Electronics, Inc., and** **Metro Display Advertising, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents M.G. Products, Inc., Masstor Systems Corp., Matrix Concepts, Inc. (n/k/a Global Media Group Holdings, Inc.), MCB Financial Corp., Media888, Inc. (f/k/a DIT Ventures, Inc.), Medical Properties, Inc., Medtrak Electronics, Inc., and Metro Display Advertising, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. M.G. Products, Inc. (CIK No. 863111) is a suspended California corporation located in San Antonio, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). M.G. Products is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1997, which reported a net loss of over $6.9 million for the prior nine months. As of October 13, 2009, the company's stock (symbol "MGPR") was traded on the over-the-counter markets.

2. Masstor Systems Corp. (CIK No. 715086) is a forfeited Delaware corporation located in San Jose, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Masstor is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 1993. On September 8, 1994, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Northern District of California, which was converted to Chapter 7, and terminated on May 8, 1997. As of October 13, 2009, the company's stock (symbol "MSCO") was traded on the over-the-counter markets.

3. Matrix Concepts, Inc. (n/k/a Global Media Group Holdings, Inc.) (CIK No. 1140463) is a void Delaware corporation located in Danville, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Matrix Concepts is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2006, which reported a net loss of $908,240 for the prior six months.

4. MCB Financial Corp. (CIK No. 902789) is a California corporation that merged out of existence and is located in San Rafael, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MCB is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001.

5. Media888, Inc. (f/k/a DIT Ventures, Inc.) (CIK No. 1129094) is a dissolved Michigan corporation located in El Monte, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Media888 is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2001, which reported a net loss of $258,549 for the prior six months.

6. Medical Properties, Inc. (CIK No. 803608) is a Maryland corporation located in Encino, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Medical Properties is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended June 30, 1994, which reported a net loss of $684,000 for the prior three months.

7. Medtrak Electronics, Inc. (CIK No. 828355) is a permanently revoked Nevada corporation located in Beverly Hills, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Medtrak is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 1996. On March 30, 2001, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, which was terminated on July 19, 2002.

8. Metro Display Advertising, Inc. (CIK No. 944742) is a California corporation that merged out of existence and is located in Irvine, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Metro Display is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 1997, which reported a net loss of $472,159 for the prior three months. On January 22, 1992, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, which was terminated on July 31, 2000.

B. DELINQUENT PERIODIC FILINGS

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

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

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

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

Appendix 1

Chart of Delinquent Filings
M.G. Products, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
M.G. Products, Inc.					
	10-K	12/31/97	03/31/98	Not filed	139
	10-Q	03/31/98	05/15/98	Not filed	137
	10-Q	06/30/98	08/14/98	Not filed	134
	10-Q	09/30/98	11/16/98	Not filed	131
	10-K	12/31/98	03/31/99	Not filed	127
	10-Q	03/31/99	05/17/99	Not filed	125
	10-Q	06/30/99	08/16/99	Not filed	122
	10-Q	09/30/99	11/15/99	Not filed	119
	10-K	12/31/99	03/30/00	Not filed	115
	10-Q	03/31/00	05/15/00	Not filed	113
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	47				
Masstor Systems Corp.	*10-Q*	03/31/94	05/16/94	Not filed	185
	10-Q	06/30/94	08/15/94	Not filed	182
	10-Q	09/30/94	11/14/94	Not filed	179
	10-K	12/31/94	03/31/95	Not filed	175
	10-Q	03/31/95	05/15/95	Not filed	173
	10-Q	06/30/95	08/14/95	Not filed	170
	10-Q	09/30/95	11/14/95	Not filed	167
	10-K	12/31/95	04/01/96	Not filed	162
	10-Q	03/31/96	05/15/96	Not filed	161
	10-Q	06/30/96	08/14/96	Not filed	158
	10-Q	09/30/96	11/14/96	Not filed	155
	10-K	12/31/96	03/31/97	Not filed	151
	10-Q	03/31/97	05/15/97	Not filed	149
	10-Q	06/30/97	08/14/97	Not filed	146
	10-Q	09/30/97	11/14/97	Not filed	143
	10-K	12/31/97	03/31/98	Not filed	139
	10-Q	03/31/98	05/15/98	Not filed	137
	10-Q	06/30/98	08/14/98	Not filed	134
	10-Q	09/30/98	11/16/98	Not filed	131
	10-K	12/31/98	03/31/99	Not filed	127
	10-Q	03/31/99	05/17/99	Not filed	125
	10-Q	06/30/99	08/16/99	Not filed	122

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-Q	09/30/99	11/15/99	Not filed	119
	10-K	12/31/99	03/30/00	Not filed	115
	10-Q	03/31/00	05/15/00	Not filed	113
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	62				
Matrix Concepts, Inc. (n/k/a Global Media Group Holdings, Inc.)	*10-QSB*	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	10-Q'	03/31/08	05/15/08	Not filed	17
	10-Q'	06/30/08	08/14/08	Not filed	14
	10-Q'	09/30/08	11/14/08	Not filed	11
	10-K'	12/31/08	03/31/09	Not filed	7
	10-Q'	03/31/09	05/15/09	Not filed	5
	10-Q'	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	12				
MCB Financial Corp.	*10-KSB*	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	10-Q'	03/31/08	05/15/08	Not filed	17
	10-Q'	06/30/08	08/14/08	Not filed	14
	10-Q'	09/30/08	11/14/08	Not filed	11
	10-K'	12/31/08	03/31/09	Not filed	7
	10-Q'	03/31/09	05/15/09	Not filed	5
	10-Q'	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	31				
Media888, Inc. (f/k/a DIT Ventures, Inc.)	*10-QSB*	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	10-Q[1]	03/31/08	05/15/08	Not filed	17
	10-Q[1]	06/30/08	08/14/08	Not filed	14
	10-Q[1]	09/30/08	11/14/08	Not filed	11
	10-K[1]	12/31/08	03/31/09	Not filed	7
	10-Q[1]	03/31/09	05/15/09	Not filed	5
	10-Q[1]	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	32				
Medical Properties, Inc.	*10-Q*	09/30/94	11/14/94	Not filed	179
	10-K	12/31/94	03/31/95	Not filed	175
	10-Q	03/31/95	05/15/95	Not filed	173
	10-Q	06/30/95	08/14/95	Not filed	170
	10-Q	09/30/95	11/14/95	Not filed	167
	10-K	12/31/95	04/01/96	Not filed	162
	10-Q	03/31/96	05/15/96	Not filed	161
	10-Q	06/30/96	08/14/96	Not filed	158
	10-Q	09/30/96	11/14/96	Not filed	155
	10-K	12/31/96	03/31/97	Not filed	151
	10-Q	03/31/97	05/15/97	Not filed	149
	10-Q	06/30/97	08/14/97	Not filed	146
	10-Q	09/30/97	11/14/97	Not filed	143
	10-K	12/31/97	03/31/98	Not filed	139
	10-Q	03/31/98	05/15/98	Not filed	137
	10-Q	06/30/98	08/14/98	Not filed	134
	10-Q	09/30/98	11/16/98	Not filed	131
	10-K	12/31/98	03/31/99	Not filed	127
	10-Q	03/31/99	05/17/99	Not filed	125
	10-Q	06/30/99	08/16/99	Not filed	122
	10-Q	09/30/99	11/15/99	Not filed	119

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-K	12/31/99	03/30/00	Not filed	115
	10-Q	03/31/00	05/15/00	Not filed	113
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	03/31/09	05/15/09	Not filed	5

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	60				
Medtrak Electronics, Inc.					
	10-QSB	09/30/96	11/14/96	Not filed	155
	10-KSB	12/31/96	03/31/97	Not filed	151
	10-QSB	03/31/97	05/15/97	Not filed	149
	10-QSB	06/30/97	08/14/97	Not filed	146
	10-QSB	09/30/97	11/14/97	Not filed	143
	10-KSB	12/31/97	03/31/98	Not filed	139
	10-QSB	03/31/98	05/15/98	Not filed	137
	10-QSB	06/30/98	08/14/98	Not filed	134
	10-QSB	09/30/98	11/16/98	Not filed	131
	10-KSB	12/31/98	03/31/99	Not filed	127
	10-QSB	03/31/99	05/17/99	Not filed	125
	10-QSB	06/30/99	08/16/99	Not filed	122
	10-QSB	09/30/99	11/15/99	Not filed	119
	10-KSB	12/31/99	03/30/00	Not filed	115
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	09/30/04	11/15/04	Not filed	59

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	10-Q[1]	03/31/08	05/15/08	Not filed	17
	10-Q[1]	06/30/08	08/14/08	Not filed	14
	10-Q[1]	09/30/08	11/14/08	Not filed	11
	10-K[1]	12/31/08	03/31/09	Not filed	7
	10-Q[1]	03/31/09	05/15/09	Not filed	5
	10-Q[1]	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	20				
Metro Display Advertising, Inc.	*10-KSB*	12/31/97	03/31/98	Not filed	139
	10-QSB	03/31/98	05/15/98	Not filed	137
	10-QSB	06/30/98	08/14/98	Not filed	134
	10-QSB	09/30/98	11/16/98	Not filed	131
	10-KSB	12/31/98	03/31/99	Not filed	127
	10-QSB	03/31/99	05/17/99	Not filed	125
	10-QSB	06/30/99	08/16/99	Not filed	122
	10-QSB	09/30/99	11/15/99	Not filed	119
	10-KSB	12/31/99	03/30/00	Not filed	115
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	10-Q[1]	03/31/08	05/15/08	Not filed	17
	10-Q[1]	06/30/08	08/14/08	Not filed	14
	10-Q[1]	09/30/08	11/14/08	Not filed	11
	10-K[1]	12/31/08	03/31/09	Not filed	7
	10-Q[1]	03/31/09	05/15/09	Not filed	5
	10-Q[1]	06/30/09	08/14/09	Not filed	2

Total Filings Delinquent 47

[1]Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. See Release No. 34-56994 (Dec. 19, 2007).. The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than $75 million in public equity float as of the end of its most recently completed second fiscal quarter) have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

October 21, 2009

IN THE MATTER OF Sun Sports and Entertainment, 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 Sun Sports and Entertainment, Inc. ("Sun Sports") because of questions regarding the accuracy of statements by Sun Sports in press releases and statements to investors concerning, among other things, the company's business prospects and financial viability.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Sun Sports.

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 October 21, 2009 through 11:59 p.m. EST, on November 3, 2009.

By the Commission.

Florence E. Harmon

By: Florence E. Harmon
Deputy Secretary

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 239, 240, 249 and 274

[Release Nos. 33-9070A; 34-60797A; IC-28942A; File No. S7-24-09]

RIN 3235-AK41

CREDIT RATINGS DISCLOSURE

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects the file number in the preamble to a proposed rule regarding credit ratings disclosure published in the Federal Register of Thursday, October 15, 2009 (74 FR 53086). The file number should read as set forth above.

FOR FURTHER INFORMATION CONTACT: Questions concerning this correction should be directed to Linda Cullen, Office of the Secretary, at (202) 551-5402.

Correction

In FR Doc. E9-24546 published on October 15, 2009, (74 FR 53086) beginning on page 53086, make the following corrections:

1. On page 53086, first column, in the ADDRESSES section, second bullet under Electronic Comments, 3rd line, revise "S7-20-09" to read "S7-24-09"; and

2. On page 53086, first column, in the ADDRESSES section, under Paper Comments, 2nd line from the bottom revise "S7-20-09" to read "S7-24-09"; and

3. On page 53103, first column, second paragraph, 12th and 8th lines from the bottom, revise "S7-20-09" to read "S7-24-09".

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: October 22, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SEURITIES EXCHANGE ACT OF 1934
Release No. 60867 / October 22, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13662

In the Matter of

Redtop Mountain Corp.
(n/k/a Weblogix, Inc.),
Reliable Power Systems, Inc.,
Renaissance Acceptance Group, Inc.,
Republic Goldfields, Inc.,
Rexon, Inc.
(n/k/a Tecmar Technologies, Inc.),
River Oaks Furniture, Inc.,
Roberds, Inc., and
Rochem Environmental, Inc.,

Respondents.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Redtop Mountain Corp. (n/k/a Weblogix, Inc.), Reliable Power Systems, Inc., Renaissance Acceptance Group, Inc., Republic Goldfields, Inc., Rexon, Inc. (n/k/a Tecmar Technologies, Inc.), River Oaks Furniture, Inc., Roberds, Inc., and Rochem Environmental, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Redtop Mountain Corp. (n/k/a Weblogix, Inc.) (CIK No. 1098962) is a void Delaware corporation located in Atlanta, Georgia with a class of securities registered

with the Commission pursuant to Exchange Act Section 12(g). Redtop is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2001, which reported a net loss of $592 since inception on November, 4, 1999.

2. Reliable Power Systems, Inc. (CIK No. 312066) is a dissolved Colorado corporation located in Chicago, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Reliable is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2002, which reported a net loss of $528,517 for the prior three months. As of October 21, 2009, the company's stock (symbol "RPSI") was traded on the over-the-counter markets.

3. Renaissance Acceptance Group, Inc. (CIK No. 706507) is a delinquent Delaware corporation located in Irving, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Renaissance is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2002, which reported a net loss of over $1.48 million for the prior nine months.

4. Republic Goldfields, Inc. (CIK No. 733314) is an Ontario corporation located in Toronto, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Republic is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the fiscal year ended December 31, 2001, which reported a year-end deficit of over $23 million (Canadian).

5. Rexon, Inc. (n/k/a Tecmar Technologies, Inc.) (CIK No. 701290) is a void Delaware corporation located in Longmont, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Rexon is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended July 2, 1995, which reported a net loss of over $27 million for the prior nine months.

6. River Oaks Furniture, Inc. (CIK No. 908309) is an inactive Mississippi corporation located in Belden, Mississippi with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). River Oaks is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 28, 1997, which reported a net loss of over $3.9 million for the prior nine months.

7. Roberds, Inc. (CIK No. 912952) is a canceled Ohio corporation located in Boca Raton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Roberds is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 1999, which reported a net loss of over $13 million for the prior twelve months. On January 19, 2000, the company filed a Chapter 11 petition in

the U.S. Bankruptcy Court for the Western District of Ohio, which terminated on September 27, 2007.

8. Rochem Environmental, Inc. (CIK No. 759824) is an expired Utah corporation located in Montgomery, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Rochem is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2001, which reported a net loss of $145,153 for the prior three months. As of October 21, 2009, the company's stock (symbol "RCEM") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

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

10. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires foreign private issuers to furnish quarterly and other reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings
Redtop Mountain Corp., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Redtop Mountain Corp. (n/k/a Weblogix, Inc.)					
	10-KSB	09/30/01	12/31/01	Not filed	94
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-KSB	09/30/02	12/30/02	Not filed	82
	10-QSB	12/31/02	02/14/03	Not filed	80
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-KSB	09/30/03	12/29/03	Not filed	70
	10-QSB	12/31/03	02/17/04	Not filed	68
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-KSB	09/30/04	12/29/04	Not filed	58
	10-QSB	12/31/04	02/14/05	Not filed	56
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-KSB	09/30/05	12/29/05	Not filed	46
	10-QSB	12/31/05	02/14/06	Not filed	44
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-KSB	09/30/06	12/29/06	Not filed	34
	10-QSB	12/31/06	02/14/07	Not filed	32
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-KSB	09/30/07	12/31/07	Not filed	22
	10-QSB	12/31/07	02/14/08	Not filed	20
	10-QSB	03/31/08	05/15/08	Not filed	17
	10-QSB	06/30/08	08/14/08	Not filed	14

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Redtop Mountain Corp. (n/k/a Weblogix, Inc.)	*10-KSB*	09/30/08	12/29/08	Not filed	10
	*10-Q**	12/31/08	02/17/09	Not filed	8
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	32				
Reliable Power Systems, Inc.					
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Reliable Power Systems, Inc.					
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	29				
Renaissance Acceptance Group, Inc.					
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Renaissance Acceptance Group, Inc.					
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	27				
Republic Goldfields, Inc.					
	20-F	12/31/02	06/30/03	Not filed	76
	20-F	12/31/03	06/30/04	Not filed	64
	20-F	12/31/04	06/30/05	Not filed	52
	20-F	12/31/05	06/30/06	Not filed	40
	20-F	12/31/06	07/02/07	Not filed	27
	20-F	12/31/07	06/30/08	Not filed	16
	20-F	12/31/08	06/30/09	Not filed	4
Total Filings Delinquent	7				
Rexon, Inc. (n/k/a Tecmar Technologies, Inc.)					
	10-K	10/01/95	01/02/96	Not filed	165
	10-Q	12/31/95	02/14/96	Not filed	164
	10-Q	03/31/96	05/15/96	Not filed	161
	10-Q	06/30/96	08/14/96	Not filed	158
	10-K	09/29/96	12/30/96	Not filed	154
	10-Q	12/29/96	02/12/97	Not filed	152
	10-Q	03/30/97	05/14/97	Not filed	149
	10-Q	06/29/97	08/13/97	Not filed	146
	10-K	09/28/97	12/29/97	Not filed	142
	10-Q	12/28/97	02/11/98	Not filed	140
	10-Q	03/29/98	05/13/98	Not filed	137
	10-Q	06/28/98	08/12/98	Not filed	134

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Rexon, Inc. (n/k/a Tecmar Technologies, Inc.)					
	10-K	09/27/98	12/28/98	Not filed	130
	10-Q	12/27/98	02/10/99	Not filed	128
	10-Q	03/28/99	05/12/99	Not filed	125
	10-Q	06/27/99	08/11/99	Not filed	122
	10-K	09/26/99	12/27/99	Not filed	118
	10-Q	12/26/99	02/09/00	Not filed	116
	10-Q	03/26/00	05/10/00	Not filed	113
	10-Q	06/25/00	08/09/00	Not filed	110
	10-K	10/01/00	01/02/01	Not filed	105
	10-Q	12/31/00	02/14/01	Not filed	104
	10-Q	04/01/01	05/16/01	Not filed	101
	10-Q	07/01/01	08/15/01	Not filed	98
	10-K	09/30/01	12/31/01	Not filed	94
	10-Q	12/30/01	02/13/02	Not filed	92
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-K	09/29/02	12/30/02	Not filed	82
	10-Q	12/29/02	02/12/03	Not filed	80
	10-Q	03/30/03	05/14/03	Not filed	77
	10-Q	06/29/03	08/13/03	Not filed	74
	10-K	09/28/03	12/29/03	Not filed	70
	10-Q	12/28/03	02/11/04	Not filed	68
	10-Q	03/28/04	05/12/04	Not filed	65
	10-Q	06/27/04	08/11/04	Not filed	62
	10-K	09/26/04	12/27/04	Not filed	58
	10-Q	12/26/04	02/09/05	Not filed	56
	10-Q	03/27/05	05/11/05	Not filed	53
	10-Q	06/26/05	08/10/05	Not filed	50
	10-K	09/25/05	12/27/05	Not filed	46
	10-Q	01/01/06	02/15/06	Not filed	44
	10-Q	04/02/06	05/17/06	Not filed	41
	10-Q	07/02/06	08/16/06	Not filed	38

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Rexon, Inc. (n/k/a Tecmar Technologies, Inc.)	*10-K*	10/01/06	01/02/07	Not filed	33
	10-Q	12/31/06	02/14/07	Not filed	32
	10-Q	04/01/07	05/16/07	Not filed	29
	10-Q	07/01/07	08/15/07	Not filed	26
	10-K	09/30/07	12/31/07	Not filed	22
	10-Q	12/30/07	02/13/08	Not filed	20
	10-Q	03/30/08	05/14/08	Not filed	17
	10-Q	06/29/08	08/13/08	Not filed	14
	10-K	09/28/08	12/29/08	Not filed	10
	10-Q	12/28/08	02/11/09	Not filed	8
	10-Q	03/29/09	05/13/09	Not filed	5
	10-Q	06/28/09	08/12/09	Not filed	2
Total Filings Delinquent	56				
River Oaks Furniture, Inc.					
	10-K	12/31/97	03/31/98	Not filed	139
	10-Q	03/31/98	05/15/98	Not filed	137
	10-Q	06/30/98	08/14/98	Not filed	134
	10-Q	09/30/98	11/16/98	Not filed	131
	10-K	12/31/98	03/31/99	Not filed	127
	10-Q	03/31/99	05/17/99	Not filed	125
	10-Q	06/30/99	08/16/99	Not filed	122
	10-Q	09/30/99	11/15/99	Not filed	119
	10-K	12/31/99	03/30/00	Not filed	115
	10-Q	03/31/00	05/15/00	Not filed	113
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
River Oaks Furniture, Inc.	*10-K*	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2

Total Filings Delinquent 47

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Roberds, Inc.					
	10-Q	03/31/00	05/15/00	Not filed	113
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Roberds, Inc.					
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	38				
Rochem Environmental, Inc.					
	10-KSB	09/30/01	12/31/01	Not filed	94
	10-QSB	12/31/01	02/14/02	Not filed	92
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-KSB	09/30/02	12/30/02	Not filed	82
	10-QSB	12/31/02	02/14/03	Not filed	80
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-KSB	09/30/03	12/29/03	Not filed	70
	10-QSB	12/31/03	02/17/04	Not filed	68
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-KSB	09/30/04	12/29/04	Not filed	58
	10-QSB	12/31/04	02/14/05	Not filed	56
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-KSB	09/30/05	12/29/05	Not filed	46
	10-QSB	12/31/05	02/14/06	Not filed	44
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-KSB	09/30/06	12/29/06	Not filed	34
	10-QSB	12/31/06	02/14/07	Not filed	32
	10-QSB	03/31/07	05/15/07	Not filed	29

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Rochem Environmental, Inc.					
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-KSB	09/30/07	12/31/07	Not filed	22
	10-QSB	12/31/07	02/14/08	Not filed	20
	10-QSB	03/31/08	05/15/08	Not filed	17
	10-QSB	06/30/08	08/14/08	Not filed	14
	10-KSB	09/30/08	12/29/08	Not filed	10
	*10-Q**	12/31/08	02/17/09	Not filed	8
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2

Total Filings Delinquent 32

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than $75 million in public equity float as of the end of its most recently completed second fiscal quarter) have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60870 / October 22, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13664

In the Matter of

BANC OF AMERICA INVESTMENT SERVICES, INC. and VIRGINIA HOLLIDAY,

Respondents.

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 Banc of America Investment Services, Inc. ("BAI") and Virginia Holliday ("Holliday"), (collectively, "Respondents").

II.

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

Summary

These proceedings arise out of BAI's and Holliday's failure reasonably to supervise Brent Lemons, a former registered representative in BAI's Tyler, Texas branch office. Between May 2005 and April 2007, while on heightened supervision, Lemons misappropriated over $1.3 million from BAI customers' accounts primarily by liquidating their variable annuities. After placing Lemons on heightened supervision, Holliday failed to determine whether the Tyler branch office complied with BAI's correspondence procedures and did not respond appropriately to red flags raised by additional customer complaints. BAI failed to develop a reasonable system to implement its policies and procedures for reviewing customer accounts and securities transactions and failed reasonably to implement its procedures for branch office compliance inspections by failing to provide for follow-up on deficiencies identified in these inspections.

Respondents

1. **BAI**, a Florida corporation with its principal place of business in Boston, has been a Commission-registered broker-dealer (File No. 8-33805) since 1985. It is a wholly-owned retail brokerage subsidiary of Bank of America Corporation. Bank of America, N.A. ("BANA") is a wholly-owned national bank subsidiary of Bank of America Corporation. Bank of America Corporation is a Delaware corporation with its principal place of business in Charlotte, North Carolina.

2. **Holliday**, age 51, was the market director for BAI's Addison, Texas Office of Supervisory Jurisdiction ("Addison OSJ") from February 2005 until July 2007. She was Lemons's immediate supervisor for the entire period he was on heightened supervision. Holliday holds Series 3, 7, 8, 24, 63 and 65 securities licenses and has no disciplinary history.

Other Relevant Person

3. **Brent Steven Lemons**, age 52, was a registered representative in BAI's Tyler, Texas branch office from September 24, 2004 through April 23, 2007, when BAI terminated him for violating BAI's policies and procedures. From 1982 to 2004, Lemons was associated with another national broker-dealer as a registered representative and as a branch office manager. Lemons holds Series 3, 7, 8 and 63 securities licenses.

4. On August 20, 2008, Lemons pleaded guilty to one count of Interstate Transportation of Stolen Money (18 U.S.C. §2314) and one count of Transaction with Criminally Derived Property (18 U.S.C. §1957). On February 24, 2009, Lemons was sentenced to 75 months and ordered to pay restitution. On May 27, 2009, in the Commission's civil action, Lemons was permanently enjoined from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Lemons's Fraudulent Scheme While Associated with BAI

5. On April 23, 2007, BAI terminated Lemons for handling customer funds in violation of its policies and procedures. Thereafter, BAI learned that Lemons had misappropriated at least $1.3 million from his customers' brokerage and bank accounts by, among other things, liquidating customers' variable annuities. To perpetrate his scheme, Lemons typically faxed notices to annuity providers directing them to liquidate all or part of his customers' annuities and deposited

the proceeds in the customers' bank accounts. Lemons then withdrew cash from the customers' bank accounts using the pre-signed withdrawal slips.[1] In part, using his apparent authority as a BANA representative, Lemons convinced BANA tellers to give him the funds. To hide his scheme, Lemons gave his customers manually prepared "statements" (sometimes handwritten) that falsely summarized their securities holdings. Because certain variable annuities were not listed on his customers' brokerage statements, Lemons was able to mislead his customers about the true value of their annuities through his manually prepared statements.[2]

Complaints Against Lemons for his Conduct at his Former Firm

6. Between January and March 2005, after Lemons arrived at BAI, his former firm disclosed four customer complaints on his Central Registration Depository ("CRD") record. One of these customer complaints, disclosed in January 2005, alleged that Lemons frequently told the customer that he owned an annuity worth over $100,000, but that Lemons never provided supporting documentation. Lemons's former firm disclosed on the CRD that it had no record of the annuity and never located any documents showing that the complainant owned an annuity.

Holliday Relied Solely on Information from Lemons in Investigating Customer Complaints

7. After learning that Lemons's fomer firm disclosed customer complaints, Holliday asked Lemons to provide a written response to each. In addition to his responses, Lemons gave Holliday a December 1, 2004 customer questionnaire that his former firm had sent to his customers. Lemons told Holliday that he believed his former firm used the questionnaire to instigate the complaints in retaliation for his leaving them for BAI. The questionnaire asked whether customers believed they had purchased annuities that did not appear on their account statements. Holliday neither asked Lemons for additional information about his variable annuity business nor did she attempt to corroborate or confirm Lemons's responses or his statements to her.

BAI Placed Lemons on Heightened Supervision

8. BAI's written supervisory procedures ("WSPs") provide for mandatory heightened supervision for registered representatives with multiple sales practice complaints.[3] Based on the former firm's customer complaints filed against him, BAI placed Lemons on heightened supervision on May 23, 2005. Holliday developed a heightened supervision plan ("HSP") for Lemons that required, among other things, increased contact between Lemons and Holliday through bi-weekly telephone conversations and quarterly office visits.

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[1] Telling his investors that it would facilitate the reinvestment of their funds, Lemons directed some of his customers to sign various blank documents, including withdrawal slips and letters of authorization.

[2] Unless annuity providers have made arrangements with BAI's clearing firm, their annuities do not appear on BAI's monthly statements. Similarly, Lemons's customers' annuities owned prior to transferring their brokerage account to BAI are supposed to receive account statements directly from the annuity provider, unless the annuity provider has made arrangements with BAI's clearing firm.

[3] Regulatory actions or arbitrations resulting in a Form U-4 amendment on the registered representative's CRD record are also counted.

Holliday Failed to Determine Whether Lemons Complied with BAI's Procedures and Missed Red Flags

9. BAI's WSPs mandate that its managers ensure incoming mail is promptly forwarded to the OSJ and that the manager, or a designee, reviews the content of outgoing correspondence. Additionally, BAI's procedures require that its supervisors determine whether the office(s) that they manage comply with all rules, regulations and policies applicable to BAI's business. During her visits, Holliday failed to determine whether Lemons or the Tyler branch office complied with BAI's correspondence procedures. Moreover, during these visits, Holliday neither reviewed the Tyler branch office's mail or faxes nor inquired about the Tyler branch office's correspondence procedures with the branch office employees who handled its correspondence. Therefore, she did not discover that the Tyler branch office only sent some of Lemons's incoming and outgoing correspondence to the OSJ for review. Had Holliday addressed whether the Tyler branch office and Lemons were complying with BAI's correspondence procedures, she likely would have found correspondence between Lemons and his customer (from his former firm), in which Lemons admits that he did not purchase an annuity for the customer contrary to Lemons's previous representations to him. In addition, Holliday likely would have discovered Lemons's correspondence with annuity providers seeking to liquidate prematurely his customers' variable annuities (often incurring significant fees for the customers). Such correspondence, in conjunction with correspondence relating to the complaint from Lemons's former firm, would have presented red flags of Lemons's suspicious conduct. If Holliday had followed up on this correspondence, for example, with customers, she likely would have detected and prevented Lemons's fraudulent activities.

Holliday Failed to Respond Reasonably to Additional Customer Complaints

10. Once on heightened supervision, if Lemons was subject to any additional complaints, BAI's WSPs required Holliday to re-evaluate Lemons's HSP to determine an appropriate course of action, including termination. BAI received two customer complaints after placing Lemons on heightened supervision. Holliday, however, did not reasonably follow up on these complaints. She did not re-evaluate Lemons's HSP or consider terminating him.

11. In August 2005, three months after placing Lemons on heightened supervision, two of Lemons's customers (a married couple) complained to Holliday orally that Lemons had represented the value of their accounts to be over $580,000, including a purported annuity worth over $450,000, but had never given them any supporting documentation for that annuity. In September 2005, Holliday agreed to review the customers' accounts. They provided her with several years of investment records, including monthly account statements with handwritten notes reflecting an outside investment valued at over $400,000. Holliday claims to have reviewed these documents, but she made no further inquiry about the handwritten notes. Despite the similarities between these customers' complaint and the customer complaint from Lemons's former firm, Holliday conducted no further investigation about the customers' annuity and never re-evaluated Lemons's HSP.

12. When BAI failed to resolve their oral complaint, the customers filed a written complaint on January 6, 2006 alleging that, as late as August 2005, Lemons represented in writing that they owned an annuity worth over $471,000. They attached a document to their complaint, which they claimed Lemons wrote, listing several annuities, including one valued at $471,021. Lemons denied preparing the document. Holliday made no effort to confirm whether

the customers owned such an annuity or to determine the basis for the customers' belief that they did own such an annuity. Had she made any inquiry, she likely would have discovered that Lemons had lied to these customers about their annuity.

13. On December 19, 2006, BAI received a second written customer complaint about Lemons. This complaint alleged that Lemons reimbursed the customer for some losses by depositing funds directly into the customer's personal bank account. Again, Holliday did not re-evaluate or change Lemons's HSP or reasonably follow-up on this customer complaint.

Lemons Misappropriated Funds After BAI Received Additional Customer Complaints

14. Following the additional customer complaints in August 2005 and January 2006, Lemons continued to engage in fraudulent activity. Between January 6, 2006 and December 19, 2006, Lemons misappropriated approximately $550,000 from two other customers.[4] Lemons misappropriated another $500,000 from customers between December 19, 2006 and April 2007, when BAI finally terminated him when the firm discovered his unauthorized withdrawals. Holliday failed to respond reasonably to the customer complaints and thus failed to prevent or detect Lemons' continuing fraud on his customers.

Lemons's Title of Tyler Market President Enabled Him to Misappropriate Customer Funds

15. On September 8, 2005, three weeks after BAI received its first verbal customer complaint against Lemons, BANA named Lemons "President, Tyler Market." In that role, Lemons was responsible for coordinating BANA's charitable activities to local community organizations. Using a BANA business card identifying him as "President, Tyler Market," Lemons touted his new position throughout the Tyler community, which led many BANA employees, including BANA tellers, to believe that he held a position of authority within BANA.

16. Holliday recommended Lemons for the Market President position, but never advised, nor required Lemons to advise, BANA of his heightened supervision or that Lemons, as a BAI registered representative, was not permitted to handle customer funds. Lemons used this position to further his fraudulent activities. For example, in April 2007, because BANA tellers believed that Lemons was a bank officer and did not know he was prohibited from handling customer funds, Lemons was able to withdraw a total of $27,000 from his customer's bank account at two different BANA banking centers in Tyler.

BAI's Failure to Supervise Lemons

Review of Customer Accounts and Securities Transactions

17. BAI's WSPs generally require supervision over each customer account and securities transaction. BAI failed to develop reasonable systems to implement this procedure. For example, the WSPs do not direct managers to conduct a periodic review or any other review of customer accounts or customer files, or provide a mechanism for managers to review customer securities transactions. If BAI had developed systems to implement the general requirement for oversight of customer accounts and securities transactions, Holliday likely would have uncovered

[4] Prior to January 6, 2006, Lemons had misappropriated approximately $250,000 from his customers.

red flags of Lemons' conduct during reviews of customer files maintained at the Tyler branch office during her branch office visits. These files contained information concerning Lemons's customers' accounts and securities transactions. Had she reviewed the customer files, Holliday likely would have discovered suspicious and incriminating materials, such as withdrawal slips that his customers signed in blank, suspiciously large annuity liquidations with significant early withdrawal fees, or handwritten customer statements containing clearly inflated values or fictitious securities holdings, all of which Lemons used to perpetrate his fraudulent scheme.

Periodic Compliance Inspections

18. BAI's WSPs require compliance inspections of each branch office at least every three years. The procedures directed that the results of the inspection be documented in an *Annual Compliance Inspection Report* addressed to OSJ management. BAI, however, failed implement this procedure so that the compliance department or supervisors followed up with the branch office regarding corrective action.

19. Eight months after hiring Lemons and ten days before placing him on heightened supervision, BAI conducted its first compliance inspection of the Tyler branch office. This inspection revealed that the Tyler branch office was not forwarding correspondence to the Addison OSJ as required by the WSPs. Holliday never received the results of the inspection. If BAI had reasonably implemented its procedures regarding compliance inspections to provide a mechanism for addressing whether appropriate compliance and/or supervisory staff received inspection reports and followed up on deficiencies, it is likely that Lemons's fraudulent activity would have been prevented or detected.

Applicable Law

20. Section 15(b)(4)(E) of the Exchange Act provides for imposing of sanctions against a broker-dealer who "has failed reasonably to supervise, with a view to preventing violations of such statutes, rules, and regulations, another person who commits such a violation, if such person is subject to his supervision." *See Smith Barney, Harris Upham & Co., Inc.,* Exchange Act Release No. 21813, 32 SEC Docket 999, 1004 (March 5, 1985). Section 15(b)(6) of the Exchange Act is also incorporated by reference and permits imposition of sanctions against persons associated with a broker or dealer. These sections also provide an affirmative defense for supervisors who show that: (1) there are established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and (2) that supervisor has reasonably discharged those duties and obligations incumbent upon him or her by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.[5]

21. The Commission has emphasized the broker-dealer's supervision of its employees through effective, established procedures is a critical component in the regulatory scheme to protect investors. *See Lehman Brothers, Inc.*, 52 SEC 982 (Sept. 12, 1996), 1996 SEC LEXIS 2453, at *21 (settled order)(citing *Smith Barney, Harris Upham & Co.*, Exchange Act Rel. No. 21813 (March 5, 1985), 1985 SEC LEXIS 2051 (settled order)) (broker-dealer lacked sufficient firm-wide policies and procedures reasonably designed to detect and prevent excessive markups

[5] *See* Sections 15(b)(4)E)(i) and (ii) of the Exchange Act.

on large retail transactions). Establishing policies and procedures alone, however, is not sufficient to discharge supervisory responsibilities; on-going monitoring and review is necessary to ensure that the established supervisory procedures are effective in preventing and detecting violations. *See Consolidated Investment Services, Inc.*, 52 SEC 582 (Jan. 5, 1996), 1996 SEC LEXIS 83. (broker-dealer had supervisory system in place, but took no steps to ascertain whether representative followed its procedures). Moreover, broker-dealers with off-site offices must inspect those offices to discharge their supervisory obligations. *Consolidated Investment Services*, 61 SEC Docket at 26 (broker-dealer's supervision of small office run by a single registered representative inadequate without inspections).

22. A branch manager must respond reasonably when suspecting that a registered representative may be engaging in improper activity. *In re Nicholas A. Boccella,* Exchange Act Release No. 26,574 (Feb. 27, 1989). "Even where the knowledge of supervisors is limited to 'red flags' or 'suggestions' of irregularity, they cannot discharge their supervisory obligations simply by relying on the unverified representations of employees." *In the Matter of John H. Gutfreund,* Exchange Act Release No. 31,554 (Dec. 3, 1992). A supervisor must conduct "adequate follow-up and review" whenever he or she detects unusual trading activity or other irregularities. *Id.* "Red flags and suggestions of irregularities demand inquiry as well as adequate follow up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of federal securities laws." *Edwin Kantor,* Exchange Act Release No. 32,341 (May 20, 1993). In large organizations, "it is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention." *See Wedbush Securities, Inc.*, 48 SEC 963 (Mar. 24, 1988), 1988 SEC LEXIS 568, at *10. (broker-dealer's top management ignored warning signals or took inadequate action when confronted with information indicating that customers were being defrauded).

Violations

23. As a result of the conduct described above, BAI and Holliday failed reasonably to supervise Lemons within the meaning of Sections 15(b)(4)(E) and 15(b)(4)(6)(A), respectively, with a view to preventing and detecting Lemons's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Civil Penalty

24. Respondent Holliday has submitted a sworn Statement of Financial Condition dated May 26, 2009 and other evidence and has asserted her inability to pay a civil penalty.

IV.

Undertakings

Respondent BAI undertakes:

25. to retain within 30 days of the entry of the Order, at its own expense, the services of an Independent Consultant not unacceptable to the Commission's Division of Enforcement, to review and evaluate the effectiveness of BAI's supervisory and compliance systems, policies and procedures designed to detect and prevent violations of the federal securities laws concerning the

following: (1) review of customer accounts and securities transactions; and (2) periodic compliance inspections.

26. 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 written Initial Report to BAI and the Commission's staff. The Initial Report shall describe the review performed, the conclusions reached and the Independent Consultant's recommendations deemed necessary to make the policies, procedures and system of supervision and compliance adequate.

27. to adopt, implement and maintain all policies, procedures and practices recommended in the Initial Report of the Independent Consultant. As to any of the Independent Consultant's recommendations about which BAI and the Independent Consultant do not agree, the 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 BAI and the Independent Consultant are unable to agree on an alternative proposal, BAI will abide by the determinations of the Independent Consultant and adopt those recommendations deemed appropriate by the Independent Consultant.

28. 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 BAI employees and agent to supply such information and documents as the Independent Consultant may reasonably request.

29. that, in order to ensure the independence of the Independent Consultant, BAI (1) shall not have the authority to terminate the Independent Consultant without the prior written approval of the Division; (2) 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.

30. to require the Independent Consultant to enter into an agreement that, for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with BAI 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 it is affiliated or of which it is a member, and any person engaged to assist the Independent Consultant in performance of its duties under this Order shall not, without prior written consent of the Division of Enforcement in Fort Worth Texas, enter into any employment, consultant, attorney-client, auditing or other professional relationship with BAI, 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.

V.

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

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

A. Respondent BAI is censured.

B. Respondent BAI shall within, ten (10) days of the entry of this Order, pay a civil money penalty in the amount of $150,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such 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 BAI 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 Stephen Korotash, Securities and Exchange Commission, Burnett Plaza, Suite 1900, 801 Cherry Street., Unit 18, Fort Worth, Texas 76102.

C. Respondent BAI shall comply with its undertaking as enumerated in Section IV.

D. Respondent Holliday be, and hereby is barred from association in a supervisory capacity with any broker or dealer with the right to reapply for association after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

E. 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 Holliday, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

F. Based upon Respondent Holliday's sworn representations in her State of Financial Condition dated May 26, 2009 and other documents submitted to the Commission, the Commission is not imposing a penalty against Respondent Holliday.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT of 1933
Release No. 9075 / October 22, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13664

In the Matter of **Banc of America Investment Services, Inc.** **Respondent.**	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION**

I.

Banc of America Investment Services, Inc. ("BAI" or "Respondent") has submitted a letter, dated September 14, 2009, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from BAI's settlement of an administrative proceeding commenced by the Commission.

II.

On October 22, 2009, pursuant to BAI's Offer of Settlement, the Commission issued an Order Instituting Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions against BAI. Under the Order, the Commission found that BAI failed to reasonably supervise one of its registered representatives. In the Order, the Commission censured BAI and ordered it to pay a $150,000 civil penalty.

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 for the securities to be offered is subject to an order of the Commission entered pursuant to Section 15(b) of the Securities Exchange Act of 1934. 17 C.F.R. § 230.602(c)(3). Rule 602(e) of the Securities Act of 1933 ("Securities Act") provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied." 17 C.F.R. § 230.602(e).

IV.

Based upon the representations set forth in BAI'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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60869 / October 22, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13663

In the Matter of **Park Meditech, Inc.,** **Peerless Industrial Group, Inc.,** **Peerless Tube Co.,** **PH Group, Inc., and** **PHC, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents Park Meditech, Inc., Peerless Industrial Group, Inc., Peerless Tube Co., PH Group, Inc., and PHC, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Park Meditech, Inc. (CIK No. 906788) is a Canadian corporation located in Lachine, Quebec, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Park Meditech is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended July 31, 1996, which reported a net loss of over $10 million (Canadian) for the prior twelve months. As of October 21, 2009, the company's stock (symbol "PMDTF") was traded on the over-the-counter markets.

2. Peerless Industrial Group, Inc. (CIK No. 746156) is an inactive Minnesota corporation located in Minneapolis, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Peerless is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 1997.

3. Peerless Tube Co. (CIK No. 76958) is a New Jersey corporation located in Bloomfield, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Peerless Tube is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended December 31, 2000, which reported a net loss of over $1.46 million for the prior twelve months. On July 18, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey, which was converted to a Chapter 7 petition, and was still pending as of October 21, 2009.

4. PH Group, Inc. (CIK No. 35305) is a canceled Ohio corporation located in Columbus, Ohio with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PH Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2001.

5. PHC, Inc. (CIK No. 225759) is a Minnesota corporation located in Bala Cynwyd, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PHC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended May 31, 1999, which reported an accumulated deficit of $42,157.

B. DELINQUENT PERIODIC FILINGS

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

7. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires foreign private issuers to furnish quarterly and other reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

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

III.

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings
Park Meditech, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Park Meditech, Inc.					
	20-F	07/31/97	02/02/98	Not filed	140
	20-F	07/31/98	02/01/99	Not filed	128
	20-F	07/31/99	01/31/00	Not filed	117
	20-F	07/31/00	01/31/01	Not filed	105
	20-F	07/31/01	01/31/02	Not filed	93
	20-F	07/31/02	01/31/03	Not filed	81
	20-F	07/31/03	02/02/04	Not filed	68
	20-F	07/31/04	01/31/05	Not filed	57
	20-F	07/31/05	01/31/06	Not filed	45
	20-F	07/31/06	01/31/07	Not filed	33
	20-F	07/31/07	01/31/08	Not filed	21
	20-F	07/31/08	02/02/09	Not filed	8
Total Filings Delinquent	12				
Peerless Industrial Group, Inc.					
	10-QSB	06/30/97	08/14/97	Not filed	146
	10-QSB	09/30/97	11/14/97	Not filed	143
	10-KSB	12/31/97	03/31/98	Not filed	139
	10-QSB	03/31/98	05/15/98	Not filed	137
	10-QSB	06/30/98	08/14/98	Not filed	134
	10-QSB	09/30/98	11/16/98	Not filed	131
	10-KSB	12/31/98	03/31/99	Not filed	127
	10-QSB	03/31/99	05/17/99	Not filed	125
	10-QSB	06/30/99	08/16/99	Not filed	122
	10-QSB	09/30/99	11/15/99	Not filed	119
	10-KSB	12/31/99	03/30/00	Not filed	115
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	47				
Peerless Tube Co.					
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	03/31/09	Not filed	7
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	34				
PH Group, Inc.					
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	03/31/09	Not filed	7
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	33				
PHC, Inc.					
	10-QSB	08/31/99	10/15/99	Not filed	120
	10-QSB	11/30/99	01/14/00	Not filed	117
	10-QSB	02/29/00	04/14/00	Not filed	114
	10-KSB	05/31/00	08/29/00	Not filed	110
	10-QSB	08/31/00	10/16/00	Not filed	108
	10-QSB	11/30/00	01/16/01	Not filed	105

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
	10-QSB	02/28/01	04/16/01	Not filed	102
	10-KSB	05/31/01	08/29/01	Not filed	98
	10-QSB	08/31/01	10/15/01	Not filed	96
	10-QSB	11/30/01	01/14/02	Not filed	93
	10-QSB	02/28/02	04/15/02	Not filed	90
	10-KSB	05/31/02	08/29/02	Not filed	86
	10-QSB	08/31/02	10/15/02	Not filed	84
	10-QSB	11/30/02	01/14/03	Not filed	81
	10-QSB	02/28/03	04/14/03	Not filed	78
	10-KSB	05/31/03	08/29/03	Not filed	74
	10-QSB	08/31/03	10/15/03	Not filed	72
	10-QSB	11/30/03	01/14/04	Not filed	69
	10-QSB	02/29/04	04/14/04	Not filed	66
	10-KSB	05/31/04	08/30/04	Not filed	62
	10-QSB	08/31/04	10/15/04	Not filed	60
	10-QSB	11/30/04	01/14/05	Not filed	57
	10-QSB	2/28/05	04/14/05	Not filed	54
	10-KSB	5/31/05	08/29/05	Not filed	50
	10-QSB	08/31/05	10/17/05	Not filed	48
	10-QSB	11/30/05	01/17/06	Not filed	45
	10-QSB	2/28/06	04/14/06	Not filed	42
	10-KSB	5/31/06	08/29/06	Not filed	38
	10-QSB	08/31/06	10/16/06	Not filed	36
	10-QSB	11/30/06	01/16/07	Not filed	33
	10-QSB	2/28/07	04/16/07	Not filed	30
	10-KSB	5/31/07	08/29/07	Not filed	26
	10-QSB	08/31/07	10/15/07	Not filed	24
	10-QSB	11/30/07	01/14/08	Not filed	21
	10-QSB	2/29/08	04/14/08	Not filed	18
	10-KSB	5/31/08	08/29/08	Not filed	14
	*10-Q**	08/31/08	10/15/08	Not filed	12
	*10-Q**	11/30/08	01/14/09	Not filed	9
	*10-Q**	2/28/09	04/14/09	Not filed	6
	*10-K**	5/31/09	08/31/09	Not filed	2
	*10-Q**	08/31/09	10/15/09	Not filed	0

Total Filings Delinquent 41

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)

*Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than $75 million in public equity float as of the end of its most recently completed second fiscal quarter) have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 9076 / October 23, 2009

Admin. Proc. File No. 3-12943

In the Matter of

RODNEY R. SCHOEMANN
c/o Peter J. Anderson and Gregory S. Kaufman
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Unregistered Offer and Sale of Securities

Respondent unlawfully made unregistered offers and sales of securities when no exemption from registration was available. *Held*, it is in the public interest to order respondent to disgorge ill-gotten profits and to cease and desist from committing or causing any violations of Sections 5(a) and 5(c) of the Securities Act of 1933.

APPEARANCES:

Peter J. Anderson and *Gregory S. Kaufman* of Sutherland Asbill & Brennan, Atlanta, GA and Washington, DC, for Rodney R. Schoemann.

William P. Hicks and *Edward G. Sullivan*, for the Division of Enforcement.

Appeal filed: January 21, 2009
Last brief received: April 16, 2009
Oral argument: September 16, 2009[1]

I.

Respondent Rodney R. Schoemann appeals from the decision of an administrative law judge.[2] Schoemann is in the business of investing his own money in the stock market. The law judge found that Schoemann violated Sections 5(a) and 5(c) of the Securities Act of 1933[3] in November 2004 by offering and selling the securities of Stinger Systems, Inc. ("Stinger"), a Nevada corporation, when no registration statement was filed or in effect with respect to those securities and no exemption from registration was available. The law judge ordered Schoemann to cease and desist from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act and to disgorge $967,901 in profits, plus prejudgment interest, from his sales of Stinger securities.

We base our findings on an independent review of the record except with respect to those findings not challenged on appeal.

II.

Schoemann purchased the Stinger shares at issue in this proceeding from Douglas Murrell, a Texas resident in the business of providing consulting services to companies seeking to purchase shell corporations in order to sell their shares publicly. Douglas Murrell was a shareholder in United Consulting Corporation ("UCC"), a Nevada shell corporation that was not publicly traded. UCC merged with Electronic Data Technology, LLC ("EDT"), an Ohio limited liability company and a manufacturer of stun devices, to form Stinger. These entities are described in greater detail below.

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[1] Rule of Practice 451(d), 17 C.F.R. § 201.451(d), provides that a member of the Commission who does not attend an oral argument may participate in the decision of the proceeding if that member reviews the oral argument transcript. Commissioner Casey, who did not attend the oral argument in this matter, has performed the requisite review.

[2] *Thomas J. Dudchik and Rodney R. Schoemann*, Initial Decision Rel. No. 363 (Dec. 5, 2008), 94 SEC Docket 12390. Thomas J. Dudchik did not appeal the Initial Decision, and the Initial Decision is final as to Dudchik. Notice That Init. Dec. Is Final, Securities Act Rel. No. 9001 (Jan. 29, 2009).

[3] 15 U.S.C. §§ 77e(a), 77e(c).

A. Douglas Murrell Acquires an Interest in UCC, and Matthew Murrell Becomes Majority Shareholder and Sole Officer and Director of UCC

UCC's principal business was to search for a merger candidate. In 1999, Douglas Murrell agreed to acquire UCC from UCC's founder. Prior to purchasing any UCC shares, Douglas Murrell consulted with Gary Henrie, a Utah-based securities attorney, regarding the corporate governance and structure of UCC. Douglas Murrell testified that he wanted to avoid a conflict of interest between his anticipated role as a consultant to UCC and any position he might hold at the company, and he wanted to ensure that he was not an affiliate of UCC. At the same time, Douglas Murrell wanted UCC's officer and director to be someone whom he trusted. Ultimately, Douglas Murrell decided that his then-twenty-four year old son, Matthew Murrell, was the best choice because, according to Douglas Murrell, his son could make independent decisions with good business sense and judgment, had a master's degree in Landscape Architecture, and was the most independent of Douglas Murrell's children.[4] Based on Douglas Murrell's recommendation, on March 14, 2000, UCC issued Matthew Murrell 10,000,000 restricted shares of UCC common stock. The Minutes of UCC's board meeting approving the issuance of the shares indicates that Matthew Murrell's shares were issued in exchange for $10,000. However, neither Matthew Murrell nor anyone else paid for the shares. When asked why Matthew Murrell received these shares, Douglas Murrell testified that "[UCC] had to have an officer/director that looked at the potential merger candidates."

On April 4, 2000, UCC's Board of Directors approved the issuance of 750,000 shares, described as "freely tradeable," to Douglas Murrell, for which he paid $8,250. At that time, UCC also issued another 250,000 "freely tradeable" shares to other persons. Thus, as of April 4, 2000, Douglas Murrell owned seventy-five percent of the authorized freely tradeable shares of UCC, and Matthew Murrell was the majority shareholder. UCC thereafter retained Douglas Murrell to serve as a consultant to UCC in its efforts to find a merger candidate. On May 1, 2000, the founder of UCC resigned as the sole officer and director, and Matthew Murrell was named the President, Secretary, Treasurer, and sole director of UCC.

B. Matthew Murrell's Background and Duties at UCC

During the time that Matthew Murrell was the sole officer and director of UCC, he was enrolled in graduate school at the University of Wisconsin and worked part-time as a natural resource scientist for the State of Wisconsin Department of Natural Resources and as a manager at a bar in Madison, Wisconsin. Matthew Murrell received no compensation from either UCC or his father while he served as UCC's sole officer and director. Matthew Murrell did not prepare any UCC corporate records or minutes, nor was he involved in any board meetings. Matthew Murrell was not aware of how many shareholders UCC had, nor did he communicate with any of the shareholders other than his father. When corporate documents required Matthew Murrell's

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[4] It does not appear that Douglas Murrell considered anyone other than his children for the position.

signature, Henrie prepared the documents and mailed them, through Douglas Murrell, to Matthew Murrell, who signed them and returned them to Henrie for filing and recordkeeping.

During the period from May 2000 to September 2004, Matthew Murrell reviewed merger candidates for UCC, but only after his father presented the candidates to him. Douglas Murrell compiled his list of potential merger candidates for UCC through discussions with various personal contacts. Douglas Murrell reviewed the resumes and management backgrounds of potential merger candidates, and conducted research on their respective industries before presenting the information to Matthew Murrell for his consideration. If Matthew Murrell thought that a particular candidate was promising, he conducted additional research about the company on his own, using the Internet and printed media. Matthew Murrell did not communicate with the management of any merger candidate he considered, and he did not preserve any of the research he conducted. Nonetheless, both Douglas and Matthew Murrell testified that any decision not to merge with a given candidate was made solely by Matthew Murrell, citing as an example the determination not to merge with a seafood company.

C. UCC Merges with EDT

In early 2004, Robert Gruder and his partner Thomas Yates Exley purchased EDT. Soon thereafter, EDT began to search for a merger partner, seeking a shell corporation with no operating history, no litigation, and no previous public trading of its securities.

On September 6, 2004, Gruder and Douglas Murrell signed an agreement (the "Consulting Agreement") under which Douglas Murrell would act as an exclusive consultant to find a merger candidate for EDT and to provide additional services related to such a merger.[5] Douglas Murrell would assist EDT in replacing the management of the merger candidate and in obtaining shares in the merger candidate. For his services, Douglas Murrell would receive a fee of $75,000, as well as 220,000 shares of the common stock of the company created by the merger. Douglas Murrell ultimately recommended that EDT merge with UCC.

During the course of several weeks in August and September 2004, EDT entered into negotiations with UCC as a potential merger partner. On September 23, 2004, EDT and UCC executed a document entitled Agreement and Plan of Reorganization (the "Merger Agreement"), under which UCC, as the Purchaser, acquired EDT, in exchange for the issuance of 10,000,000

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[5] The parties to the agreement were Stinger, with Gruder listed as Stinger's CEO, and Douglas Murrell's consulting firm. However, as discussed in detail below, Stinger did not exist as of the date of the agreement. We will use the name EDT to describe the Gruder-led entity prior to the merger.

shares of UCC to EDT-related parties, to form Stinger.[6] The Merger Agreement was signed by Matthew Murrell on behalf of UCC and by Gruder on behalf of EDT. The Merger Agreement includes a provision that states, "Upon and as a condition of closing this Agreement, [UCC] will deliver the resignations of its current officers and directors and in connection therewith appoint and elect directors as nominated by [EDT]." Although Douglas Murrell discussed the UCC/ EDT merger with Matthew Murrell, Matthew Murrell did not participate in the merger negotiations or the preparation of the necessary agreements, nor did he discuss the merger with anyone other than his father. Matthew Murrell signed all of the corporate documents necessary for the merger, which were prepared by Henrie. Douglas and Matthew Murrell testified that Matthew Murrell alone made the determination to proceed with the EDT/ UCC merger.

Although the Merger Agreement was apparently under negotiation throughout September 2004, Matthew Murrell continued to execute a number of merger-related documents, signing the documents in a number of different capacities on behalf of UCC, during the same time period.

(1) On September 20, 2004, in a Written Consent of the Sole Director of UCC, Matthew Murrell approved: (1) UCC's entry into the Merger Agreement; (2) an increase of UCC's authorized common stock to 50,000,000 shares; and (3) the change of UCC's name to Stinger Systems, Inc. upon execution of the Merger Agreement;

(2) In an Incumbency Certificate dated September 23, 2004, Matthew Murrell signed, as Chief Executive Officer of UCC, a statement indicating that he remained as one of four directors of UCC, along with Gruder (listed as both President and Director), Exley (listed as Secretary and Director), and Andrew Peter Helene, a Director;

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[6] The record includes two virtually identical versions of the Merger Agreement. The first version was initially dated August 26, 2004, but that date was crossed out in handwriting and replaced with the date September 20, 2004. The second version, dated September 23, 2004, is the version that the law judge found to be the applicable version of the Merger Agreement, and Schoemann does not contest this finding on appeal. The record does not contain evidence explaining why two virtually identical versions of the Merger Agreement exist.

Although the Merger Agreement appears to have been effective on September 23, 2004, as discussed in greater detail below, Matthew Murrell remained the sole officer and director of the merged company until September 25, 2004. During the two days after the Merger Agreement became effective, Matthew Murrell continued to sign UCC corporate documents such as written consents, even though UCC no longer existed once the Merger Agreement was effective. For ease of use and consistency, we use the name "Stinger" or the "merged entity" to describe the entity following the execution of the Merger Agreement.

(3) In a Written Consent of the Sole Director of UCC dated September 23, 2004, Matthew Murrell authorized: (1) the issuance of 9,750,000 shares of UCC stock to EDT-related parties pursuant to the terms of the Merger Agreement; (2) the issuance of 220,000 shares to Douglas Murrell's consulting firm pursuant to the terms of the Consulting Agreement; and (3) that 250,000 shares be reserved for future issuance pursuant to the instructions of EDT's President;

(4) In a Written Consent of the Majority Shareholder of UCC, dated September 23, 2004, Matthew Murrell resolved "to expand the number of members constituting the entire board of directors to six members and to thereafter reduce the number of members constituting the entire board of directors to five following the resignation of Matthew Murrell." This document further resolved "that the expansion of the board of directors and the election of the five new persons to the board of directors shall take effect on September 25, 2004, and that following the resignation of Matthew Murrell from the board of directors, the number of members constituting the entire board of directors shall be five." This document also resolved to increase the authorized capital of UCC to 50,000,000 common shares;

(5) In a Written Consent of the Sole Director of UCC dated September 24, 2004, Matthew Murrell resolved that his 10,000,000 common shares of UCC stock, which he had tendered to UCC, be cancelled; and

(6) On September 25, 2004, Matthew Murrell submitted his resignation as an officer and director of UCC.

Matthew Murrell received no compensation from Stinger or UCC for his UCC shares or for his service to UCC over the preceding four years. The only compensation that Matthew Murrell received was a $500 payment from his father's consulting firm.

D. Schoemann Purchases Stock from Douglas Murrell

In approximately June 2004, Gruder approached Schoemann about making an investment in the company that would ultimately become Stinger. On September 8 and 9, 2004, Schoemann received a Subscription Agreement for an investment in Stinger and a business plan, even though Stinger did not then exist as a corporate entity. Thereafter, Schoemann investigated the industry and market for Stinger's products. On September 21, 2004, Schoemann invested $200,000 in Stinger in exchange for 561,000 restricted shares. Schoemann received two share certificates for his 561,000 shares that were dated October 19 and 27, 2004. Schoemann understood that these initial 561,000 shares were not freely tradeable, and the certificates were marked "RESTRICTED" on their face.

Shortly after this initial purchase of restricted Stinger shares, Schoemann asked Gruder where Schoemann could purchase freely tradeable Stinger shares. Gruder referred Schoemann to Douglas Murrell. Schoemann and Douglas Murrell spoke for the first time on the telephone on September 23, 2004. Over the course of two telephone calls, Schoemann and Douglas Murrell reached an agreement that Schoemann would pay Douglas Murrell $0.75 per share for 100,000 shares, for a total purchase price of $75,000. The second telephone call occurred at approximately 2:00 p.m. Eastern time on September 23, 2004.

Later that day, Schoemann, a non-lawyer, drafted a document entitled Stock Purchase Agreement with Option (the "Stock Purchase Agreement"). The Stock Purchase Agreement states, "This Agreement is being executed this 23rd day of September 2004." In addition, next to Schoemann's signature on the document, Schoemann wrote "9/23/2004." The Stock Purchase Agreement states that Schoemann purchased 100,000 "freely tradeable shares of United Consulting, Inc., that next week will be changed to Stinger Systems, Inc." Schoemann testified that he believed he was purchasing Stinger shares, rather than UCC shares, but that Douglas Murrell told Schoemann "that the name change had not officially taken place."

The Stock Purchase Agreement further specified that Schoemann would pay for the shares by check sent to Douglas Murrell on September 28, 2004, for delivery on September 29, 2004. Schoemann testified that he included this provision in the Stock Purchase Agreement because he was uncertain if he wanted to go through with the transaction and needed extra time to think it over. Schoemann's check to Douglas Murrell was dated September 29, 2004; the memo line on the check reads: "9/23/04 Stock Purchase Agreement With Option 100,000 Freely Tradeable Stinger Systems, Inc., & 100,000 options."[7]

In a letter dated September 23, 2004, Douglas Murrell directed UCC's transfer agent to issue Schoemann a certificate for 100,000 shares of UCC. At some point before October 4, 2004, Schoemann received a certificate for these shares, which, unlike the certificates for the 561,000 shares he purchased on September 21, 2004, was not marked "RESTRICTED." On October 4, 2004, Schoemann sent this certificate to his broker, E*Trade, for deposit into his account.

Schoemann testified that he understood from Stinger's business plan that there would be a merger with a shell company, but he did not know that UCC was the shell company, even though the Stock Purchase Agreement stated that Schoemann purchased UCC shares, which were to be changed to Stinger the following week. Douglas Murrell and Schoemann did not discuss any element of UCC's corporate governance or structure prior to Schoemann's purchase of the

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[7] The Stock Purchase Agreement also contained a six-month option, under the terms of which Schoemann could purchase an additional 100,000 shares, for a price of $3.00 per share plus fifty percent of any profit made on that stock sold above $3.00 per share. Schoemann and Douglas Murrell subsequently cancelled this option, after Schoemann purchased additional Stinger shares from another source at a more favorable price.

100,000 shares. They never discussed Matthew Murrell's role with UCC or the part he or Douglas Murrell played in effecting the UCC/ EDT merger that produced Stinger. Schoemann testified that the only question he asked Douglas Murrell relating to UCC was how long Douglas Murrell had held the shares he sold to Schoemann. When Douglas Murrell replied that he had held the shares for over four years, both Schoemann and Douglas Murrell agreed that the shares were freely tradeable without, at the time, any consultation with a securities attorney. Schoemann acknowledged that he "did not know, until the commencement of the Administrative Hearing, from where Doug Murrell acquired the shares or why Doug Murrell decided to sell these shares to me."

E. Schoemann's Sales of Stinger Stock

After the completion of the EDT/ UCC merger and the subsequent cancellation of Matthew Murrell's shares, 10,000,000 shares of Stinger stock were authorized and issued to members of the management team, in addition to the already existing UCC shares held by Douglas Murrell and others. As noted above, the total authorized capital stock of Stinger was 50,000,000 shares. Gruder testified that he intended to file a registration statement for the securities soon after the merger, but Stinger did not file a registration statement with the Commission until February 7, 2005.

On October 1, 2004, Douglas Murrell requested a legal opinion from Henrie as to the tradeability of the shares he sold to Schoemann. Henrie provided an opinion letter to UCC's transfer agent stating that, although the UCC securities that Douglas Murrell sold to Schoemann were not registered, they were nevertheless not subject to the resale limitations contained in Securities Act Rule 144(k)[8] because Douglas Murrell was not an affiliate of UCC and had held the securities in question for over four years. Henrie testified that he based his opinion on his review of UCC corporate documents indicating that Matthew Murrell was UCC's sole officer and director and its majority shareholder. Henrie talked only to Douglas Murrell to obtain the information he used to reach his opinion, and never spoke with Matthew Murrell regarding his degree of control over UCC and his independence from Douglas Murrell. Henrie testified that, in his opinion, Douglas Murrell would have been a control person of UCC, but for Matthew Murrell's ownership of 10,000,000 UCC shares. Henrie did not ask whether Matthew Murrell had paid for his 10,000,000 shares. Henrie was also unaware that Matthew Murrell was not involved in the EDT/ UCC merger negotiations, but Henrie testified that this would not have been important to know in reaching his opinion as long as Matthew Murrell made the final decision about the merger on behalf of UCC.

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[8] 17 C.F.R. § 230.144(k). At the time, Rule 144(k) specified that unregistered shares could be sold without restriction if the shares were sold for the account of a person who is not an affiliate of the company at the time of the sale, provided that such person has not been an affiliate during the preceding three months and provided a period of at least two years has elapsed since the later of the date the securities were acquired from the company or from an affiliate of the company.

In early November 2004, a registered broker-dealer in Texas, First Southwest Company ("First Southwest"), agreed to make a market in Stinger stock. At First Southwest's request, Henrie provided information to the Pink Sheets, a national quotation system, as required pursuant to Rule 15c2-11 of the Securities Exchange Act of 1934.[9] Along with the Rule 15c2-11 form, Henrie submitted a letter to the Pink Sheets, dated November 8, 2004, in which he stated that the 1,000,000 Stinger shares that were originally issued as UCC shares to Douglas Murrell and others in April 2000 "are not subject to the resale limitations of Rule 144 pursuant to the operation of Rule 144(k)." On November 11, 2004, based on the Rule 15c2-11 information, Henrie's letter to the Pink Sheets, and Henrie's oral representation to First Southwest that the shares were freely tradeable, First Southwest entered the first quote for Stinger stock on the Pink Sheets and executed the first public trade of Stinger stock.

Beginning on November 12, 2004, and continuing through November 22, 2004, Schoemann sold the 100,000 shares he had purchased from Douglas Murrell through his E*Trade account, generating $967,901 in profits above his initial $75,000 purchase price. Schoemann testified that he was comfortable that his shares were freely tradeable based on E*Trade's acceptance of his share certificate for deposit into his account and based on his reading of Henrie's November 8 opinion letter submitted to the Pink Sheets.

III.

A. Violations of the Registration Requirements

1. Registration Requirements of Securities Act Section 5

Securities Act Section 5(a) prohibits any person, directly or indirectly, from selling a security in interstate commerce unless a registration statement is in effect as to the offer and sale of that security or there is an applicable exemption from the registration requirements. Securities Act Section 5(c) prohibits the offer or sale of a security unless a registration statement as to such security has been filed with the Commission, or an exemption is available.[10] The purpose of the

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[9] 17 C.F.R. § 240.15c2-11. Exchange Act Rule 15c2-11 requires brokers or dealers making a market in a security to provide documents and information prior to publishing any quotation for a security. Stinger's 15c2-11 form, dated November 9, 2004, included information about the company's stock issuances, the nature of its business, background information about the officers and directors, and attached Stinger's financial statements, among other items.

[10] 15 U.S.C. §§ 77e(a) and (c); *see also Jacob Wonsover*, 54 S.E.C. 1, 8 (1999), *petition denied*, 205 F.3d 408 (D.C. Cir. 2000); *Michael A. Niebuhr*, 52 S.E.C. 546, 549 (1995).

registration requirements is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions."[11]

The elements of a *prima facie* violation of Section 5 are that: (1) no registration statement was filed or in effect as to the security; (2) the respondent, directly or indirectly, sold or offered to sell the security; and (3) interstate transportation or communication or the mails were used in connection with the offer or sale.[12] A showing of scienter is not required to establish a violation of Section 5.[13]

Schoemann does not dispute that the Division has established a *prima facie* violation of the registration provisions here. Schoemann sold Stinger stock using interstate means between November 12 and 22, 2004, when no registration statement was filed or in effect as to the securities.

2. The Section 4(1) Exemption

Exemptions from registration are affirmative defenses that must be established by the person claiming the exemption.[14] Further, "exemptions from the general policy of the Securities

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[11] *SEC v. Murphy*, 626 F.2d 633, 642 (9th Cir. 1980) (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953)).

[12] *SEC v. Cont'l Tobacco Co.*, 463 F.2d 137, 155 (5th Cir. 1972).

[13] *Swenson v. Engelstad*, 626 F.2d 421, 424 (5th Cir. 1980)("The Securities Act of 1933 imposes strict liability on offerors and sellers of unregistered securities . . . regardless of . . . any degree of fault, negligent or intentional, on the seller's part.")(internal citation omitted); *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1046-47 (2d Cir. 1976).

[14] *Zacharias v. SEC*, 569 F.3d 458, 464, *petition denied*, 2009 WL 3190416 (D.C. Cir. 2009) (citing *Ralston Purina*, 346 U.S. at 126 ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable") and *Geiger v. SEC*, 363 F.3d 481, 484 (D.C. Cir. 2004)(same)); *Engelstad*, 626 F.2d at 425; *Lively v. Hirschfeld*, 440 F.2d 631, 632 (10th Cir. 1971).

Act requiring registration are strictly construed against the claimant."[15] Evidence in support of an exemption must be explicit, exact, and not built on mere conclusory statements.[16]

Schoemann argues that his sales of Stinger stock between November 12 and 22, 2004, were exempt from registration under Section 4(1) of the Securities Act.[17] Securities Act Section 4(1) exempts from the registration requirement "transactions by any person other than an issuer, underwriter, or dealer." Section 4(1) is intended to exempt routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions.[18] The term "underwriter" is defined to mean "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."[19] The

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[15] *Gearhart & Otis, Inc.*, 42 S.E.C. 1, 4-5 n.3 (1964) (citing *Ralston Purina*, 346 U.S. 119 (1953)), *aff'd*, 348 F.2d 798 (D.C. Cir. 1965); *see also Murphy*, 626 F.2d at 641; *Quinn & Co. v, SEC*, 452 F.2d 943, 945-46 (10th Cir. 1971).

[16] *Robert G. Weeks*, 56 S.E.C. 1297, 1322 n.35 (2003) (citing *V.F. Minton Sec., Inc.*, 51 S.E.C. 346, 352 (1993) (and authority cited therein), *aff'd*, 18 F.3d 937 (5th Cir. 1994) (Table)).

[17] 15 U.S.C. § 77d(1).

[18] *See Owen v. Kane*, 48 S.E.C. 617, 619 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988); Preliminary Note to Rule 144, 17 C.F.R. § 230.144.

[19] Securities Act Section 2(a)(11), 15 U.S.C. § 77b(a)(11). The Commission promulgated Rule 144, which creates a "safe harbor" by identifying certain conditions under which a person will be deemed not to be a statutory "underwriter." As noted in note 8, *supra*, under Rule 144(k), as in effect at the time of the sales, an individual selling restricted shares would not be deemed to be a statutory underwriter provided that a period of at least two years had elapsed since the shares were acquired and the seller had not been an affiliate for a period of three months preceding the sale. An affiliate of an issuer is defined as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1).

Schoemann concedes that Douglas Murrell was an affiliate of UCC until at least midnight on September 23, 2004, when the merger with EDT became effective, stating, "Mr. Murrell's ability to control the issuer ceased at the time of the merger when he lost any ability he had to control the pre-merger company through his son. Mr. Murrell's status as an affiliate of the issuer thus also ceased at that time." As discussed below, we find that Douglas Murrell, in fact, remained an affiliate beyond the date of the merger. Therefore, because Schoemann purchased securities from an affiliate of the issuer, Schoemann received restricted securities. Schoemann

(continued...)

term "issuer" is defined to include "any person directly or indirectly controlling or controlled by the issuer. . . ."[20] Under Securities Act Rule 405, "control" is defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[21]

Individual investors who are not securities professionals may be deemed "underwriters" within the statutory meaning of that term if they act as links in a chain of securities transactions from issuers or control persons to the public.[22] A sale by the intermediary in such a distribution is a transaction by an underwriter and thus not exempt from registration under Section 4(1).

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[19] (...continued)
did not hold these restricted securities for the two-year period required under Rule 144(k). As such, he does not meet the conditions of Rule 144. Schoemann has not argued that the Rule 144 safe harbor is available to him.

Rule 144 is not an exclusive safe harbor. *See* Preliminary Note to Rule 144, 17 C.F.R. § 230.144. Schoemann argues that, although the Rule 144 safe harbor is not available to him, his sales of the securities are still exempt from the registration requirements under Section 4(1) of the Securities Act. However, the adopting release to Rule 144 expressed clearly that individuals who do not comply with the Rule 144 safe harbor face a substantial burden in establishing the availability of an exemption from registration. "[P]ersons who offer or sell restricted securities without complying with Rule 144 are hereby put on notice by the Commission that in view of the broad remedial purposes of the Act and of public policy which strongly supports registration, they will have a substantial burden of proof in establishing that an exemption from registration is available for such offers or sales and that such persons and the brokers and other persons who participate in the transactions do so at their risk." Securities Act Rel. No. 5223 (Jan. 11, 1972). *See SEC v. Cavanagh*, 445 F.3d 105, 113 (2d Cir. 2006) (the adopting release "establishes a presumption that those not covered by [Rule 144] are likewise outside Section 4(1)"). As discussed below, we find that Schoemann has not satisfied this burden.

[20] *Id.*

[21] 17 C.F.R. § 230.405.

[22] *See Quinn & Co., Inc.*, 44 S.E.C. 461, 464 (1971), *aff'd*, 452 F.2d 943 (10th Cir. 1971); Preliminary Note to Rule 144, 17 C.F.R. § 230.144; *see also SEC v. Holschuh*, 694 F.2d 130, 138 (7th Cir. 1982)(stating that "even assuming that a particular defendant is not an issuer, underwriter, or dealer, he is not protected by Section 4(1) if the offer or sale of unregistered securities in question was part of a transaction by someone who was an issuer, underwriter, or dealer").

Otherwise, public distributions could be effected easily without registration and other protections afforded by the securities laws.[23]

a. Douglas Murrell Was a Control Person of UCC

The determination of whether a person is a control person "is a question of fact which depends upon the totality of the circumstances including an appraisal of the influence upon management and policies of a corporation by the person involved."[24] A person may be in control even though he does not own a majority of the voting stock.[25] In addition, control may rest with more than one person at the same time or from time to time.[26]

We find that Douglas Murrell controlled UCC through his son, Matthew Murrell. On appeal, Schoemann appears to concede that Douglas Murrell, through Matthew Murrell, exercised control over UCC prior to its merger with EDT. Matthew Murrell was issued 10,000,000 UCC shares in March 2000 for which he never paid, making him UCC's majority shareholder, a few weeks before his father paid $8,250 for 750,000 shares. Douglas Murrell testified that the shares were issued to Matthew Murrell primarily as a basis for making him UCC's sole officer and director. Matthew Murrell acknowledged that he had no prior experience with mergers and acquisitions, the only business of UCC and the business in which his father's consulting firm specialized. He only reviewed merger candidates that were presented to him by his father. Matthew Murrell performed virtually no work in his role with UCC, primarily signing paperwork sent to him through his father by UCC's attorney. He never met or had discussions with any shareholders or proposed merger partners.

Matthew Murrell did not participate in any of the merger negotiations with Gruder and only discussed the EDT merger with his father. His father received a $75,000 fee, as well as 220,000 shares of Stinger stock as payment for consulting services related to the merger approved by Matthew Murrell. In the Consulting Agreement, Douglas Murrell agreed to assist Stinger in securing the resignation of Matthew Murrell from his officer and director positions. Shortly after completion of the merger, Matthew Murrell cancelled all 10,000,000 of his shares and resigned from his officer and director positions, receiving no compensation other than $500 from his father's consulting firm. Although Matthew Murrell signed all of the necessary paperwork on behalf of UCC, he played no real, independent role in reaching any of the decisions he approved. As Henrie acknowledged, if Matthew Murrell did not hold the

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[23] *Quinn*, 44 S.E.C. at 465.

[24] *United States v. Corr*, 543 F.2d 1042, 1050 (2d Cir. 1976).

[25] *SEC v. R.A. Holman & Co.*, 377 F.2d 665, 667 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967).

[26] *North American Co. v. SEC*, 327 U.S. 686 (1946).

10,000,000 shares, Douglas Murrell would have been the majority shareholder of the company. Given this evidence, we find that Douglas Murrell effectively controlled Matthew Murrell's conduct in his role as officer and director of UCC.

b. Douglas Murrell Continued to be a Control Person after the Merger

Schoemann contends that the law judge failed to consider the order in which the relevant events occurred on September 23, 2004, in reaching the conclusion that Douglas Murrell was a control person of UCC at the time that Schoemann purchased his UCC shares. On appeal, Schoemann states, "[a]t the first moment of the day on September 23, 2004, Gruder acquired UCC, merged EDT into UCC, and changed its name to Stinger."[27] Schoemann contends that Douglas Murrell lost any ability he had to control the merged entity upon consummation of the merger and, therefore, was no longer a control person of the merged entity. Given that Schoemann and Douglas Murrell had never spoken before the morning of September 23, 2004, and that they reached their agreement regarding Schoemann's share purchase no earlier than approximately 2:00 p.m. on that day, Schoemann argues that he purchased Douglas Murrell's shares after the merger had occurred and after Douglas Murrell had ceased to be a control person of the merged entity. As a result, Schoemann claims that the Section 4(1) exemption applies to the transaction.

Control status is a facts and circumstances test. The record does not support the assertion that Douglas Murrell's status as a control person automatically terminated on September 23. Assuming, *arguendo*, that the Merger Agreement became effective at the start of the day on September 23, there were a number of corporate actions related to the merger that needed to be completed as a condition of the merger's closing. These actions included the appointment of new officers and directors, the issuance of stock to the EDT-related entities, the increase in the company's authorized capital stock, and the resignation of Matthew Murrell from his officer and director positions.

Schoemann argues that neither Matthew nor Douglas Murrell undertook any actions on behalf of the merged entity during the period immediately after the execution of the Merger Agreement. However, Matthew Murrell continued to sign corporate documents related to these actions on behalf of the merged entity from September 23 until his resignation on September 25.

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[27] In support of this argument, Schoemann cites precedent holding that "where a contract, policy, or statute does not specify a time of day that it is effective and where there is no evidence as to when during the day in question the contract was executed, the law treats the contract as being effective from the first moment of the day in question." Schoemann cites *La Quay v. Union Fid. Life Ins. Co.*, 403 So.2d 1359, 1360 (Fla. 1981) and *Mississippi Ben. Ass'n v. Brooks*, 185 So. 569, 570 (Miss. 1939) (finding that where a burial policy became effective on a particular day, with no hour specified, it would be considered to have become effective at the earliest moment of that particular day).

For example, on September 23, Matthew Murrell signed two Written Consents necessary to authorize the issuance of 10,000,000 shares to the EDT-related parties.[28] These issuances could only occur after the execution of the Merger Agreement because only then were the EDT-related parties entitled to the shares, and Matthew Murrell's authorization of the issuances establishes that he continued to exercise authority after the Merger Agreement became effective.[29] Moreover, according to one of the Written Consents on September 23, the new directors were not to be appointed until September 25. Because the appointments of new officers and directors were not effective until September 25, Matthew Murrell was the merged entity's sole officer and director. As a result of his position as the sole officer and director, Matthew Murrell was a control person.[30] Further, Matthew Murrell did not tender his 10,000,000 shares for cancellation

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[28] Schoemann argues that "UCC's Articles of Incorporation authorized only 20 million shares of capital stock. Given this, the Murrells' 10.75 million shares (10 million held by Matt Murrell and 750,000 held by Doug Murrell), if added to the 10 million shares issued to EDT, would have caused the Company to violate the share restrictions. Clearly, the newly issued shares were issued to replace Matt Murrell's shares formally cancelled two days later." However, in Written Consents dated September 20 and 23, 2004, Matthew Murrell, acting as the sole director and majority shareholder of UCC, had authorized the expansion of the company's capital stock to 50,000,000 shares, not the 20,000,000 previously authorized. Therefore, UCC was not in violation of its Articles of Incorporation during the two days before Matthew Murrell's shares were cancelled.

[29] Schoemann states, "the Murrells had a vested interest in seeing these companies merge, and being paid." We note that this quote combines the financial interests of Douglas and Matthew Murrell, indicating that Schoemann accepts the premise that Matthew Murrell did not act independently from his father in approving the transaction.

[30] *See, e.g., SEC v. Cavanagh*, 155 F.3d 129, 134 (2d Cir. 1998) ("A control person, such as an officer, director, or controlling shareholder . . . is treated as an issuer when there is a distribution of securities"), *aff'd on other grounds*, 445 F.3d 105 (2d Cir. 2006). As noted above, we find that Douglas Murrell possessed the ability to control Matthew Murrell's actions with respect to his control over UCC and, therefore, that Matthew Murrell's status as a control person establishes that his father was also a control person.

In support of his claim that Matthew Murrell relinquished control of UCC by the time of the merger, Schoemann points to an Annual List of Officers, Directors, and Resident Agent of UCC filed with the State of Nevada on September 23, 2004, and a September 20 agreement between UCC and a stock transfer company that identify Gruder as President, Treasurer, and a Director of UCC and lists other officers and directors. However, there is no evidence in the record to suggest that Gruder or any EDT-related parties exercised control over the merged company before September 25, 2004. In any event, Securities Act Rule 405 does not require that a party have sole control of an entity to be a control person of that entity.

until September 24, and therefore remained a significant shareholder of the merged entity beyond September 23, 2004.

Based on this evidence, we find that Matthew Murrell was a control person of the merged entity after September 23 and, because we have found that Douglas Murrell exercised control over Matthew Murrell with respect to his role with UCC, we find that Douglas Murrell continued to be a control person of the company after September 23, 2004.

c. Schoemann Purchased the Shares at Issue on September 23, 2004

Schoemann argues that, even if Douglas Murrell remained a control person of the merged entity after September 23, 2004, the Section 4(1) exemption still applies to his purchase because he did not reach an agreement with Douglas Murrell to purchase his 100,000 shares until September 29, 2004, the date that Douglas Murrell received Schoemann's check in payment for the shares. According to Schoemann, Douglas Murrell was no longer a control person of Stinger by that date, and the purchase therefore falls within the Section 4(1) exemption from registration. Schoemann contends that the law judge erred by looking only to the Stock Purchase Agreement (and ignoring the hearing testimony of Schoemann and Douglas Murrell) in reaching the conclusion that Schoemann and Douglas Murrell reached their agreement on September 23, 2004.

The term "purchase" is not defined under the Securities Act. However, under the Securities Exchange Act of 1934, the term "purchase" includes "any contract for the purchase of

a security."[31] One court has held that the term "purchase" under the Securities Act is "functionally equivalent" to the definition under the Exchange Act.[32]

A securities purchase occurs even if the parties have not performed all of their obligations under the relevant agreement.[33] In addition, under the Exchange Act, acquisitions of contractual rights to receive stock in the future are to be included in the definition of "purchases."[34] Therefore, neither the receipt of payment by the seller nor the receipt of a share certificate by the purchaser is required to establish that a purchase has occurred.

In reaching our determination as to whether a binding agreement exists, "[I]ntent [of the parties] must be determined solely from the language used when no ambiguity in its terms exists."[35] The Stock Purchase Agreement specifies that it is "being executed this 23rd day of September 2004," and Schoemann included a notation of "9/23/04" next to his signature on the Stock Purchase Agreement. The Stock Purchase Agreement states that Schoemann "will purchase 100,000 freely tradeable shares of United Consulting, Inc., that next week will be

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31 Exchange Act Section 3(a)(13), 15 U.S.C. § 78c(a)(13).

In addition, the term "sell," which is defined Section 2(a)(3) of the Securities Act, includes "every contract of sale." The Supreme Court has held that the term "purchase" under the Securities Act is a "correlative to both 'sell' and 'offer.'" *Pinter v. Dahl*, 486 U.S. 622, 645 (1988). Therefore, even though the term "purchase" is not defined in the Securities Act, the term should be interpreted to include "every contract of purchase."

See also "Securities Offering Reform," Sec. Act Rel. No. 8591 (July 19, 2005), 85 SEC Docket 3738, 3781 n.391 ("Courts have held consistently that the date of a sale is the date of a contractual commitment, not the date that a confirmation is sent or received or payment is made.") (citing *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2d Cir. 1972) (holding that a purchase occurs at "the time when the parties to the transaction are committed to one another"); *In re Alliance Pharm. Corp. Secs. Lit.*, 279 F. Supp. 2d 171, 186-87 (S.D.N.Y. 2003) (following the holding in *Radiation Dynamics* with respect to the timing of a contract of sale) and other cases)).

32 *Nat'l Bank of Commerce v. All Am. Assurance Co.*, 583 F.2d 1295, 1298 (5th Cir. 1978).

33 *Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582, 587 (7th Cir. 1984) ("Neither delivery of nor the passing of title to the contracted-for security is required for the transaction to be considered a 'sale' for purposes of the . . . securities laws.").

34 *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999).

35 *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989).

changed to Stinger Systems, Inc., from [Douglas Murrell], for $75,000." This provision contains no conditions and obligates Schoemann to purchase the shares.

In support of his argument that there was no binding agreement to purchase the shares until September 29, Schoemann relies primarily on his hearing testimony and that of Douglas Murrell. Schoemann argues that the Stock Purchase Agreement does not evidence a mutual manifestation of assent to the transaction between him and Douglas Murrell because under the agreement, Schoemann would not send payment to Douglas Murrell until September 29, 2004. Schoemann testified that this provision was included because both parties were uncertain about whether to proceed with the transaction on September 23, 2004. Schoemann describes the testimony of Douglas Murrell and Schoemann to the effect that they did not intend to form a binding agreement for the purchase of the shares on September 23 as "uncontroverted."

However, other evidence showing the parties' understanding of the transaction is inconsistent with the testimony Schoemann cites. The language of the Stock Purchase Agreement was unambiguous and unconditional, and thus was the most objective manifestation of the parties' agreement. The provision of the Stock Purchase Agreement states that Schoemann "will send out a check in the amount of $75,000 . . . for delivery on Wednesday, September 29, 2004." Nothing in this language indicates that the payment is contingent on further consideration of the transaction by the parties.

In addition, Douglas Murrell wrote UCC's transfer agent a letter, dated September 23, 2004, stating that Douglas Murrell had sold 100,000 UCC shares to Schoemann and requesting that the transfer agent issue a certificate for those shares to Schoemann. Schoemann argues that this fact is not persuasive because, although the letter was dated September 23, the letter was sent to the transfer agent as part of the package including Henrie's October 1, 2004, opinion letter. Schoemann also points to Douglas Murrell's testimony that he did not believe that he had reached an agreement with Schoemann on September 23 and had only dated the letter to the transfer agent as of September 23 because he hoped that Schoemann would agree to the transaction.[36] It is unclear from the record when Douglas Murrell provided this letter to Henrie, who then sent it to the transfer agent on October 1. Nonetheless, the fact that Douglas Murrell dated the letter September 23 is additional evidence that supports our finding that Schoemann and Douglas Murrell reached their agreement on that date. A November 11, 2004, letter from Schoemann to Douglas Murrell related to the option portion of the Stock Purchase Agreement, Schoemann

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[36] We note that the testimony cited by Schoemann occurred years after September 23, 2004. Further, Douglas Murrell's testimony that he was eager for the transaction to be completed is inconsistent with his other testimony that he "didn't feel that good about [going through with] the deal" and was concerned about selling the shares at $0.75 per share given that he expected Stinger to have great success and thought "[Stinger] could be a $10 stock."

refers to their "September 23, 2004 agreement," providing further evidence that Schoemann believed the date of the agreement to be September 23, notwithstanding his hearing testimony.

Schoemann also argues that the Initial Decision's findings are "inconsistent with the parties' intent, which was to transfer freely tradeable shares (to which there is no dispute)." Schoemann contends that a finding that the Stock Purchase Agreement was binding as of September 23 runs counter to the parties' intent, as expressed in that agreement, to purchase and sell freely tradeable shares because, based on our finding that Douglas Murrell was a control person of the merged entity on September 23, it would have been impossible for him to sell freely tradeable, unregistered shares purchased on that date. Schoemann correctly notes that the Stock Purchase Agreement specifies that the shares Schoemann would purchase were to be freely tradeable. However, Douglas Murrell incorrectly believed that his shares had been freely tradeable since his initial purchase of them in April 2000, and Schoemann testified that he never inquired as to Douglas Murrell's control person status before purchasing the shares. Therefore, there is no inconsistency between the parties' desire that Schoemann would purchase freely tradeable shares and our finding that the Stock Purchase Agreement evidences a mutual intent that an agreement was reached on September 23, 2004. To the extent that the parties considered the question at all, they believed, albeit incorrectly, that they were, in fact, reaching an agreement for the purchase of freely tradeable shares on September 23.

We find that the record establishes that Schoemann and Douglas Murrell reached a final agreement with respect to the purchase of the 100,000 shares on September 23, 2004.[37]

d. Schoemann Acquired Shares of UCC with a View to Distribution

We conclude Schoemann was an underwriter. As discussed above, an underwriter includes any person who has purchased a security from the issuer with a view to distribute the security. A distribution commences when the issuer begins making offers and does not end until the securities come to rest with the public. The fact that Schoemann purchased the shares from Douglas Murrell, who, in turn, had held the shares for four years, does not mean the shares "came to rest" with Douglas Murrell. Douglas Murrell was a control person and under the statutory definition of "issuer" was himself the issuer.

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[37] Because we find that the Stock Purchase Agreement was final on September 23, 2004, and because we have found that Douglas Murrell remained a control person after that date based on Matthew Murrell's continuing status as the sole director and a significant shareholder and his execution of several corporate consents after the merger, we do not address whether Douglas Murrell was an affiliate beyond September 25, the date of Matthew Murrell's resignation from the board of directors. We note, however, that the question of affiliate status is a facts and circumstances test, and an individual's status as an affiliate may not cease instantly after one ceases to have a control relationship with the issuer. *See Cavanagh*, 445 F.3d at 115.

In order to determine whether Schoemann purchased the UCC shares with a view to distribute them, we consider objective evidence indicating whether he initially acquired the shares "with an investment purpose and not for the purpose of reselling them."[38] In analyzing a purchaser's investment intent, "courts look to whether the security holder has held the securities long enough to negate any inference that his intent at the time of acquisition was to distribute them to the public."[39] The shares did not come to rest in the hands of Schoemann. He made clear in the Stock Purchase Agreement and in his discussions with Gruder after Schoemann's initial purchase of restricted shares and prior to his introduction to Douglas Murrell, that he sought freely tradeable shares, indications of his intent to quickly resell the shares into the market. Schoemann also began to sell his shares the day after the first quotation for Stinger appeared on the Pink Sheets and sold all 100,000 shares during the first two weeks that Stinger shares traded publicly, evidencing a lack of investment intent in his initial purchase. Thus, Schoemann served as a link in a chain of transactions through which securities moved from the issuer to the public, and in doing so, served as an underwriter. Because Schoemann was an underwriter, the Section 4(1) exemption is unavailable.

We find that Schoemann has failed to establish that Douglas Murrell was no longer a control person of the merged entity at the time that Schoemann purchased Douglas Murrell's shares and therefore has failed to meet his burden to establish that his sales of those shares were exempt from the registration requirements of the federal securities laws. Accordingly, we find that Schoemann's sales of Stinger stock between November 12 and 22, 2004, violated Securities Act Sections 5(a) and 5(c).

3. Advice of Counsel

Schoemann contends that he reviewed and relied upon Henrie's November 8 opinion letter, provided to the Pink Sheets on behalf of Henrie's client, Stinger, which stated that shares such as those he purchased from Douglas Murrell were freely tradeable. As a result of his supposed reliance on Henrie's letter, Schoemann claims that he sold the shares in good faith.

Schoemann's advice-of-counsel defense only goes to the question of scienter.[40] As noted above, scienter is not an element of Schoemann's Section 5 violations. Therefore, any reliance Schoemann may have placed on Henrie's letter is of no consequence to our determination regarding his violations. Section 5 of the Securities Act is a strict liability provision, and good faith is not a valid defense.

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38 *Ackerberg v. Johnson*, 892 F.2d 1328, 1336 (8th Cir. 1989).

39 *Id.*

40 *SEC v. Howard*, 376 F.3d 1136, 1147 (D.C. Cir. 2004).

Further, to establish a valid advice-of-counsel claim, Schoemann is required to show: (1) that he made complete disclosure to counsel; (2) that he sought advice on the legality of the intended conduct; (3) that he received advice that the intended conduct was legal; and (4) that he relied in good faith on counsel's advice.[41] Schoemann never spoke to Henrie during Henrie's preparation of the opinion letter. Thus, Schoemann would not satisfy the first two elements of a valid advice-of-counsel claim, even if such a claim were relevant to a non-scienter based violation such as this. In addition, Henrie issued the opinion while representing Stinger, not Schoemann. One cannot rely on the advice of another's counsel because that counsel cannot be relied upon to give disinterested advice.[42]

IV.

A. Cease-and-Desist Order

Securities Act Section 8A(a) authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Securities Act or the regulations thereunder.[43] In determining whether a cease-and-desist order is an appropriate sanction, we look to whether there is some risk of future violations.[44] The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction, and, absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations.[45] We also consider whether other factors demonstrate a risk of future violations, but not all factors need to be considered, and no factor is

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[41] *Zacharias*, 569 F.3d at 467; *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *C.E. Carlson v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988); *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 467 (9th Cir. 1985); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981). *See also Joseph J. Vastano, Jr.*, 57 S.E.C. 803, 813 n.22 (2004); *Anthony H. Barkate*, 57 S.E.C. 488, 497 n.19 (2004); *Toni Valentino*, 57 S.E.C. 330, 338-39 & n.11 (2004).

[42] *John A. Carley*, Securities Act Rel. No. 8888 (Jan. 31, 2008), 92 SEC Docket 1693, 1734 n.137 (citing *C.E. Carlson*, 859 F.2d at 1436 ("We agree with the SEC that counsel also must be independent.")), *aff'd in part, remanded in part, Zacharias v. SEC*, 569 F.3d 458; *Sorrell v. SEC*, 679 F.2d 1323, 1327 (9th Cir. 1982) ("A broker may not rely on counsel's advice when the attorney is an interested party."); *David M. Haber*, 52 S.E.C. 201, 206 (1995) ("However, Haber could not rely on counsel for Brown, who could not be counted on to give disinterested advice.")).

[43] 15 U.S.C. § 77A(a).

[44] *KPMG Peat Marwick, LLP*, 54 S.E.C. 1135, 1185 (2001), *reh'g denied*, 55 S.E.C. 1 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

[45] *Id.* at 1185, 1191.

dispositive. Beyond the seriousness of the violation, these factors include the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, recognition of the wrongful nature of the conduct, opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding.[46] On appeal, Schoemann has not specifically addressed the factors to be considered in our consideration of whether a cease-and-desist order is appropriate in the public interest.

We find that the public interest warrants imposing a cease-and-desist order against Schoemann. The registration requirements of the federal securities laws are "the heart of the securities regulatory system" and disregarding those requirements justifies strong remedial measures.[47] Schoemann's unregistered sales harmed the marketplace by enabling unregistered shares to be sold to the public without the benefit of the information that would have been provided had the registration requirements been followed. Schoemann testified that he makes his living solely by investing in the stock market and that he has owned significant stakes in many companies. Earning his living in this manner, Schoemann will have opportunities to commit future violations, and he has provided no assurances against future violations, nor has he recognized the wrongful nature of his conduct. A cease-and-desist order will serve the remedial purpose of encouraging Schoemann to take his responsibility to follow the registration requirements more seriously in the future.

B. Disgorgement

Section 8A(e) of the Securities Act authorizes the Commission to order the disgorgement of ill-gotten gains from violations of the Securities Act.[48] Disgorgement is an equitable remedy designed to deprive wrongdoers of unjust enrichment and to deter others from violating the securities laws.[49] "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."[50] Whether or not the violations harmed others "is irrelevant to the question whether disgorgement is appropriate. The primary purpose of disgorgement is not to refund others for

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46 *Id.* at 1192.

47 *Charles F. Kirby*, Securities Act Rel. No. 8174 (Jan. 9, 2003), 79 SEC Docket 1081, 1105, *petition denied sub nom. Geiger v. SEC*, 363 F.3d 481 (D.C. Cir. 2004).

48 15 U.S.C. § 77A(e).

49 *See, e.g. SEC v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998).

50 *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

losses suffered but rather to 'deprive the wrong-doer of ill-gotten gains.'"[51] Disgorgement need only be a reasonable approximation of profits causally connected to the violation.[52] Once the Division establishes that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden of going forward shifts to the respondent who is "then obliged clearly to demonstrate that the disgorgement figure was not a reasonable approximation."[53] Where disgorgement cannot be exact, "any risk of uncertainty . . . should fall on the wrongdoer whose illegal conduct created that uncertainty."[54]

The Division has established that Schoemann made profits of $967,901 ($1,042,901 in gross proceeds, minus Schoemann's initial $75,000 purchase price) from his violative sales of Stinger stock between November 12 and 22, 2004. On appeal, Schoemann has not challenged the accuracy of the Division's profit calculation, although he has challenged whether the sales violated the applicable provisions. Ordering disgorgement will prevent Schoemann from reaping substantial financial gain from his violations.[55] Disgorgement will also impress upon Schoemann

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[51] *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C. Cir. 1994) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)).

[52] *See, e.g., Bilzerian*, 29 F.3d at 697.

[53] *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

[54] *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995).

[55] Schoemann complains that other entities that were involved in the transactions at issue, including the transfer agent, the market maker, and Schoemann's broker, E*Trade, were not "penalized for their role in these sales." The appropriate sanction depends on the facts and circumstances of each case, and cannot be readily compared to sanctions, or the lack thereof, imposed in other cases. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973). Moreover, the purpose of disgorgement is not, as Schoemann suggests, to "penalize" the respondent, but rather to force the respondent to give up gains that were achieved through violations of the securities laws. "An order to disgorge is not a punitive measure; it is intended primarily to prevent unjust enrichment." *Zacharias*, 569 F.3d at 471 (citing *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000); *Bilzerian*, 29 F.3d at 697; *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989); *Blatt*, 583 F.2d at 1335). The Division has not asked the Commission to assess a civil money penalty in this case.

Schoemann also complains that Douglas Murrell "settled with the SEC for a minuscule amount (approximately $50,000) for his own public sales of shares, and has retained millions of dollars from those stock sales." However, settlements can be reached for any number of reasons, and settlements are not precedent. *Richard J. Puccio*, 52 S.E.C. 1041, 1045 (1996) (citing *David A. Gingras*, 50 S.E.C. 1286, 1294 (1992), and cases there cited).

and other market participants the need to comply with the registration requirements of the federal securities laws and deter them from evading such requirements in the future in the hopes of reaping a substantial financial windfall. Accordingly, we order Schoemann to disgorge $967,901, plus prejudgment interest.[56]

An appropriate order will issue.[57]

By the Commission (Chairman SCHAPIRO and Commissioners CASEY, WALTER, AGUILAR, and PAREDES).

Elizabeth M. Murphy
Secretary

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[56] Securities Act Section 8A(e) authorizes the Commission to assess "reasonable interest" in connection with an order for disgorgement in any cease-and-desist proceeding. Commission Rule of Practice 600(b) provides that interest shall be computed at the underpayment rate established by Section 6621(a)(2) of the Internal Revenue Code and shall be compounded quarterly. We have held previously that the IRS underpayment rate applies to disgorgement amounts for the entire period from the date of assessment until paid. *Laurie Jones Canady*, 54 S.E.C. 65, 85 (1999). The Division contends that the starting date for the assessment of prejudgment interest should be January 1, 2005.

[57] We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9076/October 23, 2009

Admin. Proc. File No. 3-12943

In the Matter of

RODNEY R. SCHOEMANN
c/o Peter J. Anderson and Gregory S. Kaufman
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Rodney R. Schoemann cease and desist from committing or causing any violations, or any future violations, of Sections 5(a) and 5(c) of the Securities Act of 1933; and it is further

ORDERED that Rodney R. Schoemann shall disgorge $967,901, and prejudgment interest in the amount of $335,370.98 from January 1, 2005, computed as set forth in Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600(b).

Payment of the amount to be disgorged, prejudgment interest, and the civil money penalty 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) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (4) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of the counsel of record.

By the Commission.

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-9077; 34-60875; 39-2468; IC-28984]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system made in EDGAR Release 9.17. The revisions were made primarily to enforce additional XBRL validation requirements to improve the quality of XBRL exhibits; to allow filers to electronically submit the withdrawal of application for exemptive or other relief from the Investment Companies Act as submission types APP WD and APP WD/A; and, to allow filers to add Subject Company related information for the submission types F-6, F-6/A, F-6EF, and F-6POS. The revisions to the Filer Manual reflect changes within Volume I entitled EDGAR Filer Manual, Volume I: "General Information," Version 8 (September 2009) and Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 13 (September 2009). The updated manual will be incorporated by reference into the Code of Federal Regulations.

DATES: [Insert date of publication in the Federal Register.] The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: In the Office of Interactive Disclosure for questions concerning additional XBRL validation requirements contact Jeffrey Naumann, Assistant Director of the Office of Interactive Disclosure, at (202) 551-5352; in the Division of Corporation

Finance, for questions concerning Subject Company related information for the Forms F-6, F-6/A, F-6EF, and F-6POS and Form D contact Cecile Peters, Chief, Office of Information Technology, at (202) 551-3600; in the Division of Investment Management for questions on the electronic filing of submission types APP WD and APP WD/A contact Ruth Armfield Sanders, Senior Special Counsel, Office of Legal and Disclosure, at (202) 551-6989; and in the Office of Information Technology, contact Rick Heroux, at (202) 551-8800.

SUPPLEMENTARY INFORMATION: We are adopting an updated EDGAR Filer Manual, Volume I and Volume II. The Filer Manual describes the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.[1] It also describes the requirements for filing using EDGARLink[2] and the Online Forms/XML Web site.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.[3] Filers may consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.[4]

The EDGAR system will be upgraded to Release 9.17 on September 28, 2009 and will introduce the following changes: EDGAR will be upgraded to enforce additional XBRL validation requirements to improve the quality of XBRL exhibits. This change will enhance the validation

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[1] We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on August 4, 2009. See Release No. 33–9058 (July 28, 2009) [74 FR 38523].

[2] This is the filer assistance software we provide filers filing on the EDGAR system.

[3] See Rule 301 of Regulation S-T (17 CFR 232.301).

process the EDGAR system uses to confirm compliance with the requirements in Chapter 6 of the EDGAR Filer Manual, Volume II: "EDGAR Filing". Minor clarifications were made to the instructions on XBRL/Interactive Data tagging.

EDGAR will allow filers, who previously submitted on EDGAR or in paper an application for exemptive or other relief from the Investment Company Act, to electronically submit the withdrawal of such application as new submission types APP WD or APP WD/A on the EDGARLink Submission Template 3.

EDGAR will allow filers to add Subject Company related information to the submission types F-6, F-6/A, F-6EF, and F-6POS. These submission types are available on EDGARLink Submission Template 1.

A minor change will be made to the online Form D to update the OMB expiration date. Minor backend processing changes are being made to ensure that online and third party Form D filings are validated consistently.

Along with adoption of the Filer Manual, we are amending Rule 301 of Regulation S-T to provide for the incorporation by reference into the Code of Federal Regulations of today's revisions. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51.

You may obtain paper copies of the updated Filer Manual at the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1520, Washington DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. We

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[4] See Release No. 33–9058 (July 28, 2009) [74 FR 38523] in which we implemented EDGAR Release 9.16.

will post electronic format copies on the Commission's Web site; the address for the Filer Manual is http://www.sec.gov/info/edgar.shtml.

Since the Filer Manual relates solely to agency procedures or practice, publication for notice and comment is not required under the Administrative Procedure Act (APA)[5]. It follows that the requirements of the Regulatory Flexibility Act[6] do not apply.

The effective date for the updated Filer Manual and the rule amendments is [Insert date of publication in the Federal Register]. In accordance with the APA[7], we find that there is good cause to establish an effective date less than 30 days after publication of these rules. The EDGAR system upgrade to Release 9.17 is scheduled to be available on September 28, 2009. The Commission believes that establishing an effective date less than 30 days after publication of these rules is necessary to coordinate the effectiveness of the updated Filer Manual with the system upgrade.

Statutory Basis

We are adopting the amendments to Regulation S-T under Sections 6, 7, 8, 10, and 19(a) of the Securities Act of 1933,[8] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange Act of 1934,[9] Section 319 of the Trust Indenture Act of 1939,[10] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[11]

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[5] 5 U.S.C. 553(b).

[6] 5 U.S.C. 601- 612.

[7] 5 U.S.C. 553(d)(3).

[8] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

[9] 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78w, and 78ll.

[10] 15 U.S.C. 77sss.

[11] 15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37.

List of Subjects in 17 CFR Part 232

Incorporation by reference, Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENT

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 232 - REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

1. The authority citation for Part 232 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 et seq.; and 18 U.S.C. 1350

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2. Section 232.301 is revised to read as follows:

§232.301 EDGAR Filer Manual.

Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets out the technical formatting requirements for electronic submissions. The requirements for becoming an EDGAR Filer and updating company data are set forth in the updated EDGAR Filer Manual, Volume I: "General Information," Version 8 (September 2009). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 13(September 2009). Additional provisions applicable to Form N-SAR filers are set forth in the EDGAR Filer Manual, Volume III: "N-SAR Supplement," Version 1 (September 2005). All of these provisions have been incorporated by reference into the Code of Federal Regulations, which action was approved by the Director of the

Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. You must comply with these requirements in order for documents to be timely received and accepted. You can obtain paper copies of the EDGAR Filer Manual from the following address: Public Reference Room, U.S. Securities and Exchange Commission, 100 F Street, NE, Room 1520, Washington, DC 20549, or call (202) 551-5850, on official business days between the hours of 10:00 am and 3:00 pm. Electronic copies are available on the Commission's Web site. The address for the Filer Manual is http://www.sec.gov/info/edgar.shtml. You can also inspect the document at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to:

http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

October 26, 2009

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

October 27, 2009

IN THE MATTER OF	:	
Planetgood Technologies, Inc. (n/k/a All American Coffee & Beverage, Inc.),	:	
Platronics, Inc.,	:	**ORDER OF SUSPENSION**
Plus Solutions, Inc.,	:	**OF TRADING**
Portacom Wireless, Inc.,	:	
Prime Holdings & Investments, Inc.,	:	
Pro-After, Inc. (f/k/a PurchasePro.Com, Inc.),	:	
Project Group, Inc.,	:	
ProLong International Corp.,	:	
PSS, Inc., and	:	
Purus, Inc.,	:	
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 Planetgood Technologies, Inc. (n/k/a All American Coffee & Beverage, Inc.) because it has not filed any periodic reports since the period ended September 30, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Platronics, Inc. because it has not filed any periodic reports since the period ended June 30, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Plus Solutions, Inc. because it has not filed any periodic reports since the period ended September 30, 2001.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Portacom Wireless, Inc. because it has not filed any periodic reports since the period ended September 30, 1998.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Prime Holdings & Investments, Inc. because it has not filed any periodic reports since the period ended September 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Pro-After, Inc. (f/k/a PurchasePro.Com, Inc.) because it has not filed any periodic reports since the period ended March 31, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Project Group, Inc. because it has not filed any periodic reports since the period ended September 30, 2004.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of ProLong International Corp. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of PSS, Inc. because it has not filed any periodic reports since the period ended November 2, 2002.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Purus, Inc. because it has not filed any periodic reports since October 2, 1999.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on October 27, 2009, through 11:59 p.m. EST on November 9, 2009.

By the Commission.

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60883 / October 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13665

In the Matter of **PKI Solutions, Inc.,** **Planetgood Technologies, Inc.** **(n/k/a All American Coffee & Beverage, Inc.),** **Platronics, Inc.,** **Plus Solutions, Inc.,** **Portacom Wireless, Inc.,** **Portal Net, Ltd.,** **Prime Holdings & Investments, Inc.,** **Pro-After, Inc.** **(f/k/a PurchasePro.Com, Inc.),** **Project Group, Inc.,** **ProLong International Corp.,** **PSS, Inc., and** **Purus, Inc.,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Respondents PKI Solutions, Inc., Planetgood Technologies, Inc. (n/k/a All American Coffee & Beverage, Inc.), Platronics, Inc., Plus Solutions, Inc., Portacom Wireless, Inc., Portal Net, Ltd., Prime Holdings & Investments, Inc., Pro-After, Inc. (f/k/a PurchasePro.Com, Inc.), Project Group, Inc., ProLong International Corp., PSS, Inc., and Purus, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. PKI Solutions, Inc. (CIK No. 1084801) is a Bahamian corporation located in Nassau, Bahamas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PKI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2000, which reported a net loss of over $6,000 since the company's June 16, 1992 inception.

2. Planetgood Technologies, Inc. (n/k/a All American Coffee & Beverage, Inc.) (CIK No. 1088464) is a revoked Nevada corporation located in Indianapolis, Indiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Planetgood is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB/A for the period ended September 30, 2000, which reported a net loss of over $7.46 million for the prior nine months. On February 12, 2001, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Indiana, which was terminated on January 7, 2003. As of October 21, 2009, the company's stock (symbol "ACBV") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets"), had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Platronics, Inc. (CIK No. 79090) is a revoked New Jersey corporation located in Linden, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Platronics is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 1999, which reported a net loss of $283,118 for the prior nine months. As of October 21, 2009, the company's stock ("PLTC") was quoted on the Pink Sheets, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Plus Solutions, Inc. (CIK No. 1081418) is a revoked Nevada corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Plus Solutions is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001, which reported a net loss of $818,119 for the prior three months. As of October 21, 2009, the company's stock (symbol "PLSO") was quoted on the Pink Sheets, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Portacom Wireless, Inc. (CIK No. 907166) is a delinquent Delaware corporation located in Fountain Valley, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Portacom is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended September 30, 1998, which reported a net loss of $294,519 for the prior three months. On March 23, 1998, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was terminated on December 10, 2002. As of October 21, 2009, the company's stock (symbol

"PCWRQ") was quoted on the Pink Sheets, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Portal Net, Ltd. (CIK No. 1096763) is a British Virgin Islands corporation located in Hong Kong, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Portal Net is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended September 30, 2000, which reported a net loss of over $9,000 for the prior twelve months.

7. Prime Holdings & Investments, Inc. (CIK No. 1111882) is a revoked Nevada corporation located in Westport, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Prime Holdings is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2004, which reported a net loss of $558,000 for the prior nine months. As of October 21, 2009, the company's stock (symbol "PHIV") was quoted on the Pink Sheets, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Pro-After, Inc. (f/k/a PurchasePro.Com, Inc.) (CIK No. 1087831) is a dissolved Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Pro-After is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2002, which reported a net loss of $8.82 million for the prior three months. On September 12, 2002, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Nevada, which was still pending as of October 21, 2009. As of October 21, 2009, the company's stock (symbol "PROEQ") was quoted on the Pink Sheets, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

9. Project Group, Inc. (CIK No. 1096789) is a revoked Nevada corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Project Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB/A for the period ended September 30, 2004, which reported a net loss of over $1.8 million for the prior nine months. As of October 21, 2009, the company's stock (symbol "PJTGQ") was quoted on the Pink Sheets, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

10. ProLong International Corp. (CIK No. 1016965) is a revoked Nevada corporation located in Irvine, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ProLong is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005, which reported a net loss of over $1.76 million for the prior nine months. On January 10, 2008, the company filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California which was still pending as of October 21, 2009. As of October 21, 2009, the company's

stock (symbol "PRLIQ") was quoted on the Pink Sheets, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

11. PSS, Inc. (CIK No. 793322) is a void Delaware corporation located in Seattle, Washington with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). PSS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K for the period ended November 2, 2002, which reported a net loss of over $2.25 million for the prior twelve months. As of October 21, 2009, the company's stock (symbol "PSSS") was quoted on the Pink Sheets, had two market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

12. Purus, Inc. (CIK No. 912156) is a void Delaware corporation located in Morgan Hill, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Purus is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended October 2, 1999. As of October 21, 2009, the company's stock (symbol "PURS") was quoted on the Pink Sheets, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

14. Exchange Act Section 13(a) and the rules promulgated thereunder require issuers of securities registered pursuant to Exchange Act Section 12 to file with the Commission current and accurate information in periodic reports, even if the registration is voluntary under Section 12(g). Specifically, Rule 13a-1 requires issuers to file annual reports and Rule 13a-13 requires domestic issuers to file quarterly reports. Rule 13a-16 requires foreign private issuers to furnish quarterly and other reports to the Commission under cover of Form 6-K if they make or are required to make the information public under the laws of the jurisdiction of their domicile or in which they are incorporated or organized; if they file or are required to file information with a stock exchange on which their securities are traded and the information was made public by the exchange; or if they distribute or are required to distribute information to their security holders.

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

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents.

IV.

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

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

If Respondents fail to file the directed Answers, or fail to appear at a hearing after being duly notified, the Respondents, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of any Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of

the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings
In the Matter of PKI Solutions, Inc., et al.

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
PKI Solutions, Inc.					
	20-F	12/31/01	07/01/02	Not filed	87
	20-F	12/31/02	06/30/03	Not filed	76
	20-F	12/31/03	06/30/04	Not filed	64
	20-F	12/31/04	06/30/05	Not filed	52
	20-F	12/31/05	06/30/06	Not filed	40
	20-F	12/31/06	07/02/07	Not filed	27
	20-F	12/31/07	06/30/08	Not filed	16
	20-F	12/31/08	06/30/09	Not filed	4
Total Filings Delinquent	**8**				
Planetgood Technologies, Inc. (n/k/a All American Coffee & Beverage, Inc.)					
	10-KSB	12/31/00	04/02/01	Not filed	102
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/30/01	11/14/01	Not filed	95
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Planetgood Technologies, Inc. (n/k/a All American Coffee & Beverage, Inc.)	*10-QSB*	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	04/01/09	Not filed	6
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**35**				
Platronics, Inc.					
	10-KSB	09/30/99	12/29/99	Not filed	118
	10-QSB	12/31/99	02/14/00	Not filed	116
	10-QSB	03/31/00	05/15/00	Not filed	113
	10-QSB	06/30/00	08/14/00	Not filed	110
	10-KSB	09/30/00	12/29/00	Not filed	106
	10-QSB	12/31/00	02/14/01	Not filed	104
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-KSB	09/30/01	12/31/01	Not filed	94
	10-QSB	12/31/01	02/14/02	Not filed	92
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-KSB	09/30/02	12/30/02	Not filed	82
	10-QSB	12/31/02	02/14/03	Not filed	80
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-KSB	09/30/03	12/29/03	Not filed	70
	10-QSB	12/31/03	02/17/04	Not filed	68
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-KSB	09/30/04	12/29/04	Not filed	58
	10-QSB	12/31/04	02/14/05	Not filed	56

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Platronics, Inc.	*10-QSB*	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-KSB	09/30/05	12/29/05	Not filed	46
	10-QSB	12/31/05	02/14/06	Not filed	44
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-KSB	09/30/06	12/29/06	Not filed	34
	10-QSB	12/31/06	02/14/07	Not filed	32
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-KSB	09/30/07	12/31/07	Not filed	22
	10-QSB	12/31/07	02/14/08	Not filed	20
	10-QSB	03/31/08	05/15/08	Not filed	17
	10-QSB	06/30/08	08/14/08	Not filed	14
	10-KSB	09/30/08	12/29/08	Not filed	10
	*10-Q**	12/31/08	02/17/09	Not filed	8
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**40**				
Plus Solutions, Inc.					
	10-KSB	12/31/01	04/01/02	Not filed	90
	10-QSB	03/31/02	05/15/02	Not filed	89
	10-QSB	06/30/02	08/14/02	Not filed	86
	10-QSB	09/30/02	11/14/02	Not filed	83
	10-KSB	12/31/02	03/31/03	Not filed	79
	10-QSB	03/31/03	05/15/03	Not filed	77
	10-QSB	06/30/03	08/14/03	Not filed	74
	10-QSB	09/30/03	11/14/03	Not filed	71
	10-KSB	12/31/03	03/30/04	Not filed	67
	10-QSB	03/31/04	05/17/04	Not filed	65
	10-QSB	06/30/04	08/16/04	Not filed	62
	10-QSB	09/30/04	11/15/04	Not filed	59
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Plus Solutions, Inc.	*10-KSB*	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	04/01/09	Not filed	6
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**31**				
Portacom Wireless, Inc.					
	10-K	12/31/98	03/31/99	Not filed	127
	10-Q	03/31/99	05/17/99	Not filed	125
	10-Q	06/30/99	08/16/99	Not filed	122
	10-Q	09/30/99	11/15/99	Not filed	119
	10-K	12/31/99	03/30/00	Not filed	115
	10-Q	03/31/00	05/15/00	Not filed	113
	10-Q	06/30/00	08/14/00	Not filed	110
	10-Q	09/30/00	11/14/00	Not filed	107
	10-K	12/31/00	04/02/01	Not filed	102
	10-Q	03/31/01	05/15/01	Not filed	101
	10-Q	06/30/01	08/14/01	Not filed	98
	10-Q	09/30/01	11/14/01	Not filed	95
	10-K	12/31/01	04/01/02	Not filed	90
	10-Q	03/31/02	05/15/02	Not filed	89
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Portacom Wireless, Inc.	*10-Q*	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43
	10-Q	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	04/01/09	Not filed	6
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**43**				
Portal Net, Ltd.					
	20-F	09/30/01	04/01/02	Not filed	90
	20-F	09/30/02	03/31/03	Not filed	79
	20-F	09/30/03	03/31/04	Not filed	67
	20-F	09/30/04	03/31/05	Not filed	55
	20-F	09/30/05	03/31/06	Not filed	43
	20-F	09/30/06	04/02/07	Not filed	30
	20-F	09/30/07	03/31/08	Not filed	19
	20-F	09/30/08	03/31/09	Not filed	7
Total Filings Delinquent	**8**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Prime Holdings & Investments, Inc.					
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	04/01/09	Not filed	6
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**19**				
Pro-After, Inc. ***(f/k/a PurchasePro.com, Inc.)***					
	10-Q	06/30/02	08/14/02	Not filed	86
	10-Q	09/30/02	11/14/02	Not filed	83
	10-K	12/31/02	03/31/03	Not filed	79
	10-Q	03/31/03	05/15/03	Not filed	77
	10-Q	06/30/03	08/14/03	Not filed	74
	10-Q	09/30/03	11/14/03	Not filed	71
	10-K	12/31/03	03/30/04	Not filed	67
	10-Q	03/31/04	05/17/04	Not filed	65
	10-Q	06/30/04	08/16/04	Not filed	62
	10-Q	09/30/04	11/15/04	Not filed	59
	10-K	12/31/04	03/31/05	Not filed	55
	10-Q	03/31/05	05/16/05	Not filed	53
	10-Q	06/30/05	08/15/05	Not filed	50
	10-Q	09/30/05	11/14/05	Not filed	47
	10-K	12/31/05	03/31/06	Not filed	43

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Pro-After, Inc.					
(f/k/a PurchasePro.com, Inc.)	*10-Q*	03/31/06	05/15/06	Not filed	41
	10-Q	06/30/06	08/14/06	Not filed	38
	10-Q	09/30/06	11/14/06	Not filed	35
	10-K	12/31/06	04/02/07	Not filed	30
	10-Q	03/31/07	05/15/07	Not filed	29
	10-Q	06/30/07	08/14/07	Not filed	26
	10-Q	09/30/07	11/14/07	Not filed	23
	10-K	12/31/07	03/31/08	Not filed	19
	10-Q	03/31/08	05/15/08	Not filed	17
	10-Q	06/30/08	08/14/08	Not filed	14
	10-Q	09/30/08	11/14/08	Not filed	11
	10-K	12/31/08	04/01/09	Not filed	6
	10-Q	03/31/09	05/15/09	Not filed	5
	10-Q	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**29**				
Project Group, Inc.					
	10-KSB	12/31/04	03/31/05	Not filed	55
	10-QSB	03/31/05	05/16/05	Not filed	53
	10-QSB	06/30/05	08/15/05	Not filed	50
	10-QSB	09/30/05	11/14/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	04/01/09	Not filed	6
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**19**				

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
ProLong International Corp.					
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	03/31/06	05/15/06	Not filed	41
	10-QSB	06/30/06	08/14/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/31/06	04/02/07	Not filed	30
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/30/07	11/14/07	Not filed	23
	10-KSB	12/31/07	03/31/08	Not filed	19
	*10-Q**	03/31/08	05/15/08	Not filed	17
	*10-Q**	06/30/08	08/14/08	Not filed	14
	*10-Q**	09/30/08	11/14/08	Not filed	11
	*10-K**	12/31/08	04/01/09	Not filed	6
	*10-Q**	03/31/09	05/15/09	Not filed	5
	*10-Q**	06/30/09	08/14/09	Not filed	2
Total Filings Delinquent	**15**				
PSS, Inc.					
	10-Q	02/01/03	03/18/03	Not filed	79
	10-Q	05/03/03	06/17/03	Not filed	76
	10-Q	08/02/03	09/16/03	Not filed	73
	10-K	11/01/03	01/30/04	Not filed	69
	10-Q	01/31/04	03/16/04	Not filed	67
	10-Q	05/01/04	06/15/04	Not filed	64
	10-Q	07/31/04	09/14/04	Not filed	61
	10-K	10/30/04	01/28/05	Not filed	57
	10-Q	01/29/05	03/15/05	Not filed	55
	10-Q	04/30/05	06/14/05	Not filed	52
	10-Q	07/30/05	09/13/05	Not filed	49
	10-K	10/29/05	01/27/06	Not filed	45
	10-Q	01/28/06	03/14/06	Not filed	43
	10-Q	04/29/06	06/13/06	Not filed	40
	10-Q	07/29/06	09/12/06	Not filed	37
	10-K	10/28/06	01/26/07	Not filed	33
	10-Q	01/27/07	03/13/07	Not filed	31
	10-Q	04/28/07	06/12/07	Not filed	28

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
PSS, Inc.	*10-Q*	07/28/07	09/11/07	Not filed	25
	10-K	10/27/07	01/25/08	Not filed	21
	10-Q	01/26/08	03/11/08	Not filed	19
	10-Q	04/26/08	06/10/08	Not filed	16
	10-Q	07/26/08	09/09/08	Not filed	13
	10-K	11/01/08	01/30/09	Not filed	9
	10-Q	01/31/09	03/17/09	Not filed	7
	10-Q	05/02/09	06/16/09	Not filed	4
	10-Q	08/01/09	09/15/09	Not filed	1
Total Filings Delinquent	**27**				
Purus, Inc.					
	10-KSB	01/01/00	03/31/00	Not filed	115
	10-QSB	04/01/00	05/16/00	Not filed	113
	10-QSB	07/01/00	08/15/00	Not filed	110
	10-QSB	09/30/00	11/14/00	Not filed	107
	10-KSB	12/30/00	03/30/01	Not filed	103
	10-QSB	03/31/01	05/15/01	Not filed	101
	10-QSB	06/30/01	08/14/01	Not filed	98
	10-QSB	09/29/01	11/13/01	Not filed	95
	10-KSB	12/29/01	03/29/02	Not filed	91
	10-QSB	03/30/02	05/14/02	Not filed	89
	10-QSB	06/29/02	08/13/02	Not filed	86
	10-QSB	09/28/02	11/12/02	Not filed	83
	10-KSB	12/28/02	03/28/03	Not filed	79
	10-QSB	03/29/03	05/13/03	Not filed	77
	10-QSB	06/28/03	08/12/03	Not filed	74
	10-QSB	09/27/03	11/12/03	Not filed	71
	10-KSB	01/03/04	04/02/04	Not filed	66
	10-QSB	04/03/04	05/18/04	Not filed	65
	10-QSB	07/03/04	08/17/04	Not filed	62
	10-QSB	10/03/04	11/17/04	Not filed	59
	10-KSB	01/01/05	04/01/05	Not filed	54
	10-QSB	04/02/05	05/17/05	Not filed	53
	10-QSB	07/02/05	08/16/05	Not filed	50
	10-QSB	10/01/05	11/15/05	Not filed	47
	10-KSB	12/31/05	03/31/06	Not filed	43
	10-QSB	04/01/06	05/16/06	Not filed	41

Company Name	Form Type	Period Ended	Due Date	Date Received	Months Delinquent (rounded up)
Purus, Inc.	*10-QSB*	07/01/06	08/15/06	Not filed	38
	10-QSB	09/30/06	11/14/06	Not filed	35
	10-KSB	12/30/06	03/30/07	Not filed	31
	10-QSB	03/31/07	05/15/07	Not filed	29
	10-QSB	06/30/07	08/14/07	Not filed	26
	10-QSB	09/29/07	11/13/07	Not filed	23
	10-KSB	12/29/07	03/28/08	Not filed	19
	*10-Q**	03/29/08	05/13/08	Not filed	17
	*10-Q**	06/28/08	08/12/08	Not filed	14
	*10-Q**	09/27/08	11/12/08	Not filed	11
	*10-K**	12/27/08	03/30/09	Not filed	7
	*10-Q**	03/28/09	05/12/09	Not filed	5
	*10-Q**	06/27/09	08/11/09	Not filed	2

Total Filings Delinquent **39**

* Regulation S-B and its accompanying forms, including Forms 10-QSB and 10-KSB, have been removed from the federal securities laws. *See* Release No. 34-56994 (Dec. 19, 2007). The removal took effect over a transition period that concluded on March 15, 2009. All reporting companies that previously filed their periodic reports on Forms 10-QSB and 10-KSB are now required to use Forms 10-Q and 10-K instead. Forms 10-QSB and 10-KSB will no longer be available, though issuers that meet the definition of a "smaller reporting company" (generally, a company that has less than $75 million in public equity float as of the end of its most recently completed second fiscal quarter) have the option of using new, scaled disclosure requirements that Regulation S-K now includes.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60890 / October 27, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13666

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

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 William J. Reilly, Esq. ("Respondent" or "Reilly") 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, paragraph 2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings

[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 or abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.

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 the Respondent's Offer, the Commission finds that:

1. Reilly, age 55, is a resident of Boca Raton, Florida and has been an attorney licensed to practice in the State of New York since 1979. From at least June 2006 through at least November 2006, Reilly issued legal opinions for the benefit of certain shareholders of Forest Resources Management Corp., formerly known as Executive Hospitality Corporation ("Forest"), as to whether the transfer agent could issue shares of Forest acquired in unregistered offerings and bearing restrictive legends into the public market, absent registration, pursuant to Rule 144 of the Securities Act of 1933 ("Securities Act"). In August 2006, Reilly further filed a Form 8-K with the Commission on behalf of Forest pursuant to Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act").

2. On October 15, 2009, a judgment was entered against Reilly, permanently enjoining him from future violations of Sections 5(a) and 5(c) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in a civil action entitled Securities and Exchange Commission v. Forest Resources Management Corp., et al., Civil Action Number 09 Civ. 903 (JSR), in the United States District Court for the Southern District of New York. Reilly was also (a) ordered to pay disgorgement, prejudgment interest, and a civil penalty in an amount to be determined by the Court, (b) barred from serving as an officer or director of any public company, and (c) barred from participating in the offering of any penny stock. Reilly consented to the entry of the judgment without admitting or denying any of the allegations in the complaint.

3. The Commission's Complaint alleged, among other things, that in June 2006, Reilly sold Forest, a public shell company, to promoters and that in August 2006, Forest purportedly entered into a reverse merger with Opus Management Group Ltd. In connection with the sale of the shell company and the reverse merger, Reilly, acting as attorney and as Forest's corporate officer, wrote six opinion letters to Forest's transfer agent, in which he knowingly or recklessly made false representations concerning the basis for the transfer of these shares without restrictive legends. Based on Reilly's opinion letters, Forest's transfer agent issued certificates representing 27.9 million shares of purportedly unrestricted stock to Reilly and to the promoters and their nominees, who sold at least 1,387,980 shares of Forest stock to the public and received approximately $800,000 from the sale of the stock. In addition, the Commission's Complaint alleged that in August 2006 Reilly filed a Form 8-K on behalf of Forest with the Commission. The Form 8-K falsely stated that, by reason of the reverse merger with Opus, Forest obtained valuable timber rights. Such statement was false in that Opus did not own any valuable timber rights. Reilly acted knowingly or recklessly in making such false representations in connection with the purchase or sale of securities.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Reilly is suspended from appearing or practicing before the Commission as an attorney. Furthermore, after three years from the date of this Order, Reilly has the right to apply for reinstatement by submitting an affidavit to the Commission's Office of the General Counsel truthfully stating, under penalty of perjury, that he is not subject to any suspension or disbarment of an attorney by any court of the United States or of any state, territory, district, commonwealth, or possession, and that he has not been convicted of a felony or misdemeanor involving moral turpitude as set forth in Rule 102(e)(2) of the Commission's Rules of Practice.

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. 60892 / October 28, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13668

In the Matter of **ANTHONY PEREZ,** **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 Anthony Perez ("Perez" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 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. From July 2007 to May 2008, Perez was a registered representative associated with Goldman Sachs Group Inc. ("Goldman Sachs"), a broker-dealer registered with the Commission, and served as investment banking analyst in its financial institutions group in New York City. In September 2007, Perez received a Series 7, General Securities license. Perez, 26 years old, is a resident of Maitland, Florida.

2. On September 15, 2009, a final judgment was entered by consent against Perez, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Anthony Perez and Ian C. Perez, Civil Action Number 6:09-CV-1225-Orl-28DAB, in the United States District Court for the Middle District of Florida.

3. The Commission's complaint alleged that in March 2008, Perez began working on a potential acquisition of Safeco Corp. ("Safeco") on behalf of a large Goldman Sachs client. From April 5, 2008 to April 21, 2008, Perez misappropriated material, nonpublic information concerning the potential acquisition of Safeco and tipped this confidential information to his brother, Ian C. Perez, who bought Safeco call options on April 22, 2008, and sold them on April 23, 2008, for a profit of $152,231.10.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Perez be, and hereby is barred from association with any broker or dealer with the right to reapply for association after five years to the appropriate self-regulatory organization, or if there is none, to the Commission;

Any reapplication for association by 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: Jill M. Peterson
Assistant Secretary

Chairman Schapiro and Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 60898 / October 28, 2009

INVESTMENT ADVISERS ACT OF 1940
Release No. 2942 / October 28, 2009

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3061 / October 28, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13669

In the Matter of **TAB KEPLINGER, CPA** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE 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 Rule 102(e)(3)(i) of the Commission's Rules of Practice[1] and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Tab Keplinger ("Keplinger" or "Respondent").

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

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice 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. Keplinger, age 48, is and has been a certified public accountant licensed to practice in the State of Ohio. He served as Chief Financial Officer of Brantley Capital Management, LLC ("BCM") and of Brantley Capital Corp. ("Brantley Capital") from June 1996 until July 15, 2005.

2. BCM was, at all relevant times, a limited liability company headquartered in Ohio, which served as Brantley's investment adviser from Brantley Capital's 1996 inception until September 28, 2005. BCM has previously been registered with the Commission as an investment adviser, but currently is not registered and is not serving as an investment adviser. Brantley's prospectus and BCM's investment advisory agreement and Form ADV indicate that BCM was responsible for oversight of Brantley's records and financial reporting requirements.

3. Brantley Capital was, at all relevant times, a closed-end, non-diversified investment company, incorporated in Maryland and headquartered in Ohio, which elected to be regulated as a business development company under the Investment Company Act of 1940. Brantley's common stock is registered with the Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"). Prior to April 21, 2005, Brantley's common stock traded on The Nasdaq National Market system

4. On August 13, 2009, the Commission filed a complaint against Keplinger in SEC v. Robert Pinkas et al. (Civil Action No. 1:09-cv-01906). On September 14, 2009, the court entered an order permanently enjoining Keplinger, by consent, from violating Exchange Act Sections 10(b) and 13(b)(5) and Rules 10b-5, 13a-14, 13b2-1, and 13b2-2 thereunder, and from aiding and abetting violations of Exchange Act Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and Rules 13a-1 and 13a-13 thereunder, and Advisers Act Sections 206(1) and 206(2). Keplinger was also ordered to pay a $50,000 civil money penalty. In addition, Keplinger was barred from serving as an officer or director of a publicly-traded company for five years.

5. The Commission's complaint alleges, among other things, that in Brantley Capital's Forms 10-Q and 10-K for the period 2002 to 2005, Keplinger knowingly or recklessly overstated the value of two companies, Flight Options International ("FOI") and Disposable Products Company ("DPC"), that together represented over one-half of Brantley Capital's investment portfolio. The Complaint alleges that Keplinger also knowingly or recklessly made material misrepresentations and failed to make required disclosures regarding FOI and DPC to Brantley Capital's board of directors and to investors in Brantley Capital's public filings.

IV.

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

Accordingly, it is hereby ORDERED:

A. Pursuant to Advisers Act Section 203(f), Keplinger is hereby barred from association with any investment adviser with the right to reapply for association after one (1) year to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

C. Keplinger is suspended from appearing or practicing before the Commission as an accountant.

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

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

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

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

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

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

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

E. 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

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60903; File No. PCAOB-2009-02)

October 29, 2009

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rules on Auditing Standard No. 7, Engagement Quality Review, and Conforming Amendment

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on August 4, 2009, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") the proposed rules described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rules

On July 28, 2009, the Board adopted Auditing Standard No. 7, Engagement Quality Review, and an amendment to the Board's Interim Quality Control Standards (collectively, "the proposed rules "). The text of the proposed rules text is set out below. Language that is added by the amendment to the Board's Interim Quality Control Standards is italicized.

Auditing Standard No. 7

Supersedes SECPS Requirements of Membership § 1000.08(f).

Engagement Quality Review

Applicability of Standard

1. An engagement quality review and concurring approval of issuance are required for each audit engagement and for each engagement to review interim financial

information conducted pursuant to the standards of the Public Company Accounting Oversight Board ("PCAOB").

Objective

2. The objective of the engagement quality reviewer is to perform an evaluation of the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement and in preparing the engagement report, if a report is to be issued, in order to determine whether to provide concurring approval of issuance.[1/]

Qualifications of an Engagement Quality Reviewer

3. The engagement quality reviewer must be an associated person of a registered public accounting firm. An engagement quality reviewer from the firm that issues the engagement report (or communicates an engagement conclusion, if no report is issued) must be a partner or another individual in an equivalent position. The engagement quality reviewer may also be an individual from outside the firm.[2/]

4. As described below, an engagement quality reviewer must have competence, independence, integrity, and objectivity.

1/ In the context of an audit, "engagement report" refers to the audit report (or reports if, in an integrated audit, the auditor issues separate reports on the financial statements and internal control over financial reporting). In the context of an engagement to review interim financial information, the term refers to the report on interim financial information. An engagement report might not be issued in connection with a review of interim financial information. See paragraph .03 of AU section ("sec.") 722, Interim Financial Information.

2/ An outside reviewer who is not already associated with a registered public accounting firm would become associated with the firm issuing the report if he or she (rather than, or in addition to, his or her firm or other employer): (1) receives compensation from the firm issuing the report for performing the review or (2) performs the review as agent for the firm issuing the report. See PCAOB Rule 1001(p)(i) for the definition of an associated person of a registered public accounting firm.

Note: The firm's quality control policies and procedures should include provisions to provide the firm with reasonable assurance that the engagement quality reviewer has sufficient competence, independence, integrity, and objectivity to perform the engagement quality review in accordance with the standards of the PCAOB.

Competence

5. The engagement quality reviewer must possess the level of knowledge and competence related to accounting, auditing, and financial reporting required to serve as the engagement partner on the engagement under review.[3/]

Independence, Integrity, and Objectivity

6. The engagement quality reviewer must be independent of the company, perform the engagement quality review with integrity, and maintain objectivity in performing the review.

Note: The reviewer may use assistants in performing the engagement quality review. Personnel assisting the engagement quality reviewer also must be independent, perform the assigned procedures with integrity, and maintain objectivity in performing the review.

7. To maintain objectivity, the engagement quality reviewer and others who assist the reviewer should not make decisions on behalf of the engagement team or assume any

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3/ The term "engagement partner" has the same meaning as the phrases "auditor with final responsibility for the audit" in AU sec. 311, Planning and Supervision, and "practitioner-in-charge of an engagement" in PCAOB interim quality control standard QC sec. 40, The Personnel Management Element of a Firm's System of Quality Control-Competencies Required by a Practitioner-in-Charge of an Attest Engagement. QC sec. 40 describes the competencies required of a practitioner-in-charge of an attest engagement.

of the responsibilities of the engagement team. The engagement partner remains responsible for the engagement and its performance, notwithstanding the involvement of the engagement quality reviewer and others who assist the reviewer.

8. The person who served as the engagement partner during either of the two audits preceding the audit subject to the engagement quality review may not be the engagement quality reviewer. Registered firms that qualify for the exemption under Rule 2-01(c)(6)(ii) of Regulation S-X, 17 C.F.R. § 210.2-01(c)(6)(ii), are exempt from the requirement in this paragraph.

Engagement Quality Review for an Audit

Engagement Quality Review Process

9. In an audit engagement, the engagement quality reviewer should evaluate the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement and in preparing the engagement report. To evaluate such judgments and conclusions, the engagement quality reviewer should, to the extent necessary to satisfy the requirements of paragraphs 10 and 11: (1) hold discussions with the engagement partner and other members of the engagement team, and (2) review documentation.

10. In an audit, the engagement quality reviewer should:

a. Evaluate the significant judgments that relate to engagement planning, including –

- The consideration of the firm's recent engagement experience with the company and risks identified in connection with the firm's client acceptance and retention process,
- The consideration of the company's business, recent significant activities, and related financial reporting issues and risks, and
- The judgments made about materiality and the effect of those judgments on the engagement strategy.

b. Evaluate the engagement team's assessment of, and audit responses to –

- Significant risks identified by the engagement team, including fraud risks, and
- Other significant risks identified by the engagement quality reviewer through performance of the procedures required by this standard.

Note: A significant risk is a risk of material misstatement that is important enough to require special audit consideration.

c. Evaluate the significant judgments made about (1) the materiality and disposition of corrected and uncorrected identified misstatements and (2) the severity and disposition of identified control deficiencies.

d. Review the engagement team's evaluation of the firm's independence in relation to the engagement.

e. Review the engagement completion document[4/] and confirm with the engagement partner that there are no significant unresolved matters.

f. Review the financial statements, management's report on internal control, and the related engagement report.

g. Read other information in documents containing the financial statements to be filed with the Securities and Exchange Commission ("SEC")[5/] and evaluate whether the engagement team has taken appropriate action with respect to any material inconsistencies with the financial statements or material misstatements of fact of which the engagement quality reviewer is aware.

h. Based on the procedures required by this standard, evaluate whether appropriate consultations have taken place on difficult or contentious matters. Review the documentation, including conclusions, of such consultations.

i. Based on the procedures required by this standard, evaluate whether appropriate matters have been communicated, or identified for communication, to the audit committee, management, and other parties, such as regulatory bodies.

Evaluation of Engagement Documentation

4/ Paragraph 13 of PCAOB Auditing Standard No. 3, Audit Documentation, requires the auditor to identify all significant findings or issues in an engagement completion document.

5/ See paragraphs .04-.06 of AU sec. 550, Other Information in Documents Containing Audited Financial Statements; AU sec. 711, Filings Under Federal Securities Statutes.

11. In an audit, the engagement quality reviewer should evaluate whether the engagement documentation that he or she reviewed when performing the procedures required by paragraph 10 –

a. Indicates that the engagement team responded appropriately to significant risks, and

b. Supports the conclusions reached by the engagement team with respect to the matters reviewed.

Concurring Approval of Issuance

12. In an audit, the engagement quality reviewer may provide concurring approval of issuance only if, after performing with due professional care[6/] the review required by this standard, he or she is not aware of a significant engagement deficiency.

Note: A significant engagement deficiency in an audit exists when (1) the engagement team failed to obtain sufficient appropriate evidence in accordance with the standards of the PCAOB, (2) the engagement team reached an inappropriate overall conclusion on the subject matter of the engagement, (3) the engagement report is not appropriate in the circumstances, or (4) the firm is not independent of its client.

13. In an audit, the firm may grant permission to the client to use the engagement report only after the engagement quality reviewer provides concurring approval of issuance.[7/]

6/ See AU sec. 230, Due Professional Care in the Performance of Work.

Engagement Quality Review for a Review of Interim Financial Information

Engagement Quality Review Process

14. In an engagement to review interim financial information, the engagement quality reviewer should evaluate the significant judgments made by the engagement team and the related conclusions reached in forming the overall conclusion on the engagement and in preparing the engagement report, if a report is to be issued. To evaluate such judgments and conclusions, the engagement quality reviewer should, to the extent necessary to satisfy the requirements of paragraphs 15 and 16: (1) hold discussions with the engagement partner and other members of the engagement team, and (2) review documentation.

15. In a review of interim financial information, the engagement quality reviewer should:

a. Evaluate the significant judgments that relate to engagement planning, including the consideration of –

- The firm's recent engagement experience with the company and risks identified in connection with the firm's client acceptance and retention process,
- The company's business, recent significant activities, and related financial reporting issues and risks, and

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7/ Concurring approval of issuance by the engagement quality reviewer also is required when reissuance of an engagement report requires the auditor to update his or her procedures for subsequent events. In that case, the engagement quality reviewer should update the engagement quality review by addressing those matters related to the subsequent events procedures.

- The nature of identified risks of material misstatement due to fraud.

b. Evaluate the significant judgments made about (1) the materiality and disposition of corrected and uncorrected identified misstatements and (2) any material modifications that should be made to the disclosures about changes in internal control over financial reporting.

c. Perform the procedures described in paragraphs 10.d and 10.e.

d. Review the interim financial information for all periods presented and for the immediately preceding interim period, management's disclosure for the period under review, if any, about changes in internal control over financial reporting, and the related engagement report, if a report is to be issued.

e. Read other information in documents containing interim financial information to be filed with the SEC[8/] and evaluate whether the engagement team has taken appropriate action with respect to material inconsistencies with the interim financial information or material misstatements of fact of which the engagement quality reviewer is aware.

f. Perform the procedures in paragraphs 10.h and 10.i

Evaluation of Engagement Documentation

16. In a review of interim financial information, the engagement quality reviewer should evaluate whether the engagement documentation that he or she reviewed when

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8/ See AU sec. 722.18f; AU sec. 711.

performing the procedures required by paragraph 15 supports the conclusions reached by the engagement team with respect to the matters reviewed.

Concurring Approval of Issuance

17. In a review of interim financial information, the engagement quality reviewer may provide concurring approval of issuance only if, after performing with due professional care the review required by this standard, he or she is not aware of a significant engagement deficiency.

> Note: A significant engagement deficiency in a review of interim financial information exists when (1) the engagement team failed to perform interim review procedures necessary in the circumstances of the engagement, (2) the engagement team reached an inappropriate overall conclusion on the subject matter of the engagement, (3) the engagement report is not appropriate in the circumstances, or (4) the firm is not independent of its client.

18. In a review of interim financial information, the firm may grant permission to the client to use the engagement report (or communicate an engagement conclusion to its client, if no report is issued) only after the engagement quality reviewer provides concurring approval of issuance.

Documentation of an Engagement Quality Review

19. Documentation of an engagement quality review should contain sufficient information to enable an experienced auditor, having no previous connection with the engagement, to understand the procedures performed by the engagement quality

reviewer, and others who assisted the reviewer, to comply with the provisions of this standard, including information that identifies:

a. The engagement quality reviewer, and others who assisted the reviewer,

b. The documents reviewed by the engagement quality reviewer, and others who assisted the reviewer,

c. The date the engagement quality reviewer provided concurring approval of issuance or, if no concurring approval of issuance was provided, the reasons for not providing the approval.

20. Documentation of an engagement quality review should be included in the engagement documentation.

21. The requirements related to retention of and subsequent changes to audit documentation in PCAOB Auditing Standard No. 3, Audit Documentation, apply with respect to the documentation of the engagement quality review.

Conforming Amendment to PCAOB Interim Quality Control Standards

QC sec. 20, "System of Quality Control for a CPA Firm's Accounting and Auditing Practice"

QC section ("sec.") 20, "System of Quality Control for a CPA Firm's Accounting and Auditing Practice" of the Board's interim quality control standards is amended as follows –

The third sentence of paragraph .18 of QC sec. 20 is replaced with the following sentence:

These policies and procedures also should address engagement quality reviews pursuant to PCAOB Auditing Standard No. 7, Engagement Quality Review.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

Section 103 of the Sarbanes-Oxley Act (the "Act") directs the Board, among other things, to set standards for public company audits, including a requirement for each registered public accounting firm to "provide a concurring or second partner review and approval of [each] audit report (and other related information), and concurring approval in its issuance . . . ."

As discussed more fully in Exhibit 3, the Board adopted Auditing Standard No. 7 because it believed that a well-performed engagement quality review ("EQR") can serve as an important safeguard against erroneous or insufficiently supported audit opinions and, accordingly, can contribute to audit quality. The proposed rules are intended to enhance the quality of the EQR by strengthening the existing requirements. Auditing Standard No. 7 provides for a rigorous review that will serve as a meaningful check on

the work performed by the engagement team and, the Board believes, should increase the likelihood that a registered public accounting firm will catch any significant engagement deficiencies before it issues its audit report. As a result, the Board recognizes that more work may be necessary under Auditing Standard No. 7 than was performed in some concurring reviews under the existing requirements.

Auditing Standard No. 7 requires the engagement quality reviewer (or the "reviewer") to evaluate the significant judgments made and related conclusions reached by the engagement team in forming the overall conclusion on the engagement and in preparing the engagement report. Auditing Standard No. 7 also requires the engagement quality reviewer to perform certain procedures designed to focus the reviewer on those judgments and conclusions. The procedures required of the reviewer by Auditing Standard No. 7 are different in nature from the procedures required of the engagement team. Unlike the engagement team, a reviewer does not perform substantive procedures or obtain sufficient evidence to support an opinion on the financial statements or internal control over financial reporting. If more audit work is necessary before the reviewer may provide concurring approval of issuance, the engagement team – not the reviewer – is responsible under PCAOB standards for performing the work. In contrast, the reviewer fulfills his or her responsibility to perform an effective review of the engagement under the EQR standard by holding discussions with the engagement team, reviewing documentation, and determining whether he or she can provide concurring approval of issuance.

The proposed rules also amend the Board's interim quality control standards by replacing the third sentence of paragraph .18 of in QC section 20, "System of Quality

Control for a CPA Firm's Accounting and Auditing Practice" with a statement indicating that these policies and procedures also should address engagement quality reviews pursuant to PCAOB Auditing Standard No. 7.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule changes would apply equally to all registered public accounting firms.

C. Board's Statement on Comments on the Proposed Rules Received from Members, Participants or Others

The Board released the proposed rules for public comment in PCAOB Release No. 2008-002 (February 26, 2008). The Board received 38 written comments. The Board considered these comments and made significant changes to the initial proposed rules. As a result, the Board again sought public comment in PCOAB Release No. 2009-001 (March 4, 2009). The Board received 30 written comment letters relating to its reproposal of the proposed rules. A copy of PCAOB Release Nos. 2008-002 and 2009-001 and the comment letters received in response to the PCAOB's request for comment in both releases are available on the PCAOB's web site at www.pcaobus.org.

The Board has carefully considered all comments it has received. In response to the written comments received on both the initial and reproposal of the proposed rules,

the Board has clarified and modified certain aspects of the proposed rules, as discussed below.

Overview of Auditing Standard No. 7

Overall, commenters preferred the reproposed standard to the original proposal, though some continued to believe that certain provisions were unclear and suggested certain changes to the standard. After considering commenters' feedback, the Board has made several modifications to the EQR standard to provide additional clarity. This section describes the comments received, the Board's response, and changes made in AS No. 7.[9/]

Applicability of the EQR Requirement

Paragraph 1 of the reproposed standard required an EQR for audit engagements and reviews of interim financial information ("interim reviews"), but not for other engagements performed according to the standards of the PCAOB. For the most part, commenters believed that this provision was appropriate.[10/] One commenter, however, suggested including the EQR requirements for interim reviews in AU section ("sec.") 722, Interim Financial Information, instead of including them as part of the EQR standard to "make it clear that the scope of the procedures performed remain under the umbrella of the objective of a review of interim financial information (which is much different than the scope and objective of an audit)." Because the requirements for the EQR of interim

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9/ The Board received some comments related to its standard-setting process in general. The Board continuously endeavors to improve its processes, including its standard-setting process, and is considering these comments as it does so.

10/ One commenter did not believe that an EQR should be required for interim reviews because of concerns about the scope of the EQR for interim reviews. The section entitled Specifically Required Procedures in the EQR of an Interim Review discusses the EQR requirements for interim reviews.

reviews in AS No. 7 are closely related to and described by reference to the requirements for the EQR of an audit, the Board believes it is more appropriate to locate both sets of requirements in the same standard. Accordingly, the Board is adopting the provisions regarding applicability of the EQR standard as reproposed.

Statement of Objective

The reproposed standard included a statement of objective intended to focus reviewers on the overall purpose of the standard as they carry out the more specific EQR requirements. As reproposed, the objective of the engagement quality reviewer was "to perform an evaluation of the significant judgments made by the engagement team and the conclusions reached in forming the overall conclusion on the engagement and in preparing the engagement report, if a report is to be issued, in order to determine whether to provide concurring approval of issuance."

Most commenters agreed that the EQR standard should include a statement of objective. While some believed the objective was appropriate as reproposed, several suggested substituting the phrase "related conclusions reached" for "the conclusions reached" to indicate that the reviewer is required to evaluate conclusions relating to significant judgments, rather than all conclusions. In addition, some commenters suggested making the objective less vague, while others wanted the Board to broaden it or make it less procedural.

After considering these comments, the Board has, as suggested by commenters, revised the objective so that it refers to "significant judgments made by the engagement

team[11] and the related conclusions reached . . . ." (emphasis added). This change should help reviewers maintain their focus on areas of the engagement that are most likely to contain a significant engagement deficiency. With this revision, the Board believes the statement of objective establishes, at the appropriate level of detail, a framework for the performance of the EQR that is consistent with the specific requirements in AS No. 7. Corresponding changes have been made in paragraphs 9 and 14, which describe the scope of the EQR for audits and interim reviews, respectively. The reviewer achieves his or her objective by complying with the specific requirements of the standard.

Qualifications of the Engagement Quality Reviewer

In order to provide for a high-quality EQR, the reproposed standard described the qualifications that any reviewer would be required to meet. These provisions were designed to provide assurance that the reviewer could effectively perform an EQR of the particular engagement under review. At the same time, the provisions recognized that smaller firms may have few partners – and, in the case of sole practitioners, no additional partners – available in-house to perform the EQR.

Accordingly, the reproposed standard required an engagement quality reviewer from within the firm issuing the engagement report to be a partner or another individual in an equivalent position, but also allowed a qualified individual from outside the firm to perform the EQR. In either event, the reproposed standard required the reviewer to be an

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[11] Because the engagement partner has final responsibility for the engagement, he or she has final responsibility for the significant judgments made during the engagement, notwithstanding any involvement in or responsibility for those judgments by firm personnel outside of the engagement team, such as members of the firm's national office. Accordingly the "significant judgments made by the engagement team" include all of the significant judgments made during the engagement.

associated person[12] of a registered public accounting firm.[13] The reproposed standard also included a general competence requirement and requirements related to the reviewer's independence, integrity, and objectivity.

In-House Reviewer: Partner or an Individual in an Equivalent Position

The requirement in the reproposed standard for a reviewer from within the firm to be a partner or an individual in an equivalent position was intended to address concerns expressed by some commenters on the original proposal about the authority of the engagement quality reviewer relative to that of the engagement partner. Because the EQR is intended to be an objective second look at work performed by the engagement team, the reviewer should be able to withstand pressure from the engagement partner or other firm personnel, such as members of the firm's national office. As described in the reproposing release, the Board believed that concerns about authority will most often arise when the reviewer and the engagement partner work at the same firm. The Board also believed that a standard based on perceptions of relative authority within a firm would not be sufficiently clear to be workable. Accordingly, the Board attempted to

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[12] For clarity, in paragraph 3 of AS No. 7, the Board added a reference to Rule1001(p)(i), which defines the term "associated person of a registered public accounting firm." A person not already associated with a registered firm can enter into a relationship with the firm issuing the report such that the person would become associated with that firm by performing the review. Specifically, a person not already associated with a firm would become associated with the firm issuing the report if he or she (rather than, or in addition to, his or her firm or other employer): (1) receives compensation from the firm issuing the report for performing the review or (2) performs the review as agent for the firm issuing the report. For example, if the firm issuing the report contracts directly with an employee of an unregistered accounting firm to perform the engagement quality review, that person would become associated with the firm issuing the report by virtue of that independent contractor relationship.

[13] A registered public accounting firm has an obligation to secure and enforce consents to cooperate with the Board from each associated person of the firm, see Section 102(b)(3) of the Act, including those who become associated with the firm by performing the review. The Board also may directly sanction any such person who fails to cooperate in an investigation or inspection. See Section 105(b)(3) of the Act and PCAOB Rules 5110 and 4006.

address these concerns with a requirement that an in-house reviewer – but not one from outside the firm – be a partner or person in an equivalent position.

While some commenters supported the reproposed requirement, others disagreed with it, generally because, in their view, being a partner or person in an equivalent position would not necessarily ensure that the reviewer possesses the qualities required to perform the EQR. These commenters noted that partners as well as non-partners may be subject to internal pressure within the firm to provide concurring approval of issuance. In addition, in one commenter's view, it would be burdensome for one-partner firms to hire an outside reviewer to comply with this requirement. Finally, some commenters also asked the Board to define the term "equivalent position."

While both partners and non-partners may experience pressure within the firm to provide concurring approval of issuance, the Board continues to believe that the reproposed requirement is the most appropriate way to address this issue. Partnership is not a perfect proxy for authority, but a partner is more likely to possess sufficient authority to conduct the EQR than a non-partner. The Board continues to believe that a requirement based on perceptions of authority would not be workable. Accordingly, the Board is adopting this requirement substantially as reproposed.[14/] At a firm that is not organized as a partnership, "an individual in an equivalent position" is someone with the degree of authority and responsibility of a partner in a firm that is organized as a partnership.

[14/] One commenter suggested that the phrasing of the reproposed standard did not establish a requirement for the in-house reviewer to be a partner because it stated that the reviewer "may be" a partner, a person in an equivalent position, or an individual outside the firm. While the use of "may" in that context imposed a requirement, to avoid any confusion on this point the Board has rephrased the requirement in paragraph 3 of AS No. 7 to use the word "must."

Qualified Reviewer from Outside the Firm

As noted above, the reproposed standard also allowed a qualified reviewer from outside the firm to conduct the review. In the reproposing release, the Board expressed the view that allowing a sufficiently qualified professor or other individual not employed by an accounting firm to perform the EQR should not negatively affect audit quality and may mitigate the compliance burden on sole practitioners and smaller firms. The Board sought comment on whether a qualified accountant who is not employed by an accounting firm should be allowed to conduct the EQR.[15/]

The majority of commenters on this topic did not oppose the reproposed provision. Some commenters, however, cautioned that reviewers from outside an accounting firm may not necessarily have the required technical expertise or recent audit experience. One commenter believed that allowing the use of such outside reviewers could "hamper the existing independence rules,"[16/] increase costs, and limit the potential growth of partners.

After considering these comments, the Board continues to believe that the EQR standard can – and should – allow firms the proposed flexibility in choosing a reviewer, provided that reviewer meets the competence and other qualification requirements. According to these requirements, as discussed below, any reviewer would have to have the level of knowledge and competence related to accounting, auditing, and financial reporting required to serve as the person who has overall responsibility for the

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15/ As noted in the reproposing release, under the existing requirement a firm may seek a waiver to engage an outside experienced individual to perform the EQR. Because AS No. 7 allows a firm to use an outside reviewer, such a waiver is not necessary under AS No. 7.

16/ The comment did not explain how the independence rules would be hampered.

engagement under review. Accordingly, while some persons from outside a firm might not have the required qualifications, those who do can effectively perform the EQR.[17/]

The Board also does not agree that allowing the use of a reviewer from outside the firm issuing the report would negatively affect the application or enforcement of the independence rules. As the Board noted in the reproposing release, it will continue to consider anyone who performs the EQR to be an "audit partner" and a member of the "audit engagement team" for purposes of independence requirements.[18/] In addition, because AS No. 7 would not require a firm to use an outside reviewer, allowing a firm to do so should not increase costs or limit the potential growth of partners. Any firm that is concerned that invoking the flexibility provided by the EQR standard would raise its costs or impede the development of its partners could, simply, decline to do so and use a reviewer from within the firm if one is available.

When considering an outside individual for the role of the engagement quality reviewer, the firm will likely need to make additional inquiries to obtain necessary information about the individual's qualifications. For example, while information about independence of the firm's partners is typically collected and evaluated as part of the periodic independence review, information about the independence of an outside reviewer will likely need to be requested and evaluated as part of the reviewer selection process. Firms also likely know more about the competence of their own partners than of an outside reviewer.

17/ Similarly, a reviewer does not meet all of the qualification requirements in AS No. 7 by virtue of his or her status as a partner or employee of an accounting firm.

18/ See Rule 2-01(f) of Regulation S-X, 17 C.F.R. § 210.2-01(f), for the definitions of "audit partner" and "audit engagement team."

General Competence Requirement

As noted above, the reproposed standard, like the original proposal, included a requirement for the reviewer to "possess the level of knowledge and competence related to accounting, auditing, and financial reporting required to serve as the person who has overall responsibility for the same type of engagement." This provision was intended to set a minimum requirement for those who would perform the EQR. In response to comments on the original proposal, the reproposing release explained that this provision, by its terms, did not require the engagement quality reviewer's knowledge and competence to match those of the engagement partner, or for the reviewer to be a "clone" of the engagement partner.[19/]

Some commenters reiterated their concerns that the engagement quality reviewer's skills would be expected to match those of the engagement partner, and that such a requirement could cause resource constraints for smaller firms. Other commenters suggested modifying the general competence provision by stating that the reviewer's competence should be established based on the facts and circumstances of the engagement, or describing the required qualifications from the reviewer's perspective, rather than by comparing them to the qualifications of the engagement partner. Finally, some commenters suggested including in the EQR standard a statement that the reviewer may obtain the required level of knowledge and competence through utilizing assistants.

19/ Specifically, the reproposing release noted:

> The general competence provision merely sets a minimum requirement for those who would perform the EQR, but it does not require the reviewer's competence to match that of the engagement partner. In many cases, both individuals' competence will exceed the minimum level prescribed, but there is no requirement that they do so in tandem, or even at all.

The Board continues to believe that if a minimum level of knowledge and competence in accounting, auditing, and financial reporting is required to conduct an audit, it is similarly necessary to effectively review that audit.[20/] The reviewer is not required to possess other competencies, e.g., those related to communication or management skills, that the engagement partner may have.

Accordingly, the Board is adopting the general competence provision substantially as proposed. The Board is, however, modifying the requirement to clarify further that the determination of what constitutes the appropriate level of knowledge and competence should be based on the circumstances of the engagement, including the size and complexity of the business under audit or under interim review.[21/] In AS No. 7, the Board replaced the phrase "the same type of engagement" with "the engagement." The new phrasing focuses the reviewer on the particular engagement under review, rather than that "type" of engagement.[22/] Firms that do not have partners that meet this general competence requirement available to perform the EQR may engage an outside reviewer to perform an EQR.

[20/] While a reviewer may use assistants in performing the EQR, the reviewer's own skills should meet the requirements of AS No. 7.

[21/] Footnote 18 on page 9 of the original release stated, "The determination of what constitutes the appropriate level of knowledge and competence should be based on the circumstances of the engagement, including the size or complexity of the business."

[22/] In addition, to simplify the text of AS No. 7, the Board replaced the phrase "person with overall responsibility for the engagement" with the term "engagement partner." Footnote 3 of AS No. 7 explains that the term "engagement partner" has the same meaning as the phrases the "auditor with final responsibility for the audit," as described in AU sec. 311, Planning and Supervision, and the "practitioner-in-charge of an engagement," as described in PCAOB interim quality control standard QC sec. 40, The Personnel Management Element of a Firm's System of Quality Control-Competencies Required by a Practitioner-in-Charge of an Attest Engagement. Because all of these terms refer to the same person, this change does not alter the meaning of the EQR standard.

Independence, Integrity, and Objectivity

Like the original proposal, the reproposed standard required the reviewer to be independent of the company, perform the review with integrity, and maintain objectivity. Comments on the reproposal focused on two provisions regarding objectivity – the prohibition against the reviewer supervising the engagement team and the two-year "cooling-off" period before the engagement partner could perform the EQR.

Supervision of the Engagement Team

The reproposed standard provided that to maintain objectivity the engagement quality reviewer should not, among other things, "supervise the engagement team with respect to the engagement subject to the engagement quality review." The phrase "subject to the engagement quality review" was intended to clarify that partners with leadership responsibilities in a firm, region, service, or industry practice are not, solely because of those responsibilities, precluded from reviewing any engagement performed by their subordinates in the firm. Some commenters believed that the phrase "subject to the engagement quality review" was not sufficient to clarify this point.

After considering these comments, the Board has decided that the express prohibition against "supervis[ing] the engagement team with respect to the engagement subject to the engagement quality review" is not necessary to effectuate the Board's intent. The remaining two criteria for maintaining objectivity in paragraph 7 of AS No. 7 – not making decisions on behalf of the engagement team and not assuming any responsibilities of the engagement team – are sufficient to preclude those involved in the

engagement from serving as the engagement quality reviewer.[23/] For example, partners (including the engagement partner and other partners on larger engagements), managers, and others who supervise engagement personnel on the audit under review would not qualify under the remaining criteria because they have assumed responsibilities of the engagement team. At the same time, removing the phrase "supervise the engagement team" from AS No. 7 should further clarify that those in leadership positions in the firm who did not make decisions for or assume responsibilities of the engagement team may perform the EQR.

The Two-Year "Cooling-Off" Period

The reproposed standard included a provision prohibiting an engagement partner from serving as the engagement quality reviewer for at least two years following his or her last year as the engagement partner.[24/] The Board included the "cooling-off" period because it believed that it would be harder for an engagement partner who has had overall responsibility for the audit for at least a year to perform the review with the necessary level of objectivity. While a number of commenters expressed general support for a two-

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[23/] AS No. 7 does not prohibit the engagement team from consulting with the reviewer, as long as the reviewer maintains his or her objectivity in accordance with paragraph 7. As noted in the reproposing release, such consultations may contribute to audit quality. In addition, one commenter asked the Board to clarify whether a reviewer may consult with the same personnel who previously consulted with the engagement team. The EQR standard does not prohibit the reviewer from holding discussions with such personnel. The reviewer may not, however, use personnel who previously consulted with the engagement team as assistants in performing the review unless they meet the objectivity and other qualification requirements of AS No. 7. To emphasize the requirement that assistants maintain objectivity, the Board added to paragraph 7 of AS No. 7 the phrase "and others who assist the reviewer."

[24/] SEC independence rules allow engagement partners and concurring partners to serve for five consecutive years, after which they may not serve in either role for another period of five years. Within a five-year period, SEC independence rules do not impose a "cooling-off" period before the engagement partner can serve as the concurring partner. See Rule 2 - 01(c)(6)(i)(A) of Regulation S-X.

year "cooling-off" period, some believed that it could impose an undue hardship on smaller firms, and suggested a shorter "cooling-off" period.

After considering these comments, the Board continues to believe that a "cooling-off" period will be beneficial to audit quality and that a two-year period appropriately safeguards objectivity without imposing unnecessary hardship on most firms. At the same time, the Board recognizes that compliance with this requirement could be difficult for smaller firms with fewer personnel. In its independence rules, the Securities and Exchange Commission ("SEC") exempted certain smaller firms from the audit partner rotation requirements. Specifically, Rule 2-01(c)(6)(ii) of Regulation S-X provides an exemption for firms with fewer than five issuer audit clients and fewer than ten partners, provided the Board "conducts a review at least once every three years of each of the audit client engagements that would result in a lack of auditor independence under" the SEC partner rotation requirements. The Board believes that this exemption – including the provision regarding Board inspections – also describes an appropriate exemption from the "cooling-off" requirement in the EQR standard. Accordingly, firms that qualify for the exemption from the SEC partner rotation requirements will also be exempt from the "cooling-off" period under AS No. 7.

EQR Process

The Board's goal in proposing an EQR standard was to strengthen the existing requirements for concurring reviews in order to promote a more meaningful review of the work performed by the engagement team. Accordingly, the original proposal described certain procedures that the reviewer was required to perform that were more specific than those in the existing requirements. In response to comments received on the original

proposal, the Board clarified some of the specifically required procedures and included, in a separate section in the reproposed standard, tailored requirements for an EQR of an interim review.

In general, commenters believed that the reproposed standard described the requirements of the EQR more clearly than the original proposal. However, a number of commenters suggested additional modifications that, in their view, would further clarify the Board's intent and ensure consistency of the requirements with the statement of objective. As described below, after considering these comments, the Board has modified certain of these requirements.

Terminology Used to Describe the Required Procedures

Several commenters noted that the specifically required procedures in paragraphs 9, 10, 14, and 15 of the reproposed standard were described using different, but in some cases similar, terms such as "determine," "evaluate," "identify," "read," and "review," which some commenters found confusing. In one commenter's view, the terms "determine," "identify," and "evaluate" may require the reviewer to perform procedures that are similar in scope to the procedures performed by the engagement partner. The commenters asked the Board to clarify the terminology in these sections of the EQR standard.

While the Board does not believe that this terminology required the reviewer to perform procedures that are appropriately performed by the engagement partner, it does agree that the terminology should not be confusing. Accordingly, the Board reduced the number of terms used in AS No. 7, so that the required procedures in paragraphs 9, 10,

14, and 15 are described using two terms, "evaluate" and "review" – with one exception. Because AU sec. 550, Other Information in Documents Containing Audited Financial Statements, requires the auditor to read other information in documents containing the financial statements to be filed with the SEC, paragraphs 10.g and 15.e of AS No. 7, like in the original and reproposed standards, also require the reviewer to read such other information and evaluate whether the engagement team has taken appropriate action with respect to any material inconsistencies with the financial statements or interim financial information, respectively, or material misstatements of fact of which the engagement quality reviewer is aware.

Review of Documentation

A number of commenters viewed the statement in paragraphs 9 and 14 of the reproposed standard that "the reviewer should perform the procedures . . . by reviewing documentation" as too open-ended.[25/] Commenters were concerned that this provision could be interpreted to require the review of all of the engagement documentation.

The Board did not intend to require – and the reproposed provision did not require – the reviewer to review all of the engagement documentation. Nevertheless, to clarify this point, the Board has added the phrase "to the extent necessary to satisfy the requirements" of paragraphs 10 and 11, in an EQR of an audit, and 15 and 16, in an EQR of an interim review. As a practical matter, the reviewer cannot comply with the requirements of the EQR standard without holding discussions with the engagement partner and reviewing documentation. AS No. 7 requires the reviewer to hold sufficient

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25/ That statement was intended, along with other changes in the reproposed standard, to clarify that the EQR is a review of the engagement team's work rather than a second audit. See page 17 of the reproposing release.

discussions with the engagement partner and other members of the engagement team and review sufficient documentation to perform the required procedures with due professional care. What is sufficient will necessarily depend on the facts and circumstances of the particular engagement under review. Auditors often document their significant judgments and conclusions in various summary documents, which could serve as a starting point for the reviewer's evaluation of the engagement team's work.

Paragraph 11 of the reproposed standard required the reviewer, in an EQR of an audit, to evaluate whether the engagement documentation that he or she reviewed when performing the procedures required by paragraph 10 indicates that the engagement team responded appropriately to significant risks and supports the conclusions reached by the engagement team with respect to the matters reviewed. One commenter suggested adding a requirement to paragraph 11 to evaluate engagement documentation for compliance with the requirements of Auditing Standard No. 3, Audit Documentation ("AS No. 3"). The Board originally proposed such a requirement but, in response to comments, did not include it in the reproposed standard.[26/] The Board continues to believe that the documentation review requirements of paragraph 11 of the reproposed standard are appropriate and is adopting them as reproposed.

In an EQR of an interim review, paragraph 16 of the reproposed standard required the reviewer to evaluate whether the engagement documentation that he or she reviewed "[i]ndicates that the engagement team responded appropriately to significant risks," and "[s]upports the conclusions reached by the engagement team with respect to the matters

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[26/] Commenters suggested that such a requirement would duplicate the documentation review performed by the engagement partner.

reviewed." Some commenters noted that the auditor is not required to identify significant risks in a review of interim financial information and suggested not including a corresponding requirement in the EQR standard. The Board agrees and has not included this requirement in AS No. 7.

Specifically Required Procedures in the EQR of an Audit

Like the original proposal, the reproposed standard required certain procedures designed to give the reviewer the necessary information to evaluate the engagement team's significant judgments and conclusions. In response to comments on the original proposal, the Board made changes to these provisions in the reproposed standard that were intended to clarify that the reviewer performs the EQR by reviewing the engagement team's work, rather than by auditing the company himself or herself. Some commenters suggested that the specifically required procedures in the reproposed standard needed additional clarification.

In the view of several commenters, the reproposed standard did not clearly articulate the requirement for the reviewer to focus on the significant judgments made and the related conclusions reached by the engagement team. These commenters believed that the reproposed standard might be interpreted as requiring the review of all of the engagement team's judgments and conclusions. In response, AS No. 7 refers to "significant judgments" instead of "judgments" in describing certain of the required procedures.

The Board also clarified the wording of paragraph 10.b of the reproposed standard, which required the reviewer to "evaluate the risk assessments and audit

responses . . . ." Some commenters expressed concern that this formulation required a review of audit responses for all areas of the audit. In response, AS No. 7 more specifically requires the reviewer to evaluate the engagement team's audit responses to significant risks identified by the engagement team and other significant risks identified by the engagement quality reviewer through performance of the procedures required by the EQR standard.[27/] This change should help focus reviewers on areas of the audit that are more likely to contain a significant engagement deficiency.

Some commenters also expressed concern about the requirements in paragraphs 10.e and 10.f of the reproposed standard to determine whether appropriate matters have been communicated to the audit committee, management, and others; and to determine whether appropriate consultations have taken place on difficult or contentious matters. According to these commenters, a requirement to determine whether all of the communications or consultations have taken place rather than to evaluate the engagement team's communications and consultations was inconsistent with the objective of the EQR. In response, the Board replaced the phrase "determine if" with "based on the procedures required by this standard, evaluate whether." This change should tailor the specific requirements more closely to the overall objective. The Board also placed these paragraphs after the other required procedures in paragraph 10 to emphasize that the reviewer performs the evaluation required by these paragraphs based on the information

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27/ The term "significant risk" is defined in the Board's recently proposed auditing standard on identifying and assessing risks of material misstatement to mean a "risk of material misstatement that is important enough to require special audit consideration." PCAOB Release No. 2008-006, Proposed Auditing Standards Related to the Auditor's Assessment of and Response to Risk and Conforming Amendments to PCAOB Standards (October 21, 2008). The Board intends that definition to apply to the EQR standard as well. The Board included this definition in a note to paragraph 10.b of AS No. 7. If, at the conclusion of the above mentioned rulemaking, the Board adopts a definition of significant risk that is different from that proposed, the Board will make a conforming change to the EQR standard.

obtained through the other procedures required by the EQR standard, and made a corresponding change in paragraph 15 for the EQR of an interim review.

Specifically Required Procedures in the EQR of an Interim Review

In response to comments on the original proposal, the Board included in the reproposed standard separate requirements for reviewing audits and interim reviews. The EQR requirements for interim reviews were based on the requirements for an EQR of an audit but were tailored to the different procedures performed in an interim review. A number of commenters were supportive of including separate requirements for the EQR of interim reviews in the reproposed standard. Some commenters, as discussed below, suggested modifications to those requirements.

Paragraph 15.a of the reproposed standard required the evaluation of engagement planning, including the consideration of the firm's recent engagement experience with the company and risks identified in connection with the firm's client acceptance and retention process; the company's business, recent significant activities, and related financial reporting issues and risks; and the nature of identified risks of material misstatement due to fraud. In one commenter's view, that paragraph might suggest that an interim review should include the same type of risk assessment as an audit. After considering this comment, the Board disagrees. Paragraph 15.a does not impose a requirement on the engagement team to identify risks as part of an interim review. Rather, it requires the reviewer to evaluate the engagement team's consideration of risks that have already been identified, e.g., during the preceding year's audit.

Additionally, three commenters recommended not requiring the EQR of an interim review to include an evaluation of judgments made about the severity and disposition of identified control deficiencies. In one commenter's view, such an evaluation would be inconsistent with the scope of an interim review. AU sec. 722.07, provides that the auditor:

> should perform limited procedures quarterly to provide a basis for determining whether he or she has become aware of any material modifications that, in the auditor's judgment, should be made to the disclosures about changes in internal control over financial reporting in order for the certifications to be accurate and to comply with the requirements of Section 302 of the Act.

In response, the Board modified the requirement in paragraph 15.b in AS No. 7 to be more consistent with the requirements of AU sec. 722. Accordingly, AS No. 7 requires the reviewer, among other things, to evaluate significant judgments made about any material modifications that should be made to the disclosures about changes in internal control over financial reporting.

Paragraph 15.c of the reproposed standard required the reviewer, in the EQR of an interim review, to "[r]ead the interim financial information for all periods presented and for the immediately preceding interim period, management's disclosure for the period under review, if any, about changes in internal control over financial reporting, and the related engagement report, if a report is to be filed with the SEC." Some commenters suggested that the reviewer should be required to read the engagement report even when

the issuer is not required to include the report in an SEC filing. The Board agrees and, accordingly, changed "to be filed with the SEC" to "to be issued."[28/]

Concurring Approval of Issuance

For an EQR of an audit, paragraph 12 of the reproposed standard provided that the reviewer "may provide concurring approval of issuance only if, after performing with due professional care the review required by this standard, he or she is not aware of a significant engagement deficiency." A note to the same paragraph describes a "significant engagement deficiency" as any of the four conditions described in the original proposal.[29/] The reproposed requirements for providing concurring approval of issuance in an EQR of an interim review were the same, except that the first of these four conditions was modified in light of the differences between an interim review and an audit. Specifically, in an EQR of an interim review, the first condition was "the engagement team failed to perform interim review procedures necessary in the circumstances of the engagement" rather than "the engagement team failed to obtain sufficient appropriate evidence in accordance with the standards of the PCAOB."

[28/] Additionally, one commenter recommended not requiring the reviewer to read interim financial information "for the immediately preceding interim period" because it was not clear, to this commenter, what one would review when performing the EQR for the first quarter. AU sec. 722.16 requires the accountant to apply analytical procedures to the interim financial information, which should include, among other things, comparing the quarterly interim financial information with comparable information for the immediately preceding interim period (i.e., the fourth quarter of the prior year, in a first quarter interim review). Because the Board believes the reproposed requirement is appropriately within the scope of an EQR for an interim review, it has retained it in AS No. 7.

[29/] As included in the reproposed standard, these conditions were: (1) the engagement team failed to obtain sufficient appropriate evidence in accordance with the standards of the PCAOB; (2) the engagement team reached an inappropriate overall conclusion on the subject matter of the engagement; (3) the engagement report is not appropriate in the circumstances; or (4) the firm is not independent of its client.

Commenters generally believed that the concurring approval of issuance provision was appropriately described, though one recommended excluding the reference to "due professional care" from the EQR standard because AU sec. 230, Due Professional Care in the Performance of Work, already imposes an overall requirement on auditors to exercise due professional care. Many commenters, however, were critical of the reproposing release's description of the reproposed requirement. A significant number of commenters objected to, or stated that they disagreed with, the statement in the reproposing release that the requirement to exercise due professional care imposes on the engagement quality reviewer essentially the same requirement as the "knows, or should know based on the requirements of this standard" formulation that was originally proposed. Some suggested that the Board is redefining the meaning of due professional care. One commenter stated that "[a] standard of 'knows, or should know' is akin to a strict liability requirement for engagement deficiencies," while another commenter suggested that the Board "clarify that in this context, 'due professional care' is not a negligence standard."

After considering the comments, the Board is adopting the concurring approval of issuance requirement as reproposed. While auditors are already required to exercise due professional care in discharging their responsibilities, comments, as noted above and in the reproposing release, have reflected some confusion about the applicable standard of care in an EQR. Accordingly, reference to due professional care in the requirement is appropriate.

The Board is not redefining due professional care in the context of the EQR standard. As the Board noted in the reproposing release, AU sec. 230 describes due

professional care as "reasonable care and diligence" and makes clear that an auditor who acts negligently, i.e., without "reasonable care and diligence," breaches the duty to exercise due professional care.[30/] Due professional care, as described in AU sec. 230, imposes neither a strict liability nor an actual knowledge standard. The Board intends the term to mean "reasonable care and diligence," as described in AU sec. 230.

The application of a negligence standard to the concurring approval of issuance provision means, as noted in the reproposing release, that "a reviewer cannot evade responsibility because, as a result of an inadequate review, he or she did not discover a problem that a reasonably careful and diligent review would have revealed."[31/] For that reason, the provision requires the reviewer to perform the required review with due professional care as a prerequisite to providing concurring approval of issuance. A qualified reviewer who has done so will, necessarily, have discovered any significant engagement deficiencies that could reasonably have been discovered under the circumstances. Accordingly, under AS No. 7, such a reviewer may provide concurring approval of issuance if "he or she is not aware of a significant engagement deficiency." Because a reviewer who has not performed the required review with due professional care might not have discovered any significant engagement deficiencies that could reasonably have been discovered under the circumstances – i.e., those the reviewer

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30/ See AU sec. 230.03.

31/ Of course, to impose the more severe sanctions authorized under the Act, such as a permanent bar or permanent revocation of registration, the Board must establish "(A) intentional or knowing conduct, including reckless conduct, that results in violation of the applicable statutory, regulatory, or professional standard; or (B) repeated instances of negligent conduct, each resulting in a violation of the applicable statutory, regulatory, or professional standard." Section 105(c)(5) of the Act; see also Rules on Investigations and Adjudications, PCAOB Release No. 2003-015, Appendix 2 at A2-76 (September 29, 2003) (discussing Section 105(c)(5)).

reasonably should know about – such a reviewer may not, consistent with the standard, provide concurring approval of issuance.

Documentation of the EQR

The reproposed standard required the EQR documentation to contain sufficient information to identify: who performed the review, the documents reviewed, whether and when concurring approval of issuance was provided or the reasons for not providing the approval, and the significant discussions held, including the details of such discussions. These provisions were intended to respond to comments expressing concern that the originally proposed documentation requirements were overly detailed and would result in duplication of the engagement team's work. Some commenters reiterated their concerns that some of the reproposed requirements were duplicative of requirements to document the engagement itself or overly burdensome.

The Board continues to believe that it is necessary to strengthen the documentation requirements in the interim standard to provide for an informative record of the work performed during the EQR. At the same time, the Board has reconsidered its approach to the documentation requirement in light of the comments received. As described below, the Board has added a general requirement that places the specific requirements in the context of the overall purpose of EQR documentation – to provide a record of how the reviewer carried out the review in accordance with the standard's requirements.

Specifically, paragraph 19 of AS No. 7 includes a requirement for the engagement documentation to contain sufficient information to enable an experienced auditor,[32/] having no previous connection with the engagement, to understand the procedures performed by the engagement quality reviewer, and others who assisted the reviewer, to comply with the provisions of the standard.[33/] This provision is similar to the audit documentation requirement in paragraph 6 of AS No. 3, and should clarify how the more specific requirements are meant to apply in particular circumstances.

For example, if a reviewer identified a significant engagement deficiency to be addressed by the engagement team, the engagement team should document its response to the identified deficiency in accordance with AS No. 3. Because AS No. 7 does not require duplication of documentation prepared by the engagement team, the engagement quality reviewer does not have to separately document the engagement team's response. Rather, the EQR documentation should contain sufficient information to enable an experienced auditor, having no previous connection with the engagement, to understand, e.g., the significant deficiency identified, how the reviewer communicated the deficiency to the engagement team, why such matter was important, and how the reviewer evaluated the engagement team's response. Similarly, if the reviewer participated in the discussion of the potential for material misstatement due to fraud,[34/] and the engagement team documented the discussion in accordance with AS No. 3, AS No. 7 only requires the

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32/ As described in paragraph 6 of AS No. 3, "[a]n experienced auditor has a reasonable understanding of audit activities and has studied the company's industry as well as the accounting and auditing issues relevant to the industry."

33/ Additionally, for clarity of presentation, the Board moved the requirement to include documentation of an EQR in the engagement documentation from paragraph 19 to a new paragraph 20 in AS No. 7.

34/ See paragraph .14 of AU sec. 316, Consideration of Fraud in a Financial Statement Audit.

engagement quality reviewer or reviewer's assistants to prepare separate documentation if the documentation prepared by the engagement team does not contain sufficient information to enable an experienced auditor, having no previous connection with the engagement, to understand the procedures performed by the engagement quality reviewer, and others who assisted the reviewer, to comply with the provisions of AS No. 7.

In response to comments, the Board also considered whether modifications were necessary to the specific requirements. First, the Board received several comments related to the provisions of reproposed paragraph 19.b, which required the EQR documentation to contain information sufficient to identify the documents reviewed. One commenter believed that a reviewer "may feel compelled to engage in an unnecessary review of additional documents in order to compile a more 'complete' list." Conversely, another commenter believed that the reviewer would be discouraged "to inspect one or more documents than he or she otherwise might or should, thus reducing the quality of the EQR." Some commenters suggested clarifying how the documents should be identified as "reviewed" (i.e., electronically or manually), or suggested limiting the scope of paragraph 19.b to "significant documents."

After considering these comments, the Board has decided to include this requirement in AS No. 7. Identifying a document as reviewed by the engagement quality reviewer should not be unduly burdensome, and will provide an informative record. Such a record could provide registered firms, and the Board, with better information about the EQR, which can be used to evaluate and improve the EQR process. The Board believes it is unnecessary to require in the standard a particular document identification method,

such as electronic or manual signature. Rather, this should be determined by each firm individually.

Second, a number of commenters believed that the requirement in paragraph 19.c to document details of significant discussions held by the reviewer, and others who assisted the reviewer, would not improve audit quality and that it would be costly to implement. These commenters suggested that the reviewer might not be able to determine whether a discussion is significant at the time a discussion is held and therefore feel compelled to document every discussion. In order to make clear that documentation of every discussion is neither required nor a prudent use of resources, the Board has not included an explicit requirement to document discussions in AS No. 7. As explained above, however, if documentation of a particular discussion is necessary "to enable an experienced auditor, having no previous connection with the engagement, to understand the procedures performed . . . to comply with the provisions of th[e] standard," such documentation is required under the general documentation requirement.

Effective Date

In reproposing the standard, the Board intended to make a final standard effective for EQRs of interim reviews for fiscal years beginning after December 15, 2009 and for EQRs of audits for fiscal years ending on or after December 15, 2009. Several commenters were concerned that the proposed effective date would not allow for sufficient time to train the auditing firm's personnel and implement the new EQR requirements. These commenters recommended that the effective date of the EQR standard be linked to the beginning of an audit period to provide adequate time for registered firms to prepare for adoption. The Board agrees with the concerns expressed

by the commenters and has decided to make AS No. 7 effective, subject to SEC approval, for both the EQR of audits and the EQR of interim reviews for fiscal years beginning on or after December 15, 2009.

Comparison with other EQR Standards

Three commenters suggested that the Board provide a comparison between the EQR standard and standards of other standard-setters on this subject. One commenter noted that because issuer clients often represent a minor part of a smaller firm's audit client base, the audit methodology of such a firm may be based on other standards as well as PCAOB standards. In response, the Board has described certain significant differences between the Board's EQR standard and the analogous standards of the International Auditing and Assurance Standards Board ("IAASB")[35/] and the Auditing Standards Board ("ASB") of the AICPA[36/].

This comparison is provided for informational purposes only and may not represent the views of the ASB or IAASB regarding the interpretation of their standards. It describes only certain provisions of AS No. 7, and is not a substitute for the EQR standard itself. Compliance with AS No. 7 is required for registered public accounting firms. Compliance with the analogous ASB and IAASB standards is not sufficient to meet the requirements of AS No. 7.

35/ International Standard on Quality Control 1, Quality Control for Firms that Perform Audits and Reviews of Financial Statements, and Other Assurance and Related Services Engagements, and International Standard on Auditing 220, Quality Control for an Audit of Financial Statements, issued in December 2008.

36/ AICPA, Statement on Quality Control Standards No. 7, A Firm's System of Quality Control (October 2007).

The Board has developed AS No. 7 to enhance the quality of the engagement quality review ("EQR") process by strengthening the provisions of the Board's interim standard.[37] Recently, the ASB and IAASB also updated their standards related to the EQR, and the Board considered information in the standards of the ASB and IAASB when developing its new EQR standard. As described in this section, AS No. 7 includes provisions that are similar in terminology and substance to those in the ASB and IAASB standards, and other provisions added as necessary by the Board. For example, the Board included certain provisions in AS No. 7 that are not included in the standards of the ASB or IAASB to: comply with the requirements of the Act; respond to the feedback received on the interim standard from the Board's Standing Advisory Group ("SAG") and information obtained through PCAOB oversight of registered firms; and to ensure consistency of the provisions of AS No. 7 with the provisions and terminology of other relevant standards of the PCAOB.

Some of the provisions of the IAASB standards described in this section are included in the "Application and Other Explanatory Material" section of these standards. That section "does not in itself impose a requirement," but "is relevant to the proper application of the requirements of an ISA."[38] In contrast, the comparable provisions of AS No. 7 are included in the standard, and establish requirements.

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[37] The Securities and Exchange Commission Practice Section ("SECPS") of the AICPA Requirements of Membership Sections 1000.08(f); 1000.39, Appendix E.

[38] See paragraph A59 of ISA 200, Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with International Standards on Auditing.

Applicability

PCAOB

Section 103 of the Act requires the Board to adopt an EQR standard for audit engagements.[39/] Because of the importance of interim financial information to investors, the Board has decided to include a requirement to perform an EQR for reviews of interim financial information performed in accordance with AU section ("sec.") 722, Interim Financial Information, ("interim reviews") in the EQR standard. Accordingly, AS No. 7 requires an EQR and concurring approval of issuance for each audit engagement and for each interim review engagement conducted pursuant to the standards of the PCAOB.[40/]

ASB

SQCS No. 7 does not require an EQR for any type of engagement. Accounting firms should determine whether an EQR is required for any engagement.[41/]

IAASB

ISQC 1 requires an EQR only for audits of financial statements of listed entities. Accounting firms should determine whether an EQR is required for any other engagements.[42/]

39/ See Section 103(a)(2)(A)(ii) of the Act.

40/ See paragraph 1 of AS No. 7.

41/ See paragraphs 80-81 and 83 of SQCS No. 7.

42/ See paragraphs 35(a)-(b) of ISQC 1.

Qualifications of a Reviewer

PCAOB

Associated Person – In order to obtain cooperation with the Board of the individuals that perform an EQR,[43/] the Board included in AS No. 7 a requirement, according to which the engagement quality reviewer must be an associated person of a registered public accounting firm.[44/]

A Reviewer from Outside the Firm – Similar to the standards of the ASB and IAASB, AS No. 7 allows a qualified individual from outside the firm to perform an EQR.[45/]

Partner or Person in an Equivalent Position – Because the EQR is intended to be an objective "second look" at work performed by the engagement team, the reviewer should possess sufficient authority to be able to withstand pressure from the engagement partner or other firm personnel, such as members of the firm's national office. The Board believes that concerns about authority will most often arise when the reviewer and the engagement partner are from the same firm. Therefore, the Board included in AS No. 7 the requirement that an in-house reviewer – but not one from outside the firm – be a partner or another individual in an equivalent position.[46/]

[43/] A registered public accounting firm has an obligation to secure and enforce consents to cooperate with the Board from each associated person of the firm, see Section 102(b)(3) of the Act, including those who become associated with the firm by performing the review. The Board also may directly sanction any such person who fails to cooperate in an investigation or inspection. See Section 105(b)(3) of the Act and PCAOB Rules 5110 and 4006.

[44/] See paragraph 3 of AS No. 7.

[45/] See id.

General Competence Requirement – The Board included in AS No. 7 a requirement for the reviewer to possess the level of knowledge and competence related to accounting, auditing, and financial reporting required to serve as the engagement partner on the engagement under review.[47] Without such knowledge and competence, the reviewer would not be able to appropriately evaluate the significant judgments made and related conclusions reached by the engagement team in an audit or an interim review.

Independence, Integrity, and Objectivity – The reviewer must comply with all applicable independence requirements,[48] and perform the review with integrity and objectivity.[49] The engagement quality reviewer should be able to take a step back and conduct the review from the perspective of an outsider looking in.

Accordingly, AS No. 7 requires that the firm's quality control policies and procedures should include provisions to provide the firm with reasonable assurance that the engagement quality reviewer has sufficient competence, independence, integrity, and objectivity to perform the engagement quality review in accordance with the standards of the PCAOB.[50] As described later, the ASB and IAASB contain similar provisions, except the standards of IAASB do not include the direction on independence for the reviewer.

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[46] See id.

[47] See paragraph 5 of AS No. 7. PCAOB interim quality control standards describe the competencies required of a person who has the overall responsibility for an engagement (or any practitioner-in-charge of an attest engagement). See QC sec. 40, The Personnel Management Element of a Firm's System of Quality Control-Competencies Required by a Practitioner-in-Charge of an Attest Engagement.

[48] See, e.g., Rule 2-01(c)(6) of Regulation S-X, 17 C.F.R. § 210.2-01(c)(6) (subjecting the engagement quality reviewer to the five-year partner rotation requirement).

[49] See ET sec. 102, Integrity and Objectivity, and ET sec. 191, Ethics Rulings on Independence, Integrity, and Objectivity.

While AS No. 7 does not contain the direction included in the standards of ASB and IAASB that the firm's policies and procedures should establish the degree to which a reviewer can be consulted on the engagement without compromising his or her objectivity,[51] or provide for the replacement of the reviewer when the reviewer's ability to perform an objective review has been, or may be, impaired,[52] such direction is implicit in the requirement of AS No. 7 that a reviewer must maintain objectivity in performing the EQR.[53] Importantly, AS No. 7 provides direction on maintaining objectivity, according to which the engagement quality reviewer and others who assist the reviewer should not make decisions on behalf of the engagement team or assume any of the responsibilities of the engagement team.[54]

"Cooling-off" period – An engagement quality reviewer is expected to take a fresh, objective look at the engagement. The Board believes that it would be harder for an engagement partner, who has had overall responsibility for the audit for a year or more, to perform the EQR with the necessary level of objectivity. Accordingly, AS No. 7 includes a requirement, according to which the reviewer may not be the person who served as the engagement partner during either of the two audits preceding the audit subject to the EQR. (Registered firms that qualify for the exemption under Rule 2-

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[50] See paragraph 4 of AS No. 7.

[51] See paragraph 96 of SQCS No.7; paragraph 39(b) of ISQC 1.

[52] See paragraph 97 of SQCS No. 7; paragraph 41 of ISQC 1.

[53] See paragraph 6 of AS No. 7.

[54] See paragraph 7 of AS No. 7.

01(c)(6)(ii) of Regulation S-X, 17 C.F.R. § 210.2-01(c)(6)(ii), are exempt from this requirement.)[55/]

ASB

SQCS No. 7 requires an auditing firm to establish the engagement quality reviewer qualifications, including those related to experience, authority, and objectivity.[56/] SQCS No. 7 describes the engagement quality reviewer as a partner, other person in the firm, qualified external person, or a team made up of such individuals, none of whom is part of the engagement team, with sufficient and appropriate experience and authority to perform the EQR.[57/] According to SQCS No. 7, what constitutes sufficient and appropriate technical experience, and authority depends on the circumstances of the engagement.[58/]

SQCS No. 7 does not include a "cooling-off" period, or a requirement for the reviewer to be an associated person of a registered public accounting firm.

Similar to AS No. 7, SQCS No. 7 requires that the firm establish policies and procedures designed to maintain the objectivity of the reviewer, and that such policies and procedures provide that the reviewer should satisfy the independence requirements relating to the engagements reviewed.[59/] Unlike AS No. 7, SQCS No. 7 does not provide

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55/ See paragraph 8 of AS No. 7.

56/ See paragraphs 92-94 of SQCS No. 7.

57/ See paragraph 5.e of SQCS No. 7.

58/ See paragraph 93 of SQCS No. 7.

59/ See paragraph 94 of SQCS No. 7.

a specific direction on maintaining objectivity. Instead, SQCS No. 7 provides examples of policies and procedures for maintaining the objectivity of the reviewer.[60/]

IAASB

ISQC 1 requires an auditing firm to establish the engagement quality reviewer qualification requirements, including those related to experience, authority, and objectivity.[61/] The engagement quality reviewer is described as a partner, other person in the firm, suitably qualified external person, or a team made up of such individuals, none of whom is part of the engagement team, with sufficient and appropriate experience and authority to objectively evaluate the significant judgments the engagement team made and the conclusions it reached in formulating the report.[62/] The application materials in ISQC 1 state that what constitutes sufficient and appropriate technical expertise, experience and authority depends on the circumstances of the engagement.[63/]

ISQC 1 and ISA 220 do not include reviewer independence or "cooling-off" requirements, or a requirement for the reviewer to be an associated person of a registered public accounting firm.

Similar to AS No. 7, ISQC 1 requires that the firm establish policies and procedures designed to maintain the objectivity of the reviewer.[64/] Unlike AS No. 7, the IAASB standards do not provide specific direction on maintaining objectivity. Instead,

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60/ See paragraph 95 of SQCS No. 7.

61/ See paragraphs 39 and 40 of ISQC 1.

62/ See paragraph 12(e) of ISQC 1; paragraph 7(c) of ISA 220.

63/ See paragraph A47 of the Application and Other Explanatory Materials of ISQC 1.

64/ See paragraph 40 of ISQC 1.

the application materials of ISQC 1 discuss policies and procedures for maintaining the objectivity of the reviewer.[65/]

Engagement Quality Review for an Audit

Engagement Quality Review Process

PCAOB

Similar to the standards of the ASB and IAASB, AS No. 7 requires the reviewer to evaluate the significant judgments made and the related conclusions reached by the engagement team in forming the overall conclusion on the engagement and in preparing the engagement report; and to carry out the review through discussions with those performing the engagement and the review of documentation.[66/]

Further, AS No. 7 specifically requires the reviewer, among other things, to evaluate:

- The significant judgments that relate to engagement planning;[67/]
- The engagement team's assessment of and audit responses to significant risks, including fraud risks;[68/] and
- The significant judgments made about identified misstatements and control deficiencies.[69/]

65/ See paragraph A49 of the Application and Other Explanatory Materials of ISQC 1.

66/ See paragraph 9 of AS No. 7.

67/ See paragraph 10.a of AS No. 7.

68/ See paragraph 10.b of AS No. 7.

Also, AS No. 7 contains a requirement, similar to a requirement for audits of listed entities in ISA 220, according to which the reviewer, based on the procedures required by the standard, should evaluate whether appropriate consultations have taken place on difficult or contentious matters, and review the documentation, including conclusions, of such consultations.[70/]

According to PCAOB Rule 3520, Auditor Independence, "[a] registered public accounting firm and its associated persons must be independent of the firm's audit client throughout the audit and professional engagement period." Because of the importance of compliance with PCAOB and SEC independence requirements, AS No. 7 requires the reviewer to review the engagement team's evaluation of the firm's independence in relation to the engagement.[71/]

In 2004, the Board adopted Auditing Standard No. 3, Audit Documentation ("AS No. 3"). According to paragraph 13 of AS No. 3, the auditor must identify all significant findings or issues in an engagement completion document. AS No. 7 requires the reviewer to review the engagement completion document and confirm with the person who has overall responsibility for the engagement that there are no significant unresolved matters.[72/]

69/ See paragraph 10.c of AS No. 7.

70/ See paragraph 10.h of AS No. 7.

71/ See paragraph 10.d of AS No. 7.

72/ See paragraph 10.e of AS No. 7.

Similar to the standards of the ASB and IAASB, AS No. 7 requires the reviewer to review the financial statements and the related engagement report.[73] Additionally, because an integrated audit includes an audit of internal control over financial reporting,[74] AS No. 7 requires the reviewer to review management's report on internal control.[75]

An issuer may publish various documents that contain information in addition to audited financial statements and the auditor's report thereon. The auditor is required to read the other information and consider whether such information, or the manner of its presentation, is materially inconsistent with information, or the manner of its presentation, appearing in the financial statements.[76] Accordingly, AS No. 7 requires the reviewer to read other information in documents containing the financial statements to be filed with the SEC and evaluate whether the engagement team has taken appropriate action with respect to any material inconsistencies with the financial statements or material misstatements of fact of which the engagement quality reviewer is aware.[77]

Finally, because of the importance to the audit process of effective communication between the auditor and those charged with governance, AS No. 7

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[73] See paragraph 10.f of AS No. 7.

[74] PCAOB Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements establishes requirements and provides direction that apply when an auditor is engaged to perform an audit of management's assessment of the effectiveness of internal control over financial reporting.

[75] See paragraph 10.f of AS No. 7.

[76] See AU sec. 550, Other Information in Documents Containing Audited Financial Statements.

[77] See paragraph 10.g of AS No. 7.

requires the reviewer, based on the procedures required by the standard, to evaluate whether appropriate matters have been communicated, or identified for communication, to the audit committee, management, and other parties, such as regulatory bodies.[78/]

ASB

Similar to AS No. 7, SQCS No. 7 requires that the EQR procedures include an objective evaluation of the significant judgments made by the engagement team and the conclusions reached in formulating the report.[79/] The EQR performed in accordance with SQCS No. 7 should include: reading the financial statements or other subject matter information and the report and considering whether the report is appropriate; review of selected documentation; and a discussion with the engagement partner regarding significant findings and issues.[80/]

In addition to the required procedures summarized in the preceding paragraph, an EQR performed in accordance with SQCS No. 7 may include consideration of certain other matters, examples of which are provided in the standard. SQCS No. 7 also provides examples of significant judgments that could be made by the engagement team.[81/]

IAASB

78/ See paragraph 10.i of AS No. 7.

79/ See paragraph 85 of SQCS No. 7.

80/ See paragraphs 86 and 87 of SQCS No. 7.

81/ See paragraphs 88 and 89 of SQCS No. 7.

The EQR procedures required by the standards of the IAASB are similar to those required by the ASB.[82/] Additionally, for audits of listed entities, the IAASB standards require the reviewer to consider: the engagement team's evaluation of the firm's independence in relation to the engagement; and whether appropriate consultation has taken place on matters involving differences of opinion or other difficult or contentious matters, and the conclusions arising from those consultations.[83/]

Evaluation of Engagement Documentation

PCAOB

AS No. 7 includes a documentation review requirement that is similar to the requirement for audits of listed entities in the IAASB standards. According to AS No. 7, the reviewer should evaluate whether the engagement documentation that he or she reviewed when performing the required EQR procedures indicates that the engagement team responded appropriately to significant risks and supports the conclusions reached by the engagement team with respect to the matters reviewed.[84/]

ASB

Unlike AS No. 7, SQCS No. 7 does not require the reviewer to evaluate whether the engagement documentation satisfies certain criteria. Instead, SQCS No. 7 states that an EQR may include consideration of whether working papers selected for review reflect

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82/ See paragraph 37 of ISQC 1; paragraph 20 of ISA 220.

83/ See paragraphs 38(a) and 38(b) of ISQC 1; paragraphs 21(a) and 21(b) of ISA 220.

84/ See paragraph 11 of AS No. 7.

the work performed in relation to the significant judgments and support the conclusions reached.[85/]

IAASB

Similar to AS No. 7, the IAASB standards require, for audits of financial statements of listed entities, that the reviewer consider whether audit documentation selected for review reflects the work performed in relation to the significant judgments and supports the conclusions reached.[86/]

Concurring Approval of Issuance and Resolution of Differences of Opinion

PCAOB

Under the Act,[87/] the Board's standard on EQR must require concurring approval of issuance of each audit report. AS No. 7 states that the engagement quality reviewer may provide concurring approval of issuance only if, after performing with due professional care the review required by the standard, he or she is not aware of a significant engagement deficiency.[88/] The firm may grant permission to the client to use the engagement report only after the engagement quality reviewer provides concurring approval of issuance.[89/]

85/ See paragraph 88 of SQCS No. 7.

86/ See paragraph 38(c) of ISQC 1; paragraph 21(c) of ISA 220.

87/ See Section 103(a)(2)(A)(ii) of the Act..

88/ According to paragraph 12 of AS No. 7, "A significant engagement deficiency in an audit exists when (1) the engagement team failed to obtain sufficient appropriate evidence in accordance with the standards of the PCAOB, (2) the engagement team reached an inappropriate overall conclusion on the subject matter of the engagement, (3) the engagement report is not appropriate in the circumstances, or (4) the firm is not independent of its client."

Unlike the standards of the ASB and IAASB, AS No. 7 does not include an explicit provision for addressing differences of opinion. Firms may develop their own procedures for resolving such differences. Ultimately, however, under the standard, the reviewer may not provide concurring approval of issuance if there remains a significant engagement deficiency. If no concurring approval is provided, AS No. 7 requires that the EQR documentation include information that identifies the reasons for not providing the approval.

ASB

SQCS No. 7 does not include a requirement for the engagement quality reviewer to provide concurring approval of issuance. Instead, SQCS No. 7 requires the EQR be completed before the engagement report is released.[20/] According to SQCS No. 7, when the engagement quality reviewer makes recommendations that the engagement partner does not accept and the matter is not resolved to the reviewer's satisfaction, the firm's procedures for dealing with differences of opinion apply.[21/] The firm's policies and procedures should require that conclusions reached be documented and implemented, and the engagement report not be released until the matter, on which the difference of opinion has arisen, is resolved.[22/]

19/ See paragraph 13 of AS No. 7.

20/ See paragraph 81 of SQCS No. 7.

21/ See paragraph 91 of SQCS No. 7.

22/ See paragraph 78 of SQCS No. 7.

IAASB

The standards of the IAASB do not include a requirement for the engagement quality reviewer to provide concurring approval of issuance. Instead, the IAASB standards require that the engagement partner should not date the auditor's report until the completion of the EQR.[23/] If differences of opinion arise between the engagement partner and the engagement quality reviewer, ISA 220 requires the engagement team to follow the firm's policies and procedures for dealing with and resolving differences of opinion.[24/] ISQC 1 requires the firm to establish policies and procedures for dealing with and resolving differences of opinion between the engagement partner and the engagement quality reviewer. Such policies and procedures shall require that conclusions reached be documented and implemented, and the report not be dated until the matter is resolved.[25/]

Documentation of an EQR

PCAOB

Because of deficiencies in the documentation of concurring reviews, the Board decided to strengthen the existing documentation requirements. AS No. 7 requires that documentation of an EQR should contain sufficient information to enable an experienced auditor, having no previous connection with the engagement, to understand the procedures performed by the engagement quality reviewer, and others who assisted the reviewer, to comply with the provisions of the standard, including information that identifies: the engagement quality reviewer, and others who assisted the reviewer; the

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23/ See paragraph 36 of ISQC 1; paragraph 19(c) of ISA 220.

24/ See paragraph 22 of ISA 220.

25/ See paragraphs 43-44 of ISQC 1.

documents reviewed by the engagement quality reviewer and others who assisted the reviewer; and the date the engagement quality reviewer provided concurring approval of issuance or, if no concurring approval of issuance was provided, the reasons for not providing the approval.[26/]

Unlike the standards of the ASB or the IAASB, AS No. 7 requires that the documentation of an EQR be included in the engagement documentation and provides requirements related to retention of and subsequent changes to the EQR documentation.[27/]

ASB

According to SQCS No. 7, the documentation of an EQR should state that the procedures required by the firm's policies on EQR have been performed, the EQR has been completed before the report is released, and the reviewer is not aware of any unresolved matters that would cause the reviewer to believe that the significant judgments the engagement team made and the conclusions they reached were not appropriate.[28/]

SQCS No. 7 requires that the firm should: establish procedures designed to maintain the confidentiality, safe custody, integrity, accessibility, and retrievability of engagement documentation; and establish policies and procedures for the retention of

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26/ See paragraph 19 of AS No. 7.

27/ See paragraphs 20-21 of AS No. 7.

28/ See paragraph 99 of SQCS No. 7.

engagement documentation for a period sufficient to meet the needs of the firm, professional standards, laws, and regulations.[99/]

IAASB

The engagement quality reviewer is required to document that the procedures required by the firm's policies on the EQR have been performed, the EQR has been completed on or before the date of the auditor's report, and the reviewer is not aware of any unresolved matters that would cause the reviewer to believe that the significant judgments the engagement team made and the conclusions they reached were not appropriate.[100/]

ISQC 1 requires that the firm should establish policies and procedures related to the completion of the assembly of final engagement files; confidentiality, safe custody, integrity, accessibility and retrievability of engagement documentation; and retention of engagement documentation.[101/]

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Within 75 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(a) by order approve such proposed rules; or

99/ See paragraphs 63-71 of SQCS No. 7.

100/ See paragraph 42 of ISQC 1; paragraph 25 of ISA 220.

101/ See paragraphs 45-47 of ISQC 1.

(b) institute proceedings to determine whether the proposed rules should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/pcaob.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number PCAOB-2009-02 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 PCAOB-2009-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/pcaob/shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with

the Commission, and all written communications relating to the proposed rule 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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB-2009-02 and should be submitted on or before [insert 21 days from publication in the Federal Register].

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary