SECURITIES AND EXCHANGE COMMISSION

This file is maintained pursuant to the Freedom of Information Act (5 U.S.C. 552). It contains a copy of each decision, order, rule or similar action of the Commission, for **January 2011,** with respect to which the final votes of individual Members of the Commission are required to be made available for public inspection pursuant to the provisions of that Act.

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

MARY L. SCHAPIRO, CHAIRMAN

KATHLEEN L. CASEY, COMMISSIONER

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

(53 DOCUMENTS)

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-9169; 34-63646, 39-2473, IC-29547]

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect updates to the EDGAR system. The revisions are being made primarily to implement the new EDGARLink Online Application which will allow filers to submit EDGARLink submission form types online without the use of the offline EDGARLink Tool, to support the electronic filing of submission form types ABS 15G, ABS 15G/A, a new Form 8-K Item 6.10, and to support minor changes in XBRL validations for filings containing Exhibit 101 attachments. The EDGAR system is scheduled to be upgraded to support this functionality on December 13, 2010.

The filer manual is also being revised to address changes previously made in EDGAR to support the electronic filing of new submission form types SC 14N, SC 14N/A, SC 14N-S, SC 14N-S/A, and the new Form 8-K Item 5.08.

The revisions to the Filer Manual reflect changes within Volume I entitled EDGAR Filer Manual, Volume I: "General Information," Version 9 (December 2010) and Volume II entitled EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 16 (December 2010). The updated manual will be incorporated by reference into the Code of Federal Regulations.

EFFECTIVE DATE: [Insert date of publication in the Federal Register.] The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: In the Division of Corporation Finance, for questions concerning submission form types ABS 15G, ABS 15G/A, SC 14N, SC 14N/A, SC 14N-S, SC 14N-S/A, Form 8-K Item 5.08 and Item 6.10 contact Cecile Peters, Chief, Office of Information Technology, at (202) 551-3600; in the Office of Interactive Disclosure for questions concerning XBRL validation requirements contact Jeffrey Naumann, Assistant Director of the Office of Interactive Disclosure, at (202) 551-5352; 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], EDGARLink Online, and the Online Forms/XML website.

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

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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 September 15, 2010. See Release No. 33-9140 (September 9, 2010) [75 FR 55965].

[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).

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 10.4 on December 13, 2010 and will introduce a new EDGARLink Online Application (EDGARLink Online) to allow filers to submit EDGARLink submission form types online, without the use of the offline EDGARLink Tool. EDGARLink Online can be accessed from the EDGAR Filing website (*https://www.edgarfiling.sec.gov*), by selecting the "EDGARLink Online Submissions" or by clicking the "Are you an EDGARLink filer or would you like to create a new Asset-Backed Securities Issuing Entity?" link from the EDGAR Portal Web site (*http://www.portal.edgarfiling.sec.gov*). The existing offline EDGARLink Tool and the associated Templates 1-6 will continue to be available. A new chapter, "Preparing and Transmitting EDGARLink Online Submissions", has been added to Volume II of the EDGAR Filer Manual to guide filers through the filing process using the new tool.

Submission type ABS 15G[5] and its amendment will be available on EDGARLink Online only.

A new 8-K Item 6.10 (Alternative Filings of Asset-Backed Issuers) will be available on EDGARLink Submission Template #3 and EDGARLink Online for submission form types 8-K and 8-K/A. Item 6.10 requires a PDF attachment to be included as Exhibit 99.

In addition, the validation rules processed for filings containing EX-101.INS XBRL documents will be changed to remove restrictions to allow domain items to be abstract and to allow footnoteArc elements to omit the order attribute. The validations were relaxed for EX-

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[4] See Release No. 33-9140 (September 9, 2010) [75 FR 55965] in which we implemented EDGAR Release 10.3. For a additional history of Filer Manual rules, please see the cites therein.

[5] See Proposing Release No. 33-9148, Disclosure for Asset-Backed Securities Required by Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

101.INS XBRL documents to allow a Discoverable Taxonomy Set (DTS) that has type declarations in any standard international or US namespace, to allow internationally recommended type and role declarations to be used in its DTS, and for documents whose DTS has arc role declarations to allow the link:footnoteArc element to have an arcrole that is either standard or is declared in a standard taxonomy schema. Additional validations were added for EX-101.INS XBRL documents to require a DTS that has type declarations in any standard international or US namespace to enforce restrictions on combinations of numeric data types and unit of measure declarations according to internationally recommended and US-specific data types registry.

The filer manual is also being revised to address a changes made previously in EDGAR to support new submission form types SC 14N, SC 14N-S and their amendments on both the offline EDGARLink Template #2 and EDGARLink Online and a new item in Form 8-K Item 5.08 (Shareholder Director Nominations) on both the offline EDGARLink Template #3 and EDGARLink Online for submission form types 8-K, 8-K12B, 8-K12G3, 8-K15D5 and their amendments. However, the use of the SC 14N, SC 14N-S and Form 8-K Item 5.08 is delayed until further notice. See Order Rel. No. 33-9149 (Order Granting Stay) and Rel. No. 33-9151 (Notice of stay of effective and compliance dates) for more information.

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 1543, Washington DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. We will post electronic format copies on the Commission's website; 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).[6] It follows that the requirements of the Regulatory Flexibility Act[7] 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,[8] 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 10.4 is scheduled to become available on December 13, 2010. 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,[9] Sections 3, 12, 13, 14, 15, 23, and 35A of the Securities Exchange

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[6] 5 U.S.C. 553(b).

[7] 5 U.S.C. 601- 612.

[8] 5 U.S.C. 553(d)(3).

[9] 15 U.S.C. 77f, 77g, 77h, 77j, and 77s(a).

Act of 1934,[10] Section 319 of the Trust Indenture Act of 1939,[11] and Sections 8, 30, 31, and 38 of the Investment Company Act of 1940.[12]

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,"

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10 15 U.S.C. 78c, 78l, 78m, 78n, 78o, 78w, and 78ll.

11 15 U.S.C. 77sss.

12 15 U.S.C. 80a-8, 80a-29, 80a-30, and 80a-37.

Version 9 (December 2010). The requirements for filing on EDGAR are set forth in the updated EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 16 (December 2010). 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 1543, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Electronic copies are available on the Commission's website. 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

January 5, 2011

Commissioner Casey
Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9170 / January 6, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 63661 / January 6, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29548 / January 6, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13869

In the Matter of **Paul George Chironis,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940**

I.

On April 23, 2010, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b)(6) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Paul George Chironis ("Chironis" or "Respondent").

II.

In response to these proceedings, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940 as set forth below.

III.

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

Summary

1. While a registered representative at Capital Growth Financial, Inc. ("Capital Growth), a now-defunct broker-dealer, Respondent Paul Chironis defrauded the Sisters of Charity of New York ("Sisters of Charity" or "Congregation") through abusive trading in their accounts. The Sisters of Charity maintained two accounts at Capital Growth (the "Accounts"), both of which contained predominantly mortgage-backed securities, including securities issued or guaranteed by the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), the Government National Mortgage Association (Ginnie Mae), and the Federal Housing Administration ("FHA") (collectively, "MBS"). Chironis was the registered representative on both Accounts.

2. During the period January 1, 2007 through January 31, 2008 (the "Relevant Period"), Chironis engaged in a pattern of abusive trading and charged undisclosed excessive markups and markdowns. In addition, Chironis churned the Accounts by virtue of his de facto control, excessive trading, and reckless disregard for the customer's interests. Specifically, during the Relevant Period, Chironis purchased 46 bonds for the Accounts, predominantly long-term MBS. Of the 46 bonds purchased, he sold 38 within the same period. The average holding period for bonds acquired and sold during the Relevant Period was only 4.3 months. Chironis frequently sold one bond and replaced it with a bond issued by a similar issuer and offering a similar yield over a similar duration. Similarly, Chironis made 35 purchases of closed-end bond funds, selling 12 of these positions during the Relevant Period. The average holding period for the closed-end bond funds purchased and sold during the Relevant Period was 4.8 months. The impact of Chironis' frequent trading of securities in the Accounts was exacerbated by the excessive transaction fees – in the form of markups and markdowns – that Chironis charged.

3. Chironis' trading had a devastating impact on the Accounts, while enriching Chironis. In 2007, the Accounts had an average combined balance of approximately $8.3 million. During the Relevant Period, the Accounts purchased approximately $20.1 million and sold $18 million worth of securities. The trades cost the Accounts $959,027, over 10.8% of their value in 13 months.

4. Although Chironis did not have discretionary authority, Chironis exercised *de facto* control over the Accounts. Chironis recommended transactions to the Chief Financial Officer of the Sisters of Charity (the "CFO"), who, based on their long-standing relationship, relied on Chironis and followed his recommendations. The CFO trusted Chironis to make recommendations that were in the best interest of the Congregation.

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

Respondent

5. Paul George Chironis, age 58, is a resident of Melville, New York. Chironis has worked in the securities industry since 1981 and maintained Series 7 and 63 licenses since 1983. Prior to his association with Capital Growth, Chironis received seven customer complaints filed with the NASD/FINRA, including complaints for churning and unsuitability. As a result of customer complaints, in January 2006, the Michigan Securities Division required that Chironis be placed on heightened supervision, and in March 2006 the Vermont Securities Division prohibited Chironis from soliciting investors in Vermont. Chironis was associated with Capital Growth from November 2005 until February 2008, when Capital Growth ceased business operations. Since March 2009, Chironis has been associated with another registered broker-dealer located in New York, New York.

Other Relevant Entities

6. Capital Growth, a former Florida corporation that had offices in Boca Raton, Florida and New York, New York, was a registered broker-dealer until February 2008, when it ceased operations due to its failure to meet net capital requirements. On February 11, 2008, Capital Growth filed with the Commission a Form BDW, which became effective on April 11, 2008.

7. The Sisters of Charity is a congregation of mostly elderly nuns residing in the Bronx, New York. During the relevant period, the Sisters of Charity maintained two accounts at Capital Growth: a General Account ("General Account") used for operational purposes, including paying for the care of members of the Congregation living in assisted living facilities, and a Charitable Trust Account ("Charitable Trust"), used to support the Congregation's charitable endeavors.

Background

8. Beginning in January 2007, Chironis engaged in an abusive trading pattern that featured excessive trading and charging excessive markups and markdowns on riskless principal bond trades. The Accounts were charged an average markup of 3.68% on the 46 bond purchases, and 3.03% on the 33 closed-end fund purchases. On the 67 bond sales, Capital Growth charged an average markdown of approximately 1.92%. For the 15 closed-end bond fund sales, Capital Growth charged an average markdown of approximately 1.86 %. The markups and markdowns contained two components: (1) the amount charged by Chironis, which constituted the bulk of the markup and markdown, and (2) the additional markup/markdown charged by the trading desk.

9. Attached as Appendix A is a chart listing the bond transactions Chironis made on behalf of the Sisters of Charity during the Relevant Period.

10. Attached as Appendix B is a chart listing the closed-end bond fund transactions that Chironis made on behalf of the Sisters of Charity during the Relevant Period.

11. The combined markups and markdowns charged to the Accounts during the Relevant Period totaled $959,027, which was approximately 10.8% of the combined average value of the Accounts.

Churning

12. During the Relevant Period, Chironis purchased 46 bonds for the Accounts – 39 MBS and seven corporate bonds – worth approximately $12.2 million. Of those 46 securities, he sold 38 – worth approximately $9.6 million – within the same period. The average holding period for the 38 securities bought *and* sold during the Relevant Period was 4.3 months.

13. Chironis frequently replaced one bond with a bond or bonds of similar duration and yield. For example, on July 24, 2007, Chironis sold a Ginnie Mae bond with a 6% coupon rate, a maturity date of 2033 and a principal amount of $258,504.43. The very next day, Chironis purchased a Ginnie Mae bond with the same 6% coupon rate, the same 2033 maturity date and a principal amount of $201,636.05, along with a second Ginnie Mae bond with a 6% coupon rate, a 2032 maturity date and principal amount of $199,956.51. Capital Growth, through Chironis, charged the Accounts approximately $18,352 in transaction fees – in the form of markups and markdowns – on these three transactions. On September 26, 2007, Chironis sold one of the two bonds he purchased two months earlier, and on October 24, 2007, he sold the second.

14. In addition to these bond transactions, Chironis purchased 33 closed-end bond funds – worth approximately $6.5 million – for the Accounts. Chironis sold 12 of these positions, – worth approximately $4.3 million – during the same time. The average holding period for these 12 positions was 4.8 months.

15. Given the low-yielding nature of the securities, the transaction costs involved, and the Congregation's investment objectives, Chironis' trading in the Accounts during the Relevant Period was excessive and designed to generate income in the form of transaction fees for Chironis. During the Relevant Period, the Accounts had a combined turnover ratio of approximately 2.2 and an annualized cost-to-equity ratio of approximately 10.51%. For securities that Chironis bought and sold within the Relevant Period, the Accounts experienced a *realized loss* of approximately $639,000. The combined unrealized and realized loss for the Accounts as of December 31, 2007 was $1,170,000, most of which is attributable to transaction fees.

16. Chironis' frequent trading of fixed income securities with reckless disregard for the customer's interests constituted churning. Given the relatively low yield of the securities that Chironis purchased and sold for the Accounts, the abusive trading caused the Accounts to lose money. In his conversations with the CFO in which he recommended that the Congregation purchase or sell a particular security, Chironis did not disclose the transaction costs and the impact those costs would have on the Accounts; nor did Chironis identify how short a time the fixed income securities he recommended selling had been held. Chironis omitted to disclose that, in light of the transaction costs, the transactions were not in the best interest of the Congregation.

Excessive Markups and Markdowns

17. The impact of Chironis's frequent trading was exacerbated by the excessive amount of the markups and markdowns the Accounts were charged.

18. Capital Growth charged the Accounts on a per-transaction basis by marking down bond sales and marking up bond purchases in "riskless principal" transactions. A "riskless principal" transaction is the economic equivalent of an agency trade. A broker-dealer engaging in such trades has no market making function, buys only to fill orders already in hand, and immediately "books" the shares it buys to its customers. Essentially, the firm serves as an intermediary for others who have assumed the market risk. In other words, the customer purchaser is already lined up before the broker-dealer buys the bond. On such transactions, if a customer wishes to purchase a bond, a broker-dealer locates the bond, purchases it on the open market, and then resells it to its customer at a markup. The reverse is true when a customer sells a bond.

19. Although the markups and markdowns charged on closed-end bond funds were reflected in account statements sent to the Sisters of Charity, the markups and markdowns for bond purchases and sales were not reflected in account statements or otherwise disclosed to the Congregation. As a result, the Congregation was unaware that it was paying approximately 10.8% of the value of the Accounts in transaction fees over 13 months.

20. When Chironis wanted to purchase a bond for the Accounts, he called the Capital Growth trading desk and told the trader the type of bond he wanted to buy. The trader would then bid on offers from the market and reported to Chironis with specific prices. Chironis then confirmed whether he wanted to proceed with the transaction and provided the trader with the amount of markup to charge. In addition to the markups charged by Chironis, which generally ranged from 2.75-3.0%, the Capital Growth trading desk would typically add a percentage markup or markdown of between 0.25-0.75% to compensate the trading desk. Chironis and the trading desk followed a similar procedure for markdowns on bond sales, though the markdowns were generally lower than the markups. Chironis was aware that the trading desk was adding to the markup and markdowns that he instructed the trading desk to charge.

21. Neither Chironis nor the trading desk did significant work in purchasing or selling bonds and MBS for the Accounts. The market for these securities that Chironis purchased and sold for the Accounts was highly liquid. Chironis did little or no research for the transactions. He simply instructed the trading desk as to the type of security he was looking to purchase or which security he wanted to sell. Although the trading desk did some work, including locating bids and offers and negotiating with counterparties, because the market was highly liquid, the work performed by the trading desk was minimal.

22. The undisclosed markups and markdowns charged to the Accounts were excessive given the highly liquid nature of the securities and the little work performed by Capital Growth.

Violations

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

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

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

B. Respondent Chironis shall be, and hereby is, barred from association with any broker, dealer, investment adviser, municipal securities dealer, transfer agent, municipal advisor, or nationally recognized statistical ratings organization, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.

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 the following: (a) the civil penalty ordered against Respondent; (b) the disgorgement and prejudgment interest ordered against Respondent; (c) any self-regulatory organization award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

C. Respondent shall, within 10 days of the entry of this Order, pay disgorgement of $250,000 and a civil money penalty of $100,000. Respondent shall satisfy this obligation by disbursing the foregoing disgorgement and civil penalty pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002 as follows: Respondent shall pay $350,000 by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order to the Sisters of Charity or such other appropriate party or parties as the Commission staff may identify in consultation with Respondent prior to payment. If timely payment is not made, the Securities and Exchange Commission shall enforce this Order and additional interest shall accrue pursuant to Commission Rule of Practice 600 and 31 U.S.C. 3717. Payment shall be submitted under cover letter that identifies Paul George Chironis as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Gerald Gross, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, Room 400, New York, New York, 10281.

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Appendix A
Bond Transactions in The Accounts: January 2007-January 2008

Date	Account	Buy Sell	Type of Security	Issuer	Interest Rate	Price	Amount	Markup/ Mark-down
01.04.07	Charitable Trust	Buy	Bond	Wachovia	5.5%	103.58	$274,487.00	3.45%
01.08.07	Charitable Trust	Buy	MBS	Freddie Mac	6%	105.125	$201,588.13	3.44%
01.24.07	General Account	Buy	MBS	Freddie Mac	5.5%	103.625	$169,905.95	3.5%
01.24.07	Charitable Trust	Buy	MBS	Freddie Mac	6%	105	$263,398.46	3.45%
02.02.07	Charitable Trust	Buy	MBS	Fannie Mae	5.5%	103.75	$243,743.66	3.43%
02.13.07	Charitable Trust	Buy	MBS	Fannie Mae	5.5%	102.375	$162,287.34	3.41%
02.22.07	Charitable Trust	Buy	MBS	Ginnie Mae	6%	105	$250,817.47	3.32%
02.27.07	General Account	Sell	MBS	Ginnie Mae	6%	99.25	($337,414.39)	(1.85%)
03.05.07	General Account	Buy	Bond	Bear Stearns		101.991	$356,968.50	2.26%
03.05.07	General Account	Buy	Bond	Bear Stearns		102.704	$369,749.35	Footnote[2]
03.05.07	General Account	Sell	MBS	Wells Fargo	6%	98	($343,000.00)	(0.81%)
03.19.07	Charitable Trust	Sell	MBS	Ginnie Mae	6.5%	101	($208,117.49)	(1.34%)
03.26.07	General Account	Buy	MBS	Ginnie Mae	6.5%	105.5	$100,433.30	4.46%[3]
03.26.07	Charitable Trust	Buy	MBS	Ginnie Mae	6.5%	105.5	$101,423.76	4.46%
03.26.07	General Account	Buy	MBS	Ginnie Mae	6%	104.35	$85,898.01	4.51%
03.26.07	Charitable Trust	Buy	MBS	Ginnie Mae	6.5%	105.75	$251,951.78	4.44%
03.27.07	General Account	Sell	MBS	Fannie Mae	5.5%	93	($162,500.00)	(1.98%)
03.27.07	Charitable Trust	Sell	MBS	Wells Fargo	6%	97.5	($170,625.00)	(1.17)
03.28.07	Charitable Trust	Sell	MBS	Countrywide	6%		($154,800.00)	(1.43%)
03.28.07	Charitable Trust	Buy	MBS	Fannie Mae	5.5%	104.31	$391,420.74	3.34%
04.10.07	General Account	Buy	MBS	Freddie Mac	5.5%	104	$246,478.40	3.35%
04.10.07	General Account	Sell	Treasury Bill	United States	0%	46.4	($232,000.00)	(3.33%)
04.19.09	General Account	Sell	MBS	Ginnie Mae	6%	99.25	($249,148.19)	(1.98%)
04.25.07	General Account	Sell	Bond	Bank of America	5.5%	89.25	($148,155.00)	(2.19%)
04.25.07	General Account	Buy	MBS	Fannie Mae	6%	101.75	$96,662.50	5.44%
04.25.07	General Account	Buy	MBS	Ginnie Mae	6%	104.25	$113,729.55	5.3%
04.25.07	General Account	Buy	MBS	Ginnie Mae	6.5%	105.25	$8,600.51	5.25%
04.25.07	General Account	Buy	MBS	Ginnie Mae	6%	104.75	$34,117.37	5.28%
05.09.07	Charitable Trust	Buy	MBS	Fannie Mae	5.5%	102.875	$198,829.58	3.39%
05.23.07	Charitable Trust	Buy	MBS	Fannie Mae	5.5%	101.94	$318,988.78	3.49%
06.25.07	General Account	Buy	MBS	Fannie Mae	5.5%	100.35	$101,567.05	3.45%
06.25.07	Charitable Trust	Buy	MBS	Fannie Mae	5.5%	100.35	$65,392.48	3.45%
06.27.07	General Account	Sell	Bond	Bear Stearns		97.204	($690,148.40)	(1.52%)

[2] Because Capital Growth's clearing firm was unable to produce data regarding this trade, the Division of Enforcement was unable to determine the markup charged.

[3] As shown in this Appendix, with respect to the 8 trades on March 26 and April 25, 2007 where markups between 4.44-5.44% were charged, MBS were purchased by Capital Growth out of an account unrelated to the Sisters of Charity for which Chironis was the registered representative, and were then resold to the Sisters of Charity. The identified markups are calculated by using the price at which the unrelated account sold, and the price the Sisters of Charity's accounts paid.

06.27.07	General Account	Buy	MBS	Ginnie Mae	6%	103.75	$688,175.23	3.39%
06.28.07	Charitable Trust	Sell	MBS	Ginnie Mae	6%	97	($213,793.11)	(2.11%)
07.24.07	General Account	Sell	MBS	Ginnie Mae	6%	97.5	($257,375.49)	(1.86%)
07.24.07	Charitable Trust	Sell	Bond	Wachovia	5.49%	98	($259,700.00)	(1.74%)
07.25.07	General Account	Buy	MBS	Ginnie Mae	6%	103.33	$200,682.39	3.49%
07.25.07	General Account	Buy	MBS	Ginnie Mae	6%	103.33	$199.010.97	3.49%
07.25.07	Charitable Trust	Buy	MBS	Ginnie Mae	6%	103.62	$404,035.49	3.49%
07.26.07	General Account	Sell	MBS	Ginnie Mae	7%	100.75	($30,223.76)	(1.95%)
07.26.07	General Account	Sell	MBS	Ginnie Mae	6.5%	99.25	($45,436.66)	(1.98%)
07.26.07	General Account	Sell	MBS	Ginnie Mae	6%	97.5625	($101,139.51)	(2.01%)
07.26.07	General Account	Sell	MBS	Ginnie Mae	6%	97.5625	($74,455.94)	(2.01%)
07.31.07	Charitable Trust	Sell	MBS	Freddie Mac	6%	98	($224,430.92)	(2.37%)
08.09.07	General Account	Sell	MBS	Ginnie Mae	6.5%	99.75	($86,724.15)	(2.15%)
08.09.07	General Account	Buy	Bond	General Motors	8.375%	88.23	$105,876.00	3.5%
08.15.07	Charitable Trust	Buy	MBS	Ginnie Mae	5.5%	101.35	$105,525.26	3.48%
08.15.07	Charitable Trust	Buy	MBS	Ginnie Mae	6.5%	106	$99,864.44	3.48%
08.15.07	Charitable Trust	Sell	Bond	Wachovia	4.99%	97.25	($145,875.00)	(1.57%)
08.24.07	General Account	Sell	MBS	Ginnie Mae	6%	98.36	($385,906.39)	(1.99%)
08.28.07	Charitable Trust	Sell	MBS	Fannie Mae	5.5%	97.625	($208,877.03)	(1.98%)
08.30.07	Charitable Trust	Sell	MBS	Ginnie Mae	6.5%	100.03125	($213,386.65)	(1.96%)
09.05.07	General Account	Sell	MBS	Ginnie Mae	6%	98.6875	($253,051.95)	(1.99%)
09.11.07	General Account	Sell	MBS	Freddie Mac	5.5%	98.1875	($120,478.83)	(2%)
09.11.07	General Account	Sell	MBS	Fannie Mae	6%	96.3125	($91,496.88)	(2.03%)
09.11.07	General Account	Buy	MBS	Fannie Mae	6%	104.8	$436,010.34	3.47%
09.11.07	General Account	Sell	MBS	Fannie Mae	5.5%	98.1875	$205,568.15	2%
09.17.07	Charitable Trust	Buy	MBS	Fannie Mae	6%	105.14	$200,175.53	3.46%
09.17.07	Charitable Trust	Sell	MBS	Fannie Mae	5.5%	96.03125	($60,920.28)	(2.04%)
09.17.07	Charitable Trust	Sell	MBS	Fannie Mae	6.214%	96.15625	($62,782.35)	(2.04%)
09.17.07	Charitable Trust	Sell	MBS	Ginnie Mae	6.5%	99.65625	($87,137.92)	(1.97%)
09.26.07	Charitable Trust	Sell	MBS	Freddie Mac	6%	97.75	($168,433.06)	(2.01%)
09.26.07	Charitable Trust	Sell	MBS	Fannie Mae	5.5%	97.46875	($319,916.99)	(2.01%)
09.26.07	Charitable Trust	Sell	MBS	Ginnie Mae	5.5%	96.15625	($113,269.27)	(2.04%)
09.26.07	General Account	Sell	MBS	Ginnie Mae	6%	98.359375	($181,820.69)	(1.99%)
09.26.07	General Account	Buy	MBS	Ginnie Mae	5.5%	102.46	$497,110.75	3.49%
09.26.07	Charitable Trust	Buy	MBS	Ginnie Mae	5.5%	102.46	$510,919.39	3.49%
09.26.07	General Account	Sell	MBS	Ginnie Mae	6.5%	99.53125	($49,132.97)	(1.97%)
09.26.07	General Account	Sell	MBS	Ginnie Mae	6%	98.375	($252,476.81)	(1.99%)
10.03.07	General Account	Buy	MBS	Ginnie Mae	5.5%	102.98	$801,400.06	3.5%
10.03.07	General Account	Sell	MBS	Ginnie Mae	6.5%	99.6875	($38,659.28)	(1.97%)
10.03.07	General Account	Sell	MBS	Ginnie Mae	6.5%	99.75	($48,459.69)	(1.97%)
10.03.07	General Account	Sell	MBS	Ginnie Mae	6%	98.5	($28,646.30)	(1.99%)
10.03.07	General Account	Sell	MBS	Ginnie Mae	7%	100.5	($22,528.03)	(1.95%)
10.03.07	General Account	Sell	MBS	Ginnie Mae	7%	101.28125	($27,839.17)	(1.94%)
10.03.07	General Account	Sell	MBS	Ginnie Mae	6%	98.90625	($633,798.44)	(1.98%)
10.09.07	General Account	Sell	MBS	Fannie Mae	5.5%	95.6875	($94,106.15)	(2.05%)
10.09.07	General Account	Sell	MBS	Fannie Mae	5%	87.25	($61,075.00)	(2.24%)
10.09.07	General Account	Buy	MBS	Ginnie Mae	5.5%	102.85	$250,868.00	3.5%
10.09.07	General Account	Sell	MBS	Ginnie Mae	6.5%	99.6875	($28,758.15)	(1.97%)
10.09.07	General Account	Sell	MBS	Ginnie Mae	7%	101.0625	($26,463.14)	(1.94%)
10.12.07	General Account	Sell	Bond	GM	8.375%	90.125	($108,150.00)	(2.17%)
10.15.07	General Account	Buy	Bond	Ford Motors	7.45%	86.4	$129,600.00	3.47%
10.24.07	General Account	Sell	MBS	Ginnie Mae	6%	99.3125	($191,936.45)	(1.97%)
10.24.07	General Account	Buy	MBS	Ginnie Mae	5.5%	103.875	$820,430.19	3.49%

10.25.07	Charitable Trust	Buy	MBS	Ginnie Mae	5.5%	104	$816,585.60	3.48%
10.25.07	Charitable Trust	Sell	MBS	Ginnie Mae	6%	99.484375	($379,466.14)	(1.97%)
10.25.07	Charitable Trust	Sell	Bond	GE	3.238%	95	($95,000.00)	(2.06%)
10.25.07	Charitable Trust	Sell	Bond	GE	5.954%	96.3	($96,300.00)	(2.03%)
10.25.07	Charitable Trust	Sell	Bond	Morgan Stanley	4.93%	96.05	($96,050.00)	(2.04%)
10.25.07	Charitable Trust	Sell	Bond	PB Nova Scotia	0%	95.875	($143,812.50)	(2.04%)
10.29.07	General Account	Buy	MBS	Ginnie Mae	5.5%	103.79	$650,162.82	3.5%
11.07.07	Charitable Trust	Sell	MBS	Fannie Mae	5.281%	94.90625	($29,143.96)	(1.46%)
11.07.09	Charitable Trust	Sell	MBS	Freddie Mac	5.5%	90.625	($235,625.00)	(2.16%)
11.07.07	Charitable Trust	Sell	MBS	Ginnie Mae	5.5%	97.28125	($100,763.57)	(2.01%)
11.07.07	Charitable Trust	Sell	MBS	Ginnie Mae	6.5%	100.125	($93,929.50)	(1.96%)
11.07.07	Charitable Trust	Buy	MBS	Ginnie Mae	5.5%	103.35	$501,281.65	3.45%
11.19.07	Charitable Trust	Sell	MBS	CitiMortgage	6%	87.125	($152,468.75)	(2.24%)
11.28.07	Charitable Trust	Buy	MBS	Ginnie Mae	5%	102.9	$497,543.80	3.48%
11.28.07	Charitable Trust	Buy	Bond	JP Morgan	6.625	109	$54,500.00	3.39%
11.28.07	General Account	Buy	Bond	Wells Fargo	5.25%	105	$52,500.00	3.45%
11.29.07	General Account	Sell	MBS	Freddie Mac	5%	84.25	($151,650.00)	(2.32)
11.29.07	General Account	Buy	MBS	Ginnie Mae	5%	103.2	$498,994.37	3.47%
12.03.07	General Account	Buy	MBS	Ginnie Mae	5.5%	105.375	$303,072.80	3.5%
12.11.07	Charitable Trust	Sell	MBS	Fannie Mae	5.5%	97.40625	($532,058.51)	(2.01%)
12.18.07	General Account	Sell	MBS	Fannie Mae	6%	99.671875	($401,251.47)	(1.48%)
12.26.07	General Account	Sell	MBS	Ginnie Mae	5.5%	98.625	($1,740,585.31)	(1.25%)
01.03.08	Charitable Trust	Buy	MBS	Ginnie Mae	5.5%	104.92	$376,575.69	3.5%
01.17.08	Charitable Trust	Sell	MBS	Fannie Mae	6%	101	($59,975.37)	(1.46%)
01.17.08	General Account	Sell	MBS	Ginnie Mae	5.5%	100	($466,545.29)	(1.96%)
01.23.08	Charitable Trust	Sell	MBS	Ginnie Mae	5.5%	101.421875	($775,643.27)	(1.46%)
01.23.08	General Account	Sell	MBS	Wells Fargo	5.5%		($612,602.19)	(1.46%)
01.31.08	Charitable Trust	Sell	MBS	Ginnie Mae			($478,991.01)	(1.96%)

Appendix B
Closed-End Bond Fund Transactions in the Accounts: January 2007-January 2008[4]

Date	Account	Buy/Sell	Issuer	Amount	Markup/ Markdown
01.31.07	Charitable Trust	Buy	Nuveen	$234,517.68	2.84%
02.01.07	General Account	Buy	Nuveen	$99,918.78	2.91%
02.05.07	Charitable Trust	Buy	RMK	$186,186.89	2.59%
02.05.07	Charitable Trust	Sell	Eaton Vance	($188,033.00)	(1.57%)
02.06.07	Charitable Trust	Buy	Nuveen	$50,082.00	2.79%
02.09.07	Charitable Trust	Buy	Blackrock Income	$200,114.50	2.95%
02.13.07	Charitable Trust	Sell	Eaton Vance	($162,723.20)	(0.52%)
03.19.07	Charitable Trust	Buy	Blackrock Core	$202,466.00	3.05%
03.28.07	Charitable Trust	Sell	Blackrock Income	$257,277.50	2.83%
04.12.07	Charitable Trust	Sell	Pimco	$103,615.80	2.98%
04.19.07	General Account	Buy	Nuveen	$296,998.00	3.13%
05.02.07	Charitable Trust	Buy	Pimco	$83,886.40	3.26%
05.02.07	Charitable Trust	Sell	Eaton Vance	($39,072.18)	(1.15%)
05.10.07	Charitable Trust	Buy	First Trust	$100,284.80	2.65%
05.21.07	General Account	Sell	Eaton Vance	($55,145.05)	(1.15)
05.23.07	Charitable Trust	Sell	Nuveen	($290,200.00)	(0.68%)
06.06.07	General Account	Buy	Pimco	$134,960.00	3.37%
06.20.07	General Account	Buy	Eaton Vance Ltd.	$94,932.90	2.74%
06.21.07	General Account	Buy	Pimco	$101,811.20	2.99%
06.21.07	Charitable Trust	Buy	Pimco	$57,923.54	2.98%
07.02.07	Charitable Trust	Buy	Pimco	$192,110.00	2.67%
07.26.07	General Account	Buy	Blackrock Opportunity	$219,815.00	2.81%
07.31.07	Charitable Trust	Buy	Blackrock Opportunity	$220,000.00	2.35%
08.22.07	General Account	Buy	Pimco	$151,875.00	3.4%
08.29.07	General Account	Buy	Pimco	$305,687.93	3.43%
08.29.07	Charitable Trust	Buy	Pimco	$249,595.50	3.42%
08.30.07	Charitable Trust	Buy	Nuveen	$167,022.70	3.13%
09.05.07	General Account	Buy	Eaton Vance Ltd.	$239,540.00	3.01%
09.28.07	Charitable Trust	Buy	Nuveen	$143,550.00	3%
11.11.07	Charitable Trust	Sell	Blackrock Core	($141,897.60)	(1.66%)
11.11.07	Charitable Trust	Sell	Nuveen	($92,972.00)	(1.69%)
11.13.07	Charitable Trust	Sell	Pimco	($108,840.00)	(1.42%)

[4] In this Appendix B, the following closed-end bond funds are referenced by shortened versions of their names, as follows: Nuveen Floating Rating Income Opportunity Fund ("Nuveen"), RMK High Income Fund ("RMK"), Eaton Vance Senior Floating Rate Trust ("Eaton Vance"), Eaton Vance Limited Duration Income Fund ("Eaton Vance Ltd."), Blackrock Income Opportunity Trust ("Blackrock Income"), Blackrock Core Bond Trust ("Blackrock Core"), Blackrock PFD Opportunity Trust ("Blackrock Opportunity"), Pimco Corporate Opportunity Fund ("Pimco"), First Trust/Four Corners Senior Floating Rate Income Fund II ("First Trust"), Western Asset Worldwide Income Fund ("Western Asset"), Alpine Global Premier Properties Fund ("Alpine"), Alpine Total Dynamic Dividend Fund ("Alpine Dynamic"), Neurberger Berman Real Estate Securities Fund ("Neuberger Berman"), and Evergreen Global Dividend Opportunity Fund ("Evergreen").

11.14.07	Charitable Trust	Buy	Blackrock Opportunity	$204,150.00	2.75%
11.20.07	General Account	Sell	Nuveen	($133,920.00)	(2.62%)
11.28.07	Charitable Trust	Sell	Pimco	($306,481.90)	(2.91%)
11.30.07	General Account	Sell	Pimco	($331,775.00)	(2.93%)
12.04.07	General Account	Sell	Pimco	($207,150.00)	(2.81%)
12.05.07	General Account	Sell	Pimco	($68,117.00)	(2.1%)
12.07.09	General Account	Buy	Western Asset	$106,720.00	3.98%
12.12.07	Charitable Trust	Buy	Western Asset	$202,200.00	3.85%
12.27.07	General Account	Buy	Blackrock Opportunity	$356,000.00	2.89%
01.02.08	General Account	Buy	Alpine	$207,970.45	2.97%
01.03.08	General Account	Buy	Neuberger Berman	$179,121.00	3%
01.07.08	General Account	Buy	Alpine Dynamic	$215,640.00	2.86%
01.08.08	General Account	Buy	Evergreen	$226,680.00	2.72%
01.14.08	General Account	Buy	Blackrock Opportunity	$227,958.00	2.7%
01.23.08	General Account	Buy	Blackrock Opportunity	$232,631.00	2.6%
01.24.08	Charitable Trust	Buy	Blackrock Opportunity	$355,680.00	2.59%
01.29.08	Charitable Trust	Buy	Pimco	$190,596.00	3.25%

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34-63652; File No. S7-02-11]

RIN 3235-AK89

SUSPENSION OF THE DUTY TO FILE REPORTS FOR CLASSES OF ASSET-BACKED SECURITIES UNDER SECTION 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: Section 942(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act eliminated the automatic suspension of the duty to file under Section 15(d) of the Securities Exchange Act of 1934 for asset-backed securities issuers and granted the Commission the authority to issue rules providing for the suspension or termination of such duty. We are proposing to permit suspension of the reporting obligations for asset-backed securities issuers when there are no longer asset-backed securities of the class sold in a registered transaction held by non-affiliates of the depositor. We are also proposing to amend our rules relating to the Exchange Act reporting obligations of asset-backed securities issuers in light of these statutory changes.

DATES: Comments should be received on or before February 7, 2011.

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-02-11 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 S7-02-11. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing 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 Hearne, Special Counsel, or Kathy Hsu, Senior Special Counsel, in the Office of Rulemaking, at (202) 551-3430, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Rules 12h-3 and 15d-22[1] and Form 15[2] under the Securities Exchange Act of 1934 ("Exchange Act").[3]

I. Background

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1 17 CFR 240.12h-3 and 17 CFR 240.15d-22.

2 17 CFR 249.323.

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

This release is one of several that the Commission is issuing to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act")[4] related to asset-backed securities ("ABS"). Section 942(a) of the Act eliminated the automatic suspension of the duty to file under Section 15(d)[5] of the Exchange Act for ABS issuers and granted the Commission the authority to issue rules providing for the suspension or termination of such duty. In this release, we propose rule amendments to permit the suspension of reporting obligations for ABS issuers under certain circumstances and to update our rules in light of the amendment of Exchange Act Section 15(d).

Exchange Act Section 15(d) generally requires an issuer with a registration statement that has become effective pursuant to the Securities Act of 1933[6] ("Securities Act") to file ongoing Exchange Act reports with the Commission. In 2004, the Commission adopted an Exchange Act reporting regime specifically designed for ABS issuers. Under those rules, the Exchange Act reporting requirements for ABS issuers consist of:

- Annual reports on Form 10-K[7] that include a report on the assessment of compliance with servicing criteria as well as an attestation report on assessments of compliance by a registered public accounting firm;
- Distribution reports on Form 10-D[8] that include distribution and pool performance information for the distribution period and disclosure regarding the assets filed based on the frequency of distributions on the ABS; and

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4 Pub. L. No. 111-203 (July 21, 2010).

5 15 U.S.C. 78o(d).

6 15 U.S.C. 77a et seq.

7 17 CFR 249.310.

8 17 CFR 249.312.

- Current reports on Form 8-K.[9]

As discussed in more detail below, in April 2010, the Commission proposed changes to the ongoing reporting requirements for ABS issuers that would include, among other things, loan - level information in the distribution reports and revised triggering events for current reports.

Prior to enactment of the Act, Exchange Act Section 15(d) provided that for issuers without a class of securities registered under the Exchange Act the duty to file ongoing reports is automatically suspended as to any fiscal year, other than the fiscal year within which the registration statement for the securities became effective, if the securities of each class to which the registration statement relates are held of record by less than three hundred persons. As a result, the reporting obligations of ABS issuers, other than those with master trust structures,[10] were generally suspended after the ABS issuer filed one annual report on Form 10-K because the number of record holders was below, often significantly below, the 300 record holder threshold.[11]

ABS offerings are typically registered on shelf registration statements and each ABS offering is typically sold in a separate "takedown" off of the shelf. In 2004, the Commission adopted Exchange Act Rule 15d-22, relating to ABS reporting under Exchange Act Section

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9 17 CFR 249.308.

10 In a securitization using a master trust structure, the ABS transaction contemplates future issuances of ABS backed by the same, but expanded, asset pool that consists of revolving assets. Pre-existing and newly issued securities would therefore be backed by the same expanded asset pool. Thus, given their continued issuance, master trust ABS issuers typically continue to report, even after the first annual report is filed.

11 One source noted that in a survey of 100 randomly selected asset-backed transactions, the number of record holders provided in reports on Form 15 ranged from two to more than 70. The survey did not consider beneficial owner numbers. See Committee on Capital Markets Regulation, The Global Financial Crisis: A Plan for Regulatory Reform, May 2009, at fn. 349.

15(d).[12] Exchange Act Rule 15d-22(b) codified the staff position that the starting and suspension dates for any reporting obligation with respect to a takedown of ABS is determined separately for each takedown. Exchange Act Rule 15d-22 also clarified that a new takedown for a new ABS offering off the same shelf registration statement did not necessitate continued reporting for a class of securities from a prior takedown that was otherwise eligible to suspend reporting.

Prior to enactment of the Act, in April of 2010, we proposed rules that would revise the disclosure, reporting and offering process for ABS (the "2010 ABS Proposing Release").[13] Among other things, the 2010 ABS Proposing Release proposed to replace the investment grade ratings conditions to ABS shelf eligibility with four new eligibility conditions. One of the proposed new conditions would require an ABS issuer to undertake to file the same Exchange Act reports with the Commission as would be required by Section 15(d) of the Exchange Act and rules thereunder, if the issuer were subject to the reporting requirements of that section.[14] Before we acted on that proposal, the Act rendered that proposed shelf eligibility condition unnecessary by removing any class of ABS from the automatic suspension provided in Exchange Act Section 15(d) by inserting the phrase, "other than any class of asset-backed securities." Consequently, ABS issuers no longer automatically suspend reporting under Exchange Act Section 15(d). Instead, the Act granted the Commission authority to "provide for the suspension or termination of the duty to file

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12 See Asset-Backed Securities, Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506] ("2004 ABS Adopting Release").

13 See Asset-Backed Securities, Release No. 33-9117 (April 7, 2010) [75 FR 23328].

14 See proposed Item 512(a)(7)(ii) of Regulation S-K from the 2010 ABS Proposing Release. The issuer's reporting obligation in the proposed undertaking would have extended as long as non-affiliates of the depositor hold any of the issuer's securities that were sold in registered transactions.

under this subsection for any class of asset-backed security, on such terms and conditions and for such period or periods as the Commission deems necessary or appropriate in the public interest or for the protection of investors."[15]

As noted, by adding the exception for ABS, the amendment removed the automatic suspension for any class of ABS. The effect is that the Exchange Act Section 15(d) reporting obligation now requires ongoing reporting for ABS issuers. As a result, we are proposing to update our rules consistent with the changes to Exchange Act Section 15(d), as amended by Section 942(a) of the Act.[16] Our proposal to amend Exchange Act 15d-22 is described below. In addition, because ABS issuers no longer automatically suspend reporting absent Commission action, we are proposing relief where there are no longer ABS of a class that were sold in a registered transaction held by non-affiliates of the depositor.

II. Discussion of Proposals

As indicated above, Exchange Act Section 15(d), as amended by the Act, establishes an ongoing reporting obligation for each class of ABS for which an issuer has filed a registration statement which has become effective pursuant to the Securities Act. Exchange Act Section 15(d) also grants the Commission authority to provide for the suspension or termination of the duty to file. We believe that post-issuance reporting of information by an

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15 15 U.S.C. 78o(d)(2).

16 One comment letter relating to the Commission's 2010 ABS Proposing Release argues that Rule 15d-22(b) specifically provides suspension from reporting and is available to automatically suspend reporting obligations despite enactment of Section 942 of the Act. See comment letter from the American Securitization Forum to the 2010 ABS Proposing Release available on-line at http://sec.gov/comments/s7-08-10/s70810-70.pdf. See also comment letter from the American Securitization Forum on Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act available on-line at http://www.sec.gov/comments/df-title-ix/asset-backed-securities/assetbackedsecurities-10.pdf. However, as explained in the 2004 ABS Adopting Release, Rule 15d-22(b) clarifies that the starting and suspension for any reporting obligation with regard to a takedown of ABS is determined separately for each takedown. See supra note 12 at 1563. It did not, and should not be read, to provide an independent basis for suspending the reporting obligation of Exchange Act Section 15(d).

ABS issuer provides investors and the markets with transparency regarding many aspects of the ongoing performance of the securities and the servicer in complying with servicing criteria, among other things, and further believe this transparency is important for investors and the market in evaluating transaction performance and making ongoing investment decisions. We recognize, however, the costs imposed by ongoing reporting obligations and are proposing limited relief from these reporting obligations that we believe is appropriate in the public interest and consistent with the protection of investors. In addition, we are proposing rule and form amendments to update our rules relating to ABS takedowns under a shelf registration statement.

A. Suspension of Exchange Act Section 15(d) Reporting Obligation

We are proposing in new Exchange Act Rule 15d-22(b) to permit suspension of the reporting obligations for a given class of ABS pursuant to Exchange Act Section 15(d) for any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of the fiscal year, there are no longer ABS of the class that were sold in a registered transaction held by non-affiliates of the depositor.[17] As revised by the Act, Exchange Act Section 15(d) no longer provides for the automatic suspension of the duty to file periodic and other reports for issuers of a class of ABS. Without action by the Commission, ABS issuers that have filed a registration statement that has become effective pursuant to the Securities Act or that have conducted a takedown off of a shelf registration statement as described above, would be obligated to continue to file such reports for the life of the security.

[17] We are also proposing to amend Form 15 to provide a checkbox referring to proposed Rule 15d-22(b).

In the 2010 ABS Proposing Release, we noted the importance to investors of post-issuance reporting of information regarding an ABS transaction in understanding transaction performance and in making ongoing investment decisions.[18] We also believe, however, that there is a point at which the benefits to investors and the market of reporting significantly diminish, such as the limited benefit provided by reporting of an issuer that has no non-affiliated holders of its securities. Where an issuer has only affiliated holders of its securities, there is no public market for the securities and the affiliated holders typically have access to comparable information to that provided by public reports. In addition, preparation of reports under such circumstances would add to the cost of offering and maintaining the ABS and therefore to the cost of capital formation.

In the 2010 ABS Proposing Release we sought to balance the value of the information to investors and the market with the burden to issuers of preparing the reports. We proposed in the 2010 ABS Proposing Release to require, as a condition to ABS shelf eligibility, that the issuer undertake to file reports providing disclosure as would be required pursuant to Exchange Act Section 15(d) and the rules thereunder as long as non-affiliates of the depositor hold any of the issuer's securities that were sold in a registered transaction.[19] While our

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18 See 2010 ABS Proposing Release, supra note 13, at 23347.

19 Id. In light of the Act, we are no longer pursuing our proposal relating to ongoing reporting as a condition to ABS shelf eligibility. However, we found comments on the proposed shelf eligibility condition helpful in preparing proposed Exchange Act Rule 15d-22. Some commentators supported the proposed ongoing reporting requirements. See, for example, comment letters to the 2010 ABS Proposing Release from American Bar Association, Council of Institutional Investors, Metropolitan Life Insurance Company, and Prudential Investment Management, Inc. One commentator, the Council of Institutional Investors, asserted that transparency is related to asset quality and that ongoing reporting would facilitate due diligence by investors. Other commentators noted the burdens of reporting and suggested alternatives to filing reports with the Commission as a condition to shelf eligibility. See, for example, comment letters to the 2010 ABS Proposing Release from Bank of America Corporation (suggesting automatic suspension be continued but on a more delayed basis such as three years), Cleary Gottlieb Steen & Hamilton (suggesting that investors be permitted to opt the class of ABS out of reporting), and Kutak Rock LLP (suggesting a higher threshold below which ABS issuers could suspend reporting pursuant to Section 15(d) such as 50 investors or $3 million).

proposal to require ongoing reporting as a condition to ABS shelf eligibility and the comments we received on that proposal are informative, the Act no longer provides for the automatic suspension of the duty to file periodic and other reports for issuers of a class of ABS.

We believe that the limited benefits of ongoing reporting to investors and the market where there are only affiliated holders of the ABS would not justify the burden of reporting by issuers. Consequently, we are proposing new Exchange Act Rule 15d-22(b) which would provide that the reporting obligation regarding any class of ABS is suspended for any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of the fiscal year there are no longer any securities of such class held by non-affiliates of the depositor that were sold in the registered transaction. We are also proposing to amend Form 15 to add a checkbox for ABS issuers to indicate that they are relying on proposed Exchange Act Rule 15d-22(b) to suspend their reporting obligation to alert the market and the Commission of the change in reporting status.

Request for Comment

- Is it appropriate to suspend the Exchange Act Section 15(d) reporting obligation regarding a class of ABS for any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of the fiscal year there are no longer any securities of such class held by non-affiliates of the depositor that were sold in a registered transaction?

Comments on the 2010 ABS Proposing Release are available on-line at http://www.sec.gov/comments/s7-08-10/s70810.shtml.

- Should we instead consider allowing suspension of the reporting obligation dependent on a limited number of non-affiliates of the depositor holding the securities? If so, what would be an appropriate number and why? Please provide data establishing a basis for such a limit.
- If an issuer is unable to locate a security holder in order to provide information and make distributions to that security holder, such that the distributions are returned to the issuer without payment to the unknown security holder and the issuer or its agent has attempted to notify the unknown security holder within seven months of the failed distribution, should we allow the issuer not to count such security holders when determining the number of non-affiliates of the depositor that hold its securities? Should we allow an issuer to suspend the Exchange Act Section 15(d) reporting obligation regarding a class of ABS if, at the beginning of the fiscal year there are no longer any securities of such class, other than securities held by such lost or missing security holders, held by non-affiliates of the depositor that were sold in a registered transaction?
- Should we allow an issuer to suspend the Exchange Act Section 15(d) reporting obligation regarding a class of ABS if that issuer has effected legal or covenant defeasance of such class? Why or why not? Is legal or covenant defeasance typically provided for in ABS indentures or other governing instruments? Is legal or covenant defeasance effected with any meaningful frequency in the ABS market? Are there certain asset classes or tranches where it is more or less common? Please provide data to support your conclusions.

- Is there another standard, such as one relying on the percentage of pool assets remaining or the percentage of pool assets held by non-affiliates of the depositor, that would be more appropriate? Should we permit suspension based on a mandatory period of time since the registered offering? If so, how long would be appropriate? Three years? Five years? Should the amount of time depend on the asset class?

B. Revisions to Existing Exchange Act Rule Provisions

In light of the statutory changes to Exchange Act Section 15(d), we are proposing to update Exchange Act Rule 15d-22 to indicate when annual and other reports need to be filed and when starting and suspension dates are determined with respect to a takedown. We are also proposing to amend Exchange Act Rule 12h-3(b)(1) to add the language ", other than any class of asset-backed securities," to conform the rule to the language of amended Exchange Act Section 15(d) and to add a clarifying note.

Exchange Act Rule 15d-22 currently provides that: 1) no annual or other reports need be filed pursuant to Exchange Act Section 15(d) for ABS until the first bona fide sale in a takedown of securities under the registration statement; and 2) the starting and suspension dates for any reporting obligation with respect to a takedown of ABS is determined separately for each takedown.

We are proposing to amend Exchange Act Rule 15d-22. The revised rule would retain the approach that the Exchange Act Section 15(d) reporting obligation relates to each separate takedown in current Exchange Act Rules 15d-22(a) and 15d-22(b) in a new Exchange Act Rule 15d-22(a). Proposed Rule 15d-22(a)(1) tracks the language in current Exchange Act Rule 15d-22(a) providing that with respect to an offering of ABS sold off the shelf pursuant to Securities Act Rule 415(a)(1)(x),[20] the requirement to file annual and other reports pursuant to Exchange Act Section 15(d) regarding a class of securities commences upon the first bona fide sale in a takedown of securities under the registration statement. Proposed Exchange Act Rule 15d-22(a)(2) would restate the concept contained in current Exchange Act Rule 15d-22(b) that the requirement to file annual and other reports pursuant to Exchange Act Section 15(d) regarding a class of securities is determined separately for each takedown of securities under the registration statement. Exchange Act Rule 15d-22(b) currently does this by relying on language relating to when an issuer may suspend reporting under Exchange Act Section 15(d). Because the Act eliminated the automatic suspension of reporting for ABS issuers, we are proposing to delete current Exchange Act Rule 15d-22(b) and replace it with new Exchange Act Rule 15d-22(a)(2).[21]

As proposed, Exchange Act Rule 15d-22(c), which states that Exchange Act Rule 15d-22 does not affect other reporting obligations applicable to any class of securities from additional takedowns or reporting obligations that may be applicable pursuant to Exchange Act Section 12, such as for an ABS issuer's non-ABS securities, would remain substantially unchanged, except for minor revisions to reflect the amendments discussed above. We believe it is appropriate to continue to apply this provision to all of proposed Exchange Act

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20 17 CFR 230.415(a)(1)(x).

21 Current Exchange Act Rule 15d-22(b) states: "Regarding any class of asset-backed securities in a takedown off of a registration statement pursuant to § 230.415(a)(1)(x) of this chapter, no annual and other reports need be filed pursuant to section 15(d) of the Act regarding such class of securities as to any fiscal year, other than the fiscal year within which the takedown occurred, if at the beginning of such fiscal year the securities of each class in the takedown are held of record by less than three hundred persons." As is currently the case, proposed Rule 15d-22(a)(2) would only require a registrant to file reports after a takedown of securities under the registration statement. If the registrant has filed a registration statement but has not conducted a takedown, the registrant would not be required to file annual and other reports related to those securities.

Rule 15d-22 to make clear that other reporting obligations applicable to a class of securities are not affected by the rules.

Finally, we are proposing to amend Exchange Act Rule 12h-3(b)(1) to exclude ABS from the classes of securities eligible for suspension. Exchange Act Rule 12h-3(b) currently designates the classes of securities eligible for suspension of the duty to file reports under Exchange Act Section 15(d). The Act explicitly removed "any class of asset-backed security" from the automatic suspension of Exchange Act Section 15(d). Since the language of Exchange Act Rule 12h-3 tracks the language of the Exchange Act, we are proposing to add the language from amended Exchange Act Section 15(d) to our rule. We are also proposing to add a note to direct ABS issuers to Exchange Act Rule 15d-22 for the requirements regarding suspension of reporting for ABS.

Request for Comment

- Does proposed Exchange Act Rule 15d-22(a) effectively provide guidance relating to when an ABS issuer is required to file annual and other reports pursuant to Section 15(d) of the Exchange Act regarding a class of securities upon a takedown of securities from a shelf registration statement? Are there other changes that we should make to the Commission guidance relating to the application of Exchange Act Section 15(d) to registered ABS?
- Do our proposed revisions to Exchange Act Rule 12h-3 appropriately modify the rule to give effect to the statutory change and provide clarity to ABS issuers regarding the reporting obligations and where to refer relating to the ability to suspend reporting?

III. Reporting Obligation of ABS Whose Exchange Act Section 15(d) Obligation was Suspended Prior to Enactment of the Act

A suspension from reporting under Exchange Act Section 15(d) is applicable under the statute only for a year and needs to be reconsidered each subsequent year:

> The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class, other than any class of asset-backed securities, to which the registration statement relates are held of record by less than three hundred persons.[22] (emphasis added)

Consequently, once an issuer has registered an offering under the Securities Act it needs to consider at the beginning of each fiscal year whether it has a reporting obligation under Exchange Act Section 15(d). This is the case even if an issuer has previously been eligible to suspend reporting under Exchange Act Section 15(d). As a result, the revision to Exchange Act Section 15(d) results in a "springing" Section 15(d) reporting obligation for ABS issuers on the first day of their next fiscal year since, by its terms, Section 15(d) as amended, does not provide for the suspension of reporting for ABS, unless the Commission exercises its authority to provide for a suspension or termination of such reporting. We note that unlike corporate issuers that can generate new revenue and actively manage their assets and business, ABS issuers by definition are a discrete pool of self-liquidating assets. One commentator has noted, among other things, that historically the transaction documents have not contained provisions necessary to support an ongoing reporting obligation, or provide for

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22 15 U.S.C. 78o(d). We note that our staff has previously stated in this regard, "If on the first day of any subsequent fiscal year the thresholds in Rule 12h-3(b)(1) are exceeded, the suspension of reporting obligations under Section 15(d) will lapse, and the issuer would be required to resume periodic and current reporting under Section 15(d) in the manner specified in Rule 12h-3(e)." See Staff Legal Bulletin No. 18 (Mar. 15, 2010), fn. 7.

the funds to cover the costs of taking steps to recommence reporting.[23] While the transaction documents may not provide for recommencing reporting, we note that most transaction documents require ABS issuers to provide periodic distribution reports to the trustee or security holders in order to provide information for investors for the life of the securitization. Taking into account all of these factors, the staff of the Division of Corporation Finance has issued a no-action letter applicable to all ABS issuers whose reporting obligations had been suspended prior to the date of enactment of the Act that states that, provided the issuer continues complying with requirements under the transaction agreements to make ongoing information regarding the ABS and the related pool assets available to security holders in the manner and to the extent required under those transaction agreements, the Division would not recommend enforcement action if the issuer continues to determine its reporting requirements based on the standards set forth in Section 15(d) of the Exchange Act immediately prior to enactment of the Act.[24] The letter also requires as an additional condition to the no-action position that the issuer retain the information for at least five years after the ABS are no longer outstanding and provide copies of such information to the Commission or its staff upon request.

IV. General Request for Comments

We request comment on the specific issues we discuss in this release, and on any other approaches or issues that we should consider in connection with the proposed amendments. We seek comment from any interested persons, including investors, securitizers, ABS issuers, sponsors, originators, servicers, trustees, disseminators of EDGAR

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23 See comment letters from the American Securitization Forum supra note 16.

24 See Staff no-action letter to American Securitization Forum (January 6, 2011).

data, industry analysts, EDGAR filing agents, and any other members of the public.

V. Paperwork Reduction Act

A. Background

Certain provisions of the disclosure rules and forms applicable to ABS issuers contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[25] While the amendments proposed today do not alter the disclosure requirements set forth in these rules and forms, the amendment to Exchange Act Section 15(d) effected by the Act will increase the number of filings made pursuant to these rules and forms. Accordingly, the Commission is submitting revised burden estimates for certain of these collections of information to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[26] 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. The titles for the affected collections of information are:

(1) "Form 10-K" (OMB Control No. 3235-0063);

(2) "Form 10-D" (OMB Control No. 3235-0604);

(3) "Form 8-K" (OMB Control No. 3235-0288); and

(4) "Form 15" (OMB Control No. 3235-0167).[27]

The forms were adopted under the Exchange Act and set forth the disclosure requirements for periodic and current reports filed with respect to ABS and other types of securities to inform investors.

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25 44 U.S.C. 3501 et seq.

26 44 U.S.C. 3507(d) and 5 CFR 1320.11.

27 We are proposing to add a new check box to Form 15 (OMB Control No. 3235-0167) to allow ABS issuers to indicate that they are relying on proposed Rule 15d-22(b) to suspend their reporting obligation. We do not believe that the proposed changes will affect the burden estimates for Form 15.

Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the collections of information.

B. Revisions to PRA Reporting and Cost Burden Estimates

Our PRA burden estimate for Form 10-K, Form 8-K and Form 15 is based on an average of the time and cost incurred by all types of public companies, not just ABS issuers, to prepare the collection of information. Form 10-D is a form that is only prepared and filed by ABS issuers. Form 10-D is filed within 15 days of each required distribution date on the ABS, as specified in the governing documents for such securities, containing periodic distribution and pool performance information.

Our PRA burden estimates for the collections of information are based on information that we receive on entities assigned to Standard Industrial Classification Code 6189, the code used by ABS issuers, as well as information from outside data sources.[28] When possible, we base our estimates on an average of the data that we have available for years 2004 through 2009. In some cases, our estimates for the number of ABS issuers that file Form 10-D with the Commission are based on an average of the number of ABS offerings in 2006 through 2009.[29]

1. Statutory Effects

Prior to the amendment to Exchange Act Section 15(d), except for master trust issuers, the requirement to file Form 10-K for ABS issuers was typically suspended after the

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28 We rely on two outside sources of ABS issuance data. We use the ABS issuance data from Asset-Backed Alert on the initial terms of offerings, and we supplement that data with information from Securities Data Corporation (SDC).

29 Form 10-D was not implemented until 2006. Before implementation of Form 10-D, ABS issuers often filed their distribution reports under cover of Form 8-K.

year of initial issuance because the issuer had fewer than 300 security holders of record. The Act amended Exchange Act Section 15(d) to remove issuers of a class of ABS from automatic suspension of the filing requirement. Subsequent to the enactment of the Act, the number of Forms 10-K and 10-D filed by ABS issuers is expected to increase each year by the number of ABS registered offerings and the number of Forms 15 filed by ABS issuers is expected to decrease by a similar number. The yearly average of ABS registered offerings with the Commission over the period from 2004 to 2009 was 958. As a result, for PRA purposes, we estimate an annual increase in Form 10-K filings of 958 filings[30] and corresponding increases in Form 10-D filings of 5,748 filings and Form 8-K filings of 1437.[31] Concurrently, for PRA purposes, we estimate an annual decrease in Form 15 filings of 958 filings.[32]

We estimate that, for Exchange Act reports generally, 75% of the burden of preparation is carried by the company internally and that 25% of the burden is carried by outside professionals retained by the registrant at an average cost of $400 per hour. Consistent with our estimates in 2004, we estimate that 120 hours would be needed to

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30 See the 2010 ABS Proposing Release, supra note 13, at 23402. In order to estimate the number of Forms 10-K filed by ABS issuers for PRA purposes, we average the number of Forms 10-K over three years. In the first year after implementation, we use 958 as an estimate for the number of Forms 10-K we expect to receive. In the second year, we increase our estimate of the number of Forms 10-K expected by 958 to a total of 1,916 and in the third year, the addition of another 958 brings the total to 2,874. The average number of Forms 10-K over three years would, therefore, be 1,916. As a result, for PRA purposes, we estimate an increase in Form 10-K filings of 958 filings. These estimates assume that the market for ABS returns to historic levels.

31 We are estimating that each ABS issuer would have an annual Form 10-K filing, six Form 10-D filings and 1.5 8-K filings consistent with our estimates in the 2010 ABS Proposing Release. See 2010 ABS Proposing Release, supra note 13, at n. 521.

32 We assume that in any given year the issuers of all 958 registered ABS issued in the prior year would have suspended reporting using Form 15. The average number of Form 15 over three years would, therefore, have been 958. After the implementation of the Act, Form 15 will no longer be used by these ABS issuers as it was in the past. As a result, for the purposes of PRA, we estimate a decrease in Form 15 filings of 958.

complete and file a Form 10-K for an ABS issuer, 30 hours would be needed to complete and file a Form 10-D for an ABS issuer, 5 hours would be needed to complete and file a Fork 8-K for an ABS issuer, and 1.5 hours would be needed to complete and file a Form 15 for an ABS issuer.[33]

In summation, we estimate, for PRA purposes, increases of 114,960 total burden hours for Form 10-K (958 Forms 10-K times 120 burden hours per filing), 172,440 total burden hours for Form 10-D (5,748 Forms 10-D times 30 burden hours per filing), and 7,185 total burden hours for Form 8-K (1,437 Forms 8-K times 5 burden hours per filing), as well as a decrease of 1,437 total burden hours for Form 15 (958 Forms 15 times 1.5 burden hours per filing) as a result of the statutory changes to Exchange Act Section 15(d).[34] We allocate 75% of those hours (an increase of 86,220 hours for Form 10-K, 129,330 hours for Form 10-D, and 5,389 hours for Form 8-K) to internal burden and the remaining 25% to external costs using a rate of $400 per hour (an increase of $11,496,000 for Form 10-K, $17,244,000 for Form 10-D and $718,500 for Form 8-K).

2. Effects on Burden Estimates of the Proposed Rules

We are proposing to permit ABS issuers to suspend their reporting obligation with respect to a class of ABS for any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of the fiscal year non-affiliates no longer hold any of the issuer's securities of that class that were sold in registered transactions. While we expect that issuers will be able to suspend their reporting obligations in the future, based on average expected deal life data, for purposes of the PRA, we estimate

33 See 2010 ABS Proposing Release, supra note 13, at 23402 – 23403.

34 We allocate all of the burden for Form 15 filings to internal burden hours.

that the proposal will not affect our PRA estimates over the next three years.[35] We are also proposing to amend Exchange Act Rule 15d-22 relating to reporting and shelf registration and Exchange Act Rule 12h-3 to conform the rule to Exchange Act Section 15(d). We do not believe that these proposals will affect our PRA estimates.

3. Summary of Proposed Changes to Annual Burden Compliance in Collection of Information

Table 1 illustrates the changes in annual compliance burden in the collection of information in hours and costs for existing reports for ABS issuers.

Form	Current Annual Responses	Proposed Annual Responses	Current Burden Hours	Decrease or Increase in Burden Hours	Proposed Burden Hours	Current Professional Costs	Decrease or Increase in Professional Costs	Proposed Professional Costs
10-K	13,545	14,503	21,363,548	86,220	21,449,768	2,848,473,000	11,496,000	2,859,969,000
10-D	10,000	15,478	225,000	129,330	354,330	30,000,000	17,244,000	47,244,000
8-K	115,795	117,232	493,436	5,389	498,825	54,212,000	718,500	54,930,500
15	3,000	2,042	4,500	(1,437)	3,063	0	0	0

4. 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,

35 Since historical data on the numbers of classes of ABS that reduce their non-affiliated holders to zero is not generally available, we are using statistics relating to average expected deal life to establish our PRA estimate. Statistics compiled from SDC Platinum suggest that the average expected deal life of a class of ABS is over 5 years.

including through the use of automated collection techniques or other forms of information technology.[36]

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, DC 20549-1090, with reference to File No. S7-02-11. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-02-11, and be submitted to the Securities and Exchange Commission, Office 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.

VI. Benefit-Cost Analysis

The Exchange Act establishes an ongoing reporting obligation for each class of ABS for which an issuer has filed a registration statement that has become effective pursuant to the Securities Act and grants the Commission authority to provide for the suspension or termination of the duty to file. In light of the changes made to Exchange Act Section 15(d) in the Act, the Commission is proposing to amend Exchange Act Rule 12h-3 and 15d-22,

36 We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

and to provide for the suspension of the duty to file for certain issuers as discussed in this release.[37]

We believe that reporting of the ongoing performance of the ABS is useful to investors and the market by providing readily accessible information upon which investors may evaluate performance and make ongoing investment decisions. We also recognize, however, that there is a point at which the benefits to investors and the market of reporting diminish. In proposing to provide for the suspension of the duty to file for ABS issuers when non-affiliated holders no longer hold securities in the issuer, we have sought to balance the value of the information to investors and the market with the burden on the issuers of preparing the reports. We further recognize that there are other alternatives for determining when the suspension of the duty to file is appropriate and have sought comment on that issue in this release.

We are sensitive to benefits and costs of the proposed rules, if adopted. The discussion below focuses on the benefits and costs of the decisions made by the Commission in the exercise of the new exemptive authority provided by the Act. We request that commentators provide their views along with supporting data as to the benefits and costs of the proposed amendments.

A. Benefits

The proposals would allow an issuer to suspend reporting under certain circumstances and update certain provisions relating to reporting obligations under a shelf registration statement. The Act amended Exchange Act Section 15(d) to eliminate the automatic

[37] The proposed amendments to Exchange Act Rules 12h-3 and 15d-22 do not substantively alter the current requirements and should help issuers comply with their obligations and avoid confusion.

suspension of the duty to file ongoing Exchange Act reports for ABS issuers and granted the Commission authority to issue rules providing for the suspension or termination of such duty. The proposals would permit issuers to suspend their reporting obligation under Exchange Act Section 15(d) for any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of the fiscal year there are no longer ABS of the class that were sold in a registration statement held by non-affiliates of the depositor. Permitting such issuers to suspend reporting would allow those issuers to avoid the costs of preparing and filing annual and periodic reports with the Commission when non-affiliates of the depositor no longer hold any outstanding classes of the securities sold in registered transactions.

B. Costs

In revising Exchange Act Section 15(d), Congress exhibited an intent to increase the continued reporting by ABS issuers, but gave the Commission authority to place limitations on that reporting in the public interest. The Commission is exercising this authority and proposing a rule which would allow ABS issuers to suspend their reporting obligation under certain limited conditions. Permitting the suspension of reporting would limit the ability of market participants and observers to access and review information for those ABS that suspend reporting. We believe that this cost would be mitigated, since affiliates would generally be able to receive relevant information because of their relationship with the depositor. Thus, only non-holders of a particular ABS would be affected. Furthermore, the utility of the information to market participants and observers would be limited since ABS owned solely by affiliates would generally not have a public market. We recognize that there is an additional cost to preparing ongoing disclosure for registered transactions relative to issuing in the private markets. Issuers' willingness to issue registered ABS may be affected by the proposed threshold at which issuers may suspend their reporting obligations under Section 15(d), or another suspension threshold that we may adopt.

C. Request for Comment

We seek comments and empirical data on all aspects of this Benefit-Cost Analysis including identification and quantification of any additional benefits and costs.

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a) of the Exchange Act[38] 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 3(f) of the Exchange Act[39] requires the Commission, when engaging in rulemaking that requires it to consider 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 update the reporting requirements for takedowns from shelf registration in Exchange Act Rule 15d-22 and provide for the suspension of the duty to file for certain ABS issuers as discussed in this release. The proposal to allow ABS issuers without non-affiliated holders to suspend their duty to file would decrease transparency regarding those issuers, to the extent that non-affiliated investors and the market use that

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[38] 15 U.S.C. 78w(a).

[39] 15 U.S.C. 78c(f).

information. However, the suspension of the duty to file would reduce compliance costs for issuers which could increase efficiency and facilitate capital formation.

The Act eliminated the ability of ABS issuers to suspend their duty to file ongoing reports under Exchange Act Section 15(d). An inability to suspend the duty to file may encourage some issuers to offer ABS privately or not to issue ABS at all, rather than registering those ABS and incurring the ongoing reporting costs. If issuers register fewer ABS, this would reduce liquidity and decrease transparency in the ABS market. The current proposal that would allow ABS issuers under limited circumstances to suspend their duty to file and provide issuers certainty regarding when they may suspend reporting may encourage some ABS issuers to register ABS and offer ABS in the public markets, which would increase liquidity and transparency and facilitate capital formation.

The clarifications provided in Exchange Act Rule 15d-22 and 12h-3 may have a beneficial effect on the efficiency of managing ABS offerings, especially takedowns from ABS shelf registration, by providing issuers with a better understanding of their Exchange Act reporting obligations and facilitating compliance.

We do not believe the proposed amendments would have an impact or burden on competition. We request comment on whether the proposed amendments, if adopted, would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Commentators are requested to provide empirical data and other factual support for their views if possible. We request comment on whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation. Commentators are requested to provide empirical data and other factual support for their views if possible.

VIII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[40] 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 proposed amendments 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. Regulatory Flexibility Act Certification

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that the proposals contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposals relate to the ongoing reporting requirements for ABS issuers under the Exchange Act. Exchange Act Rule 0-10(a)[41] 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. As the depositor and issuing entity are most often limited purpose entities in an ABS

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40 Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

41 17 CFR 240.0-10(a).

transaction, we focused on the sponsor in analyzing the potential impact of the proposals under the Regulatory Flexibility Act. Based on our data, we only found one sponsor that could meet the definition of a small broker-dealer for purposes of the Regulatory Flexibility Act.[42] Accordingly, the Commission does not believe that the proposals, if adopted, would have a significant economic impact on a substantial number of small entities.

X. Statutory Authority and Text of Proposed Rule and Form Amendments

We are proposing the amendments contained in this document under the authority set forth in Section 942 of the Act, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

List of Subjects

17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out above, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

1. The authority citation for part 240 continues to read 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, 78 *l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78 *ll*, 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 and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

42 This is based on data from Asset-Backed Alert.

2. Amend § 240.12h-3 by:

a. In paragraph (b)(1) add ", other than any class of asset-backed securities," in the first sentence after "Any class of securities"; and

b. Adding a Note to paragraph (b).

The addition to read as follows:

§ 240.12h-3 Suspension of duty to file reports under section 15(d).

* * * * *

(b) * * *

(2) * * *

NOTE TO PARAGRAPH (b): The suspension of classes of asset-backed securities is addressed in § 240.15d-22.

* * * * *

3. Revise § 240.15d-22 to read as follows:

§ 240.15d-22 Reporting regarding asset-backed securities under section 15(d) of the Act.

(a) With respect to an offering of asset-backed securities registered pursuant to §230.415(a)(1)(x) of this chapter:

(1) Annual and other reports need not be filed pursuant to section 15(d) of the Act (15 U.S.C. 78o(d)) regarding any class of securities to which such registration statement relates until the first bona fide sale in a takedown of securities under the registration statement; and

(2) The starting and suspension dates for any reporting obligation under section 15(d) of the Act (15 U.S.C. 78o(d)) with respect to a takedown of any class of asset-backed

securities is determined separately for each takedown of securities under the registration statement.

(b) The duty to file annual and other reports pursuant to section 15(d) of the Act (15 U.S.C. 78o(d)) regarding any class of asset-backed securities is suspended as to any fiscal year, other than the fiscal year within which the registration statement became effective, if, at the beginning of the fiscal year there are no longer any asset-backed securities of such class that were sold in a registered transaction held by non-affiliates of the depositor.

(c) This section does not affect any other reporting obligation applicable with respect to any classes of securities from additional takedowns under the same or different registration statements or any reporting obligation that may be applicable pursuant to section 12 of the Act (15 U.S.C. 78l).

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

4. Amend Form 15 (referenced in § 249.323) by adding a checkbox referring to "Rule 15d-22(b)" after the checkbox referring to "Rule 15d-6".

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: January 6, 2011

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63665 / January 6, 2011

Administrative Proc. File No. 3-12944

In the Matter of

STEVEN ALTMAN, ESQ.

c/o Jeffrey C. Hoffman, Esq.
Hoffman & Pollok LLP
260 Madison Avenue
22nd Floor
New York, NY 10016

ORDER DENYING MOTION FOR RECONSIDERATION AND A STAY

On November 10, 2010, we issued an opinion and order permanently denying Steven Altman, Esq., an attorney licensed to practice law in New York, the privilege of appearing or practicing before the Commission pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice[1] and Section 4C of the Securities Exchange Act of 1934.[2] We found that, between January 28 and March 10, 2004, Altman engaged in unethical and improper professional conduct, in violation of New York bar rules, while representing a prospective witness for the Division of Enforcement (the "Division") in a Commission administrative proceeding. Specifically, we

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1 17 C.F.R. § 201.102(e)(1)(ii) (providing, in pertinent part, that "[t]he Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter -- to be lacking in character or integrity or to have engaged in unethical or improper professional conduct").

2 15 U.S.C. § 78d-3(a)(2) (providing, in pertinent part, that "[t]he Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter -- to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct").

found that Altman offered to have his client evade the Division's service of a subpoena and/or testify falsely in exchange for financial and other benefits from two respondents in the proceeding. We concluded that Altman's conduct was fundamentally repugnant to the integrity of the Commission's processes and warranted permanent denial of the privilege of appearing or practicing before us.

Altman now moves for reconsideration of our November 10, 2010, opinion and order and for a stay pending judicial review. In his motion, Altman "urge[s] the Commission to not substitute its judgment for that of the ALJ[,] who heard, saw, and experienced first hand" the live testimony and determined to impose a nine-month suspension. According to Altman, "the Commission misperceives the basis for sanctions by eliminating the ability to demonstrate reformation and ignoring the history of the individual at issue, substituting the permanence of terminal execution for the providence of forgiveness and reform." Altman argues that "there is an absence of precedent upon which to evaluate the critical elements of remorse and deterrence in a manner that would permit such a sizeable change in the sanction, without creating the appearance, if not the fact, of the sanction as being punitive. . . ." Altman requests that we defer to the nine-month suspension imposed by the law judge because she was in the best position to determine credibility, remorse, and the "risks and threats of recidivism."

We analyze Altman's motion for reconsideration under Rule of Practice 470.[3] The remedy of a motion for reconsideration is designed to correct manifest errors of law or fact or permit the presentation of newly discovered evidence.[4] Respondents may not use a motion for reconsideration to reiterate arguments previously made or to cite authority previously available.[5] Moreover, we accept only that evidence the movant "could not have known about or adduced before entry of the order subject to the motion for reconsideration."[6]

Altman's motion fails to meet these requirements. Altman argues, in essence, that the Commission erred by not imposing the same nine-month suspension as the law judge. This argument has no merit. Once the Commission granted the parties' petitions for review, the initial decision ceased to have any force or effect.[7] On review, the Commission was vested with all of

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3 17 C.F.R. § 201.470.

4 *Leslie A. Arouh*, 58 S.E.C. 162, 163 & n.6 (2005).

5 *Id.* at 163 & n.7.

6 *Feeley & Wilcox Asset Mgmt. Corp.*, 56 S.E.C. 1264, 1269 n.18 (2003).

7 *Fundamental Portfolio Advisors, Inc.*, 56 S.E.C. 651, 679 n.44 (2003).

the powers which it would have had in making the initial decision.[8] The Commission was free to decide the sanction *de novo*.[9] In addition, the law judge, who heard the live testimony, found that Altman was not "candid and credible" and rejected his version of events. Altman provides no other arguments that give us any reason to reconsider our prior decision.

Nor do we see a basis for granting a stay. We generally consider a stay request in light of four factors: whether the party seeking the stay is likely to prevail on appeal; whether the party seeking the stay is likely to suffer irreparable injury if the stay is not granted; whether any other party is likely to suffer substantial harm if the stay is granted; and whether the stay will serve the public interest.[10] The party seeking the stay has the burden of demonstrating that a stay is justified.[11]

Altman's motion fails to address any of the relevant factors. Nevertheless, we have evaluated his stay request in light of the four factors. Given Altman's egregious misconduct, we believe that Altman is not likely to prevail on appeal on the issue of the Commission's asserted abuse of discretion in imposing a permanent denial of the privilege of appearing or practicing before it.[12] We therefore conclude that a stay is not warranted.

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8 *See* 5 U.S.C. § 557(b) (stating, in pertinent part, that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"); *see also* 17 C.F.R. § 201.411(a) (stating that "[t]he Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record").

9 *See Containerfreight Transp. Co. v. ICC*, 651 F.2d 668, 670 (9th Cir. 1981).

10 *See Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

11 *Id.* at 978.

12 Courts of appeal review the Commission's factual findings under the "very deferential" substantial evidence standard. *Siegel v. SEC*, 592 F.3d 147, 155 (D.C. Cir.), *cert. denied*, 130 S. Ct. 3333 (2010). Under this standard, "[t]he reviewing court may not substitute its own judgment for the agency's choice between two fairly conflicting views, even if that court would justifiably have made a different choice had the matter been before it *de novo*." *Id.* Courts of appeal review the Commission's conclusions regarding sanctions to determine whether they are "arbitrary, capricious, or an abuse of discretion." *Id.*; *see also Berger v. SEC*, 347 Fed. Appx. 692, 694 (2d Cir. 2009); *see generally* 5 U.S.C. § 706(2)(A). "The agency's choice of remedy is peculiarly a matter for administrative competence, and [the court of appeals] will reverse it only if the remedy chosen is unwarranted in law or is without justification in fact." *Siegel*, 592 F.3d at 155.

Accordingly, IT IS ORDERED that the motion for reconsideration filed by Steven Altman, Esq., be, and it hereby is, DENIED, and it is further

ORDERED that Altman's request for a stay of the Commission's November 10, 2010 opinion and order permanently denying him the privilege of appearing or practicing before the Commission be, and it hereby is, DENIED.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63672 / January 7, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3132 / January 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14176

In the Matter of **FONTANA CAPITAL, LLC AND FORREST FONTANA** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, AND SECTIONS 203(e) AND 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 and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Fontana Capital, LLC ("Fontana Capital") and Forrest Fontana ("Fontana") (collectively, the "Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Fontana Capital is a limited liability company incorporated in Delaware in January 2005. At all relevant times, its principal place of business was in Boston, Massachusetts. Fontana Capital was registered with the Commission as an investment adviser from November 29, 2004 until it withdrew its registration effective April 28, 2010. During the

relevant times, Fontana Capital was, directly or indirectly, the investment adviser to Fontana Capital Long Short Fund L.P., Fontana Capital Enhanced Long Short Fund, L.P., Fontana Capital Fund QP, L.P., Fontana Capital Long Short Offshore Fund, Ltd. and Fontana Capital Enhanced Long Short Offshore Fund, Ltd.

2. Fontana is the sole owner of Fontana Capital. He served as the firm's Chief Investment Officer and portfolio manager from the firm's inception until April 2010. He is currently one of two remaining employees at Fontana Capital. At all relevant times, Fontana made all investment decisions for Fontana Capital.

B. OTHER RELEVANT ENTITIES

1. XL Group PLC ("XL Group") is a holding company domiciled in Ireland. XL Group's stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange and the Bermuda Stock Exchange. XL Group is a global insurance and reinsurance company. XL Group was at all relevant times known as XL Capital Ltd. ("XL Capital"). The company changed its name to XL Group effective July 1, 2010.

2. Merrill Lynch and Company ("Merrill Lynch") was at all relevant times a financial services company headquartered in New York, New York and registered with the Commission as a broker-dealer. Merrill Lynch's stock was at all relevant times registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange. Merrill Lynch is now a wholly owned subsidiary of Bank of America Corporation.

3. Wells Fargo and Company ("Wells Fargo") is a financial services company headquartered in San Francisco, California. Wells Fargo's stock is registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

C. RESPONDENTS' PARTICIPATION IN FOLLOW-ON OFFERINGS

1. Rule 105 of Regulation M of the Exchange Act provides, in pertinent part:

> In connection with an offering of equity securities for cash pursuant to a registration statement. . . filed under the Securities Act of 1933 ("offered securities"), it shall be unlawful for any person to sell short . . . the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period ("Rule 105 restricted period") that is the shorter of the period: (1) Beginning five business days before the pricing of the offered securities; or (2) Beginning with the initial filing of such registration statement . . . and ending with the pricing.

17 C.F.R. § 242.105(a)(1) and (a)(2) (effective October 9, 2007)

2. Rule 105 of Regulation M is designed to protect the independent pricing mechanism of the securities market shortly before follow-on or secondary offerings.[1]

3. During the relevant period, Respondents violated Rule 105 with respect to three follow-on offerings, involving XL Capital, Merrill Lynch and Wells Fargo, resulting in unlawful profits of approximately $1,101,000.

4. On Friday, July 25, 2008, Fontana Capital, at Fontana's direction, sold short a total of 60,000 XL Capital shares at $18.98 per share.

5. On Monday, July 28, 2008, XL Capital stock closed at $18.37. On Tuesday, July 29, 2008, before the trading markets opened, XL Capital priced a follow-on offering of its securities at $16 per share (the "XL Capital Offering"). The registered shares were offered to the public through an underwriter on a firm-commitment basis. Accordingly, the Rule 105 restricted period was from Tuesday, July 22, 2008 through Monday, July 28, 2008.

6. On Tuesday, July 29, 2008, Fontana Capital, at Fontana's direction, purchased 50,000 shares in the XL Capital Offering. Fontana Capital realized a profit of approximately $149,000 by participating in the XL Capital Offering after having shorted XL Capital's stock during the Rule 105 restricted period.

7. On Friday, July 25, 2008, Fontana Capital, at Fontana's direction, sold short a total of 40,000 Merrill Lynch shares at $27.30 per share.

8. On Monday, July 28, 2008, Merrill Lynch's stock closed at $25.31. On Tuesday, July 29, 2008, before the trading markets opened, Merrill Lynch priced a follow-on offering of its securities at $22.50 per share (the "Merrill Lynch Offering"). The registered shares were offered to the public through an underwriter on a firm-commitment basis. Accordingly, the Rule 105 restricted period was from Tuesday, July 22, 2008 through Monday, July 28, 2008.

9. On Tuesday, July 29, 2008, Fontana Capital, at Fontana's direction, purchased 200,000 Merrill Lynch shares in the Merrill Lynch Offering. Fontana Capital realized a profit of approximately $792,000 by participating in the Merrill Lynch offering after having shorted Merrill Lynch's stock during the Rule 105 restricted period.

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[1] "The first time an issuer conducts a public offering of its securities, the offering is referred to as an initial public offering ("IPO"). Subsequent offerings by the issuer are referred to as follow-on offerings or repeat offerings. A secondary offering is an offering of securities held by security holders, for which there already exist trading markets for the same class of securities as those being offered." Short Selling in Connection With a Public Offering, 17 Fed. Reg. 75,002, 75,003 n. 12 (December 13, 2006).

10. On Thursday, November 6, 2008, Fontana Capital, at Fontana's direction, sold short a total of 100,000 Wells Fargo shares at $28.60. That day, Wells Fargo stock closed at $28.77.

11. After the close of the trading markets on Thursday, November 6, 2008, Wells Fargo priced a follow-on offering of its securities at $27 per share (the Wells Fargo Offering"). The registered shares were offered to the public through an underwriter on a firm-commitment basis. Accordingly, the Rule 105 restricted period was from Friday October 31, 2008 through Thursday November 6, 2008.

12. On Friday, November 7, 2008, Fontana Capital, at Fontana's direction, purchased 100,000 shares in the Wells Fargo Offering. As a result, Fontana Capital realized a profit of approximately $160,000 by participating in the Wells Fargo offering, after having shorted Wells Fargo's stock during the Rule 105 restricted period.

D. VIOLATIONS

As a result of the conduct described above, Fontana Capital and Fontana willfully committed violations of Rule 105 of Regulation M.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

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

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Sections 203(e) and 203(f) of the Advisers Act including, but not limited to, disgorgement under Section 203(j) of the Advisers Act and penalties pursuant to Section 203(i) of the Advisers Act; and

C. Whether, pursuant to Section 21C of the Exchange Act Respondents should be ordered to cease and desist from committing or causing violations of and any future violations of Rule 105 of Regulation M of the Exchange Act and whether Respondents should be ordered to pay disgorgement pursuant to Section 21C(e) of the Exchange Act.

IV.

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

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

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

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice. 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 witnesses 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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63674 / January 7, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3224 / January 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14177

In the Matter of CARL W. JASPER, CPA Respondent.	ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3) OF THE COMMISSION'S RULES OF PRACTICE

I.

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

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

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

II.

The Commission finds that:

A. RESPONDENT

1. Jasper, age 54, is and has been a certified public accountant ("CPA") licensed to practice in the State of California. From April 1999 through January 2007, Respondent served as Vice President, Chief Financial Officer, and Principal Accounting Officer of Maxim Integrated Products, Inc. ("Maxim"), a San Jose semiconductor company. From 1983 to 1995, Respondent worked as an auditor for Ernst & Young, LLP. Respondent's CPA license was inactive during his tenure at Maxim.

B. CIVIL INJUNCTION

2. On November 5, 2010, the United States District Court for the Northern District of California entered an amended final judgment against Respondent. *SEC v. Jasper*, C-07-6122 JW (N.D. Cal. Dec. 4, 2007). The Amended Final Judgment followed a jury trial in which the jury found that Respondent violated Section 17(a)(1) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act"), and Rules 10b-5, 13a-14, 13b2-1, and 13b2-2 thereunder, and aided and abetted Maxim's violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules12b-20, 13a-1, 13a-11, and 13a-13 thereunder.

3. The Amended Final Judgment against Respondent, among other things, permanently enjoins him from future violations, direct or indirect, of Section 17(a)(1) of the Securities Act and Section 10(b) of the Exchange Act and Rules 10b-5, 13a-14, 13b2-1, and 13b2-2 thereunder, and from aiding and abetting any violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. It also bars Respondent, for a period of two years, from acting as an officer or director for any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. § 78*l*, or that is required to file reports pursuant to Section 15(d) of the Exchange Act, 15 U.S.C. § 78o(d), and requires Respondent to reimburse Maxim $1,869,639 and pay a civil penalty of $360,000.

4. The Commission's first amended complaint alleged that Respondent, from at least 2000 through 2005, engaged in a scheme to illegally backdate stock options granted to Maxim's employees and directors, concealing millions of dollars in expenses from investors and significantly overstating Maxim's income. It further alleged that Respondent was aware that Maxim granted options on purported dates that had been selected with hindsight and that he knew, or was reckless in not knowing, that Maxim was failing to report expenses for those in-the-money options and was falsely reporting that it only granted options at fair market value. It further alleged that Respondent signed several of Maxim's public filings, including annual, quarterly, and current reports and registration statements that were materially false and misleading.

III.

Based upon the foregoing, the Commission finds that a court of competent jurisdiction has permanently enjoined Respondent, a CPA, from violating the Federal securities laws within the meaning of Rule 102(e)(3)(i)(A) of the Commission's Rules of Practice. In view of these findings, the Commission deems it appropriate and in the public interest that Respondent be temporarily suspended from appearing or practicing before the Commission.

IT IS HEREBY ORDERED that Respondent be, and hereby is, temporarily suspended from appearing or practicing before the Commission. This Order shall be effective upon service on the Respondent.

IT IS FURTHER ORDERED that Respondent may within thirty days after service of this Order file a petition with the Commission to lift the temporary suspension. If the Commission within thirty days after service of the Order receives no petition, the suspension shall become permanent pursuant to Rule 102(e)(3)(ii).

If a petition is received within thirty days after service of this Order, the Commission shall, within thirty days after the filing of the petition, either lift the temporary suspension, or set the matter down for hearing at a time and place to be designated by the Commission, or both. If a hearing is ordered, following the hearing, the Commission may lift the suspension, censure the petitioner, or disqualify the petitioner from appearing or practicing before the Commission for a period of time, or permanently, pursuant to Rule 102(e)(3)(iii).

This Order shall be served upon Respondent personally or by certified mail at his last known address.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63675 / January 7, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3133 / January 7, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29549 / January 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14178

In the Matter of KIMBALL L. YOUNG, Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER AS TO KIMBALL L. YOUNG.

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Company Act") against Kimball L. Young ("Young" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to Kimball L. Young ("Order"), as set forth below.

III.

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

Summary

1. These proceedings involve deceptive conduct and breaches of fiduciary duty by Young and Thomas S. Albright ("Albright"), while they served as co-portfolio managers of the Tax Free Fund for Utah ("TFFU" or "Fund"), a municipal bond fund operated and advised by Aquila Investment Management, LLC ("Aquila"), a registered investment adviser.

2. Between 2003 and April 2009, Young and Albright improperly charged bond issuers $520,626 in "credit monitoring fees" on certain private placement and non-rated bond offerings in the TFFU portfolio. The fees, which ranged between 0.5 and 1% of the bond's par value, were a one-time fee purportedly to compensate Young and Albright for additional credit monitoring that they contend was required because the bonds were not rated. In fact, any credit monitoring work Young and Albright performed was part of their regular job responsibilities.

3. Young reviewed and signed documents that falsely represented to the issuers that the fee was required by and paid to the TFFU. In fact, the TFFU did not require or receive the credit monitoring fees. Instead, the fees were paid to Young's company, Kimball Young LLC d/b/a Municipal Credit Monitors ("MCM") and split equally between Young and Albright.

4. Neither Aquila nor the TFFU Board of Trustees ("TFFU Board" or "Board") authorized Young and Albright to charge credit monitoring fees, which posed a conflict of interest and were prohibited by Section 17(e)(1) of the Company Act. In fact, neither Aquila nor the TFFU Board was aware that such fees were being charged. Despite having regular contact

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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 these or any other proceedings.

with Aquila's senior management and the TFFU Board, neither Young nor Albright disclosed they were charging the fees for approximately six years. Aquila management did not learn that Young and Albright were charging the fees until April 2009, at which point Aquila removed them as portfolio managers and reported their conduct to the Commission.

Respondent

5. **Kimball L. Young**, age 64, is a resident of Salt Lake City, Utah. He worked for Aquila from 1997 until his termination in June 2009. Young served as co-portfolio manager of the TFFU from August 2001 until his suspension in April 2009. Young served as Senior Vice President of TFFU from 1997 to 2009. During the time of the misconduct, Young was also a registered representative associated with Aquila Distributors, Inc., a registered broker-dealer that sold TFFU securities. He holds Series 7, 24, 53, and 63 licenses, although he is no longer associated with any broker-dealer.

Other Relevant Persons and Entities

6. **Aquila Investment Management, LLC,** is a Delaware corporation with its principal place of business in New York, New York. Established in 1984, Aquila is registered with the Commission as an investment adviser. It is a wholly-owned subsidiary of Aquila Management Corporation and serves as investment adviser to the Aquila Group of Funds.

7. **Aquila Distributors, Inc.** is a registered broker-dealer based in New York, New York. It is an affiliate of Aquila and the distributor for each of the Aquila-sponsored funds. It is responsible for advertising and promoting the sale of the funds to investors.

8. **The Tax Free Fund for Utah** is a non-diversified open-end SEC-registered investment company advised by Aquila. The TFFU was organized on December 12, 1990 as a Massachusetts business trust and commenced operations on July 24, 1992. The TFFU invests in tax-free municipal obligations issued by the State of Utah, its counties and various other local authorities and other states and entities that do not tax interest from obligations by the State of Utah.

9. **Kimball Young LLC d/b/a Municipal Credit Monitor** is a Utah company formed and operated solely by Young since at least 2000. During the relevant period, Young used this company to charge credit monitoring fees to the bond issuers in connection with the private placement offerings in which the TFFU participated.

10. **Thomas S. Albright**, age 58, is a resident of Louisville, Kentucky. He worked for Aquila from July 2000 until his termination in June 2009. Albright was the TFFU's co-portfolio manager from August 2001 until his suspension in April 2009. Albright also served as Senior Vice President of the TFFU from 2003 to 2009 and as portfolio manager of Aquila's Churchill Tax Free Fund of Kentucky ("Kentucky Fund"). Albright held Series 6, 7, 24, and 65 licenses. As an employee of Aquila, Albright was associated with Aquila Distributors, though he was not

a registered representative.

Background

11. In 1992, Aquila established the TFFU as a municipal bond mutual fund that invested in tax-exempt obligations of the State of Utah and those of other municipal entities that were not taxed by the State of Utah.

12. Young, who had been involved in public finance in Utah for many years, was instrumental in the creation of the TFFU and was the Fund's first investor. Young served as the primary marketing representative for the Fund and performed all of the outreach to broker-dealers and financial advisers. Young performed this role on an independent contractor basis until 1999, when Aquila Distributors hired him as a senior vice president. Albright was the portfolio manager of Aquila's Kentucky Fund and had experience buying and selling publicly offered and rated bonds.

13. From 1992 until August 2001, Aquila contracted with banks to perform the portfolio management function. In August 2001, the bank that was performing the portfolio management duties resigned as portfolio manager. Aquila started to manage the fund directly and hired Young and Albright to co-manage the TFFU portfolio in August 2001.

14. As co-portfolio managers, both Young and Albright reported to the TFFU Board and to Aquila's CEO who also served as a member of the TFFU Board. Young and Albright also served as officers of the TFFU. Neither Young nor Albright served as an officer of Aquila. However, they were employed and compensated directly by Aquila to manage the TFFU portfolio.

15. Young also served as senior vice president of marketing for Aquila Distributors until April 2009. For matters relating to marketing and distribution, Young reported to the president of Aquila Distributors. Albright had no role with Aquila Distributors. With respect to compliance matters, both Young and Albright reported directly to Aquila's Chief Compliance Officer.

16. As co-portfolio managers, Young and Albright were responsible for the day-to-day management of the TFFU portfolio consistent with the investment guidelines provided in the TFFU's prospectus. They were responsible for identifying investment opportunities in the municipal bond market for the TFFU portfolio and purchasing and selling of securities for the TFFU's portfolio. They were also responsible for monitoring the overall risk profile of the TFFU portfolio and informing the TFFU Board about the creditworthiness of the securities in the TFFU portfolio.

17. Young's plan for the TFFU included acquiring private placements, which the TFFU had not previously done. The TFFU Board perceived non-rated private placement offerings as risky securities and was initially reluctant to invest the Fund's assets in such securities. However, in December 2001, Young and Albright convinced the TFFU Board to

authorize them to acquire private placements provided that such private placements did not exceed 10% of the portfolio's assets and that no single private placement holding exceeded $2.5 million. In early 2003, Young and Albright started investing the TFFU portfolio's assets in private placement offerings.

18. In December 2004, Young and Albright proposed that the TFFU Board relax the private placement limits from 10% to 20% of the portfolio's assets and increase the maximum size of any single private placement holding from $2.5 million to $5 million. In March 2005, the TFFU Board increased the maximum size to $5 million which was modified to 5% of the portfolio's assets in September 2005. In December 2005, the TFFU Board also increased the portfolio holdings limit for private placements from 10% to 20%. Consequently, the TFFU's investment in non-rated private placement securities increased between 2003 and April 2009.

19. Young, who was based in Utah, focused on the acquisition of non-rated securities, including private placements. Albright, who was based in Kentucky, focused primarily on buying and selling publicly-traded, rated bonds in the secondary markets.

20. Young was dissatisfied with Aquila's compensation system, which, as a general matter, did not include performance-based compensation or bonuses. Young suggested a performance-based pay system to Aquila's CEO at the time he was hired as a full-time employee in 1999, and thereafter, he raised this issue several times. Aquila, however, did not adopt a performance-based system.

The Credit Monitoring Fees

21. In 2003, at Young's suggestion, Young and Albright began charging issuers of non-rated and private placement bonds that Young and Albright acquired for the TFFU "credit monitoring fees," purportedly to cover costs to monitor the credit risk posed by these unrated securities. The fees, which ranged between 0.5% and 1.0% of the face value of the bonds, were a one-time fee assessed at the closing and paid to Young's company, MCM. After MCM received the fees, Young sent a check for half of the fees to Albright.

22. On multiple occasions, Young, who was principally responsible for dealing with the bond issuers, reviewed and signed documents that misrepresented the true recipient of the credit monitoring fees in deal documents, including closing memoranda, certifications and the actual loan agreements. Instead of stating that the fees would be paid to MCM, or to Young and Albright, the deal documents indicated that the credit monitoring fees were required by and would be paid to the TFFU. For example, a document entitled "Certificate and Receipt of Bond Purchaser," which was signed by Young on behalf of the TFFU, included the following representation: "The Purchaser [defined to be the TFFU] will receive an upfront credit compliance monitoring fee in the amount of $61,301.28. Such fee is for the annual credit compliance monitoring of the [bond issuer] performed by the Purchaser over the life of the Bonds." Young signed certificates with similar representations for other deals.

23. Between 2003 and April 2009, Young and Albright obtained a total of $520,626 in credit monitoring fees, which they split equally. In 2008, the amount of credit monitoring fees received by Young and Albright jumped dramatically due to an increase in the number of non-rated bonds acquired by the TFFU. In 2007, Young and Albright received a combined total of $35,615 in credit monitoring fees. In 2008, they received a combined total of $256,071.

Any Credit Monitoring Work Performed by Young and Albright was Part of Their Regular Job Responsibilities

24. Although Young performed some credit monitoring functions, including reviewing issuers' financial statements, conducting occasional site visits and monitoring issuers' credit profile, this work was part of his job responsibilities, most of which he performed during regular business hours.

25. Albright did very little credit monitoring for these bonds. After Young identified a bond to bid on and performed due diligence on the issuer's creditworthiness, Albright assisted in calculating the yield, maturity and call features of the private placement bonds, which he did not have to do with publicly-traded rated securities. In addition, Albright monitored the prices of all bonds in the portfolio on a daily basis. If the price of a bond changed more than a particular percentage point, Albright would attempt to ascertain whether the change was driven by the market or by the particular issuer. Albright performed that function for *all bonds* in the TFFU portfolio. Albright performed all of his purported credit monitoring work during normal business hours.

26. In addition, in 2001, at the Board's request, Aquila retained an independent consultant to perform ongoing credit analyses of all bonds in the TFFU portfolio, including non-rated bonds. The independent consultant, who was paid a monthly fee by Aquila, performed analyses of all private placement and other non-rated bonds in the TFFU's portfolio throughout the period that Young and Albright charged issuers credit monitoring fees.

Young and Albright Failed to Disclose the Credit Monitoring Fees to Aquila or the TFFU Board

27. Neither Aquila nor the TFFU Board authorized Young and Albright to charge the credit monitoring fees.

28. In fact, Aquila and the TFFU Board were unaware that Young and Albright were charging the fees. Throughout the six-year period they charged and received credit monitoring fees, Young and Albright had regular contact with members of Aquila's senior management, including Aquila's CEO and Chief Compliance Officer, yet never disclosed they were receiving credit monitoring fees. Young and Albright regularly communicated with Aquila's senior management regarding portfolio management activities by email and telephone. Young and Albright also saw the CEO and CCO several times a year at TFFU board meetings. In addition,

Young and Albright met with the CEO each year to discuss their compensation. Yet from 2003 to April 2009, neither Young nor Albright ever mentioned that they were receiving credit monitoring fees to the CEO, CCO or anyone at Aquila. Young and Albright even failed to mention the fees during their annual compensation meetings with the CEO, including their meeting in 2008, a year in which the amount of credit monitoring fees they received jumped from approximately $17,800 per person to $128,035 per person.

29. In addition, during the six years they charged credit monitoring fees, Young and Albright failed to disclose the fees to the TFFU Board and TFFU shareholders. Between 2003 and April 2009, the TFFU Board held quarterly meetings which Young and Albright attended. During these meetings, Young and Albright made presentations to the TFFU Board about private placements and non-rated transactions in the TFFU portfolio. The Board was particularly concerned with private placements and the risks they posed and inquired about the credit risk at every meeting. Young and Albright, however, never mentioned that they were performing purported extra credit monitoring work for which they were being compensated by issuers.

30. Young and Albright's failure to disclose the fees to Aquila management or the Board is particularly striking given that they were aware that Aquila had retained and was paying an independent consultant to do credit monitoring work. Young and Albright worked closely with the independent consultant, reviewed her quarterly reports and incorporated the reports in the Board packages that they prepared. During the entire time that the independent consultant worked with Young and Albright, neither Young nor Albright ever mentioned to the independent consultant that they were performing credit monitoring work and were getting paid for it. And at every TFFU Board meeting, Young and Albright presented and discussed the independent consultant's work but never disclosed that they were purportedly also performing credit monitoring work for which they were being compensated.

Aquila's Policies and Procedures Prohibited Charging Credit Monitoring Fees

31. Aquila's compliance policies and procedures prohibited Young and Albright's conduct and obligated Young and Albright to disclose the credit monitoring fees prior to April 2009. Aquila's Code of Ethics explicitly prohibited employee conflicts of interests and required portfolio managers to observe their fiduciary duties. In particular, paragraph V(b) of the Code of Ethics prohibited employees from placing their interests above those of Aquila, taking inappropriate advantage of their positions or having actual or potential conflicts of interests or even the appearance of such conflict with advisory clients. Young and Albright signed acknowledgements that they had received, read and understood the Code of Ethics on an annual basis.

32. In addition, Aquila Distributor's Supervisory Procedures Manual expressly prohibited registered representatives, including Young, from acting as an officer, director or employee of another entity. The Manual further prohibited Young from accepting compensation from any other person as a result of any business activity without the prior written consent of

Aquila, which Young did not obtain. Young executed acknowledgements on an annual basis that he had received, read and understood the provisions of the Manual, yet never disclosed that he was the owner and president of MCM and that through MCM he was receiving credit monitoring fees.

33. Moreover, on an annual basis, Young completed a questionnaire for TFFU trustees and officers as part of Aquila's compliance controls. The questionnaire specifically asked whether Young was affiliated with any company other than the Aquila entities. Young consistently answered "no" to this question despite being the owner and an officer of MCM. The questionnaire also asked whether they were aware of any other issues that might bear adversely upon their ability to serve as officers of the Fund to which Young consistently answered "no."

Young and Albright Finally Disclosed the Fees in April 2009 and Were Terminated

34. Young and Albright did not disclose the credit monitoring fees to Aquila until April 2009. During the first quarter of 2009, Aquila Distributors implemented additional broker-dealer compliance procedures, which included a requirement that all employees of Aquila Distributors identify all sources of outside income and certify that the information is correct. Instead of completing the attestation, Young flew to New York at his own expense and asked to meet with the CEO and the chairman of Aquila. At the meeting, Young disclosed that he had several sources of outside income that he had not previously reported, including the credit monitoring fees. Subsequently, Albright confirmed to Aquila's senior management that he shared the credit monitoring fees with Young. Aquila suspended Young and Albright in April 2009 and terminated them in June 2009 after conducting an internal investigation.

Violations

35. As a result of the conduct described above, Young willfully violated Section 17(e)(1) of the Company Act, which prohibits any affiliated person of a registered investment company, or any affiliated person of such an affiliated person, from receiving compensation from any source other than the investment company, in connection with the sale of such company's property. Young violated this provision when he received credit monitoring fees in connection with the purchase of non-rated bonds in the TFFU portfolio.

36. As a result of the conduct described above, Young willfully violated Section 206(1) of the Advisers Act, which prohibits an investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client, and Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. Young violated these provisions when he improperly obtained credit monitoring fees from the issuers under false or misleading circumstances and failed to disclose the fees to the TFFU Board and shareholders.

Undertakings

37. Respondent Young has undertaken to provide to the Commission, within 30 days after the end of the five-year bar period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

IV.

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

Accordingly, pursuant to Section 15(b) of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Company Act, it is hereby ORDERED that:

A. Respondent Young cease and desist from committing or causing any violations and any future violations of Section 17(e)(1) of the Company Act and Sections 206(1) and 206(2) of the Advisers Act;

B. Respondent Young be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, effective on the second Monday following the entry of this Order, with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

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

D. Respondent Young shall pay disgorgement of $260,313, prejudgment interest of $34,476 and a civil money penalty in the amount of $75,000. Respondent shall satisfy this obligation as follows: Respondent shall pay the $75,000 penalty to the United States Treasury and the $294,789 in disgorgement and prejudgment interest to the TFFU or such other appropriate party or parties as the Commission staff may identify in consultation with Respondent, confirmed in writing, prior to payment. Respondent shall pay the penalty of $75,000 within 10 days of the entry of this Order. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312-0003; and (D) submitted under cover letter that identifies Kimball L. Young as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check or wire transfer confirmation shall be sent to James McGovern, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, Three World Financial Center, Suite 400, New York, NY 10281. Respondent shall pay the $294,789 disgorgement and prejudgment interest by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order to the TFFU or such other appropriate party or parties as the Commission staff may identify in consultation with Respondent, confirmed in writing, prior to payment as follows: $109,895 within 10 days of this entry of this Order, and 4 payments of $46,223 each every 90 days thereafter with one final fourth payment of $46,225 to be made on the first year anniversary of the entry of this Order. Respondent shall provide a copy of the money order or check or wire transfer confirmation of each such payment at the time it is made to James McGovern, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, Three World Financial Center, Suite 400, New York, NY 10281. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. § 3717. Furthermore, if the full amount of any payment described herein is not made by the date the payment is required by the Order, the entire amount of disgorgement, prejudgment interest and civil money penalty plus any interest accrued pursuant to 31 U.S.C. § 3717, minus payments made, if any, is due and payable immediately without further application.

E. Respondent shall comply with the undertakings enumerated in Section III, paragraph 37 above.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63676 / January 7, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3134 / January 7, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29550 / January 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14179

In the Matter of **THOMAS S. ALBRIGHT,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER AS TO THOMAS S. ALBRIGHT**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Company Act"), against Thomas S. Albright ("Albright" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order as to Thomas S. Albright ("Order"), as set forth below.

III.

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

Summary

1. These proceedings involve deceptive conduct and breaches of fiduciary duty by Kimball L. Young ("Young") and Albright, while they served as co-portfolio managers of the Tax Free Fund for Utah ("TFFU" or "Fund"), a municipal bond fund operated and advised by Aquila Investment Management, LLC ("Aquila"), a registered investment adviser.

2. Between 2003 and April 2009, Young and Albright improperly charged bond issuers $520,626 in "credit monitoring fees" on certain private placement and non-rated bond offerings in the TFFU portfolio. The fees, which ranged between 0.5 and 1% of the bond's par value, were a one-time fee purportedly to compensate Young and Albright for additional credit monitoring that they contend was required because the bonds were not rated. In fact, any credit monitoring work Young and Albright performed was part of their regular job responsibilities.

3. Neither Aquila nor the TFFU Board of Trustees ("TFFU Board" or "Board") authorized Young and Albright to charge credit monitoring fees, which posed a conflict of interest and were prohibited by Section 17(e)(1) of the Company Act. In fact, neither Aquila nor the TFFU Board was aware that such fees were being charged. Despite having regular contact with Aquila's senior management and the TFFU Board, neither Young nor Albright disclosed they were charging the fees for approximately six years. Aquila management did not learn that Young and Albright were charging the fees until April 2009, at which point Aquila removed them as portfolio managers and reported their conduct to the Commission.

Respondent

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

4. **Thomas Albright**, age 58, is a resident of Louisville, Kentucky. He worked for Aquila from July 2000 until his termination in June 2009. Albright was the TFFU's co-portfolio manager from August 2001 until his suspension in April 2009. Albright also served as Senior Vice President of the TFFU from 2003 to 2009 and as portfolio manager of Aquila's Churchill Tax Free Fund of Kentucky ("Kentucky Fund"). Albright held Series 6, 7, 24, and 65 licenses. As an employee of Aquila, Albright was associated with Aquila Distributors, though he was not a registered representative.

Other Relevant Persons and Entities

5. **Aquila Investment Management, LLC,** is a Delaware corporation with its principal place of business in New York, New York. Established in 1984, Aquila is registered with the Commission as an investment adviser. It is a wholly-owned subsidiary of Aquila Management Corporation and serves as investment adviser to the Aquila Group of Funds.

6. **Aquila Distributors, Inc.** is a registered broker-dealer based in New York, New York. It is an affiliate of Aquila and the distributor for each of the Aquila-sponsored funds. It is responsible for advertising and promoting the sale of the funds to investors.

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8. **Kimball Young LLC d/b/a Municipal Credit Monitor** is a Utah company formed and operated solely by Young since at least 2000. During the relevant period, Young used this company to charge credit monitoring fees to the bond issuers in connection with the private placement offerings in which the TFFU participated.

9. **Kimball L. Young**, age 64, is a resident of Salt Lake City, Utah. Young served as co-portfolio manager of the TFFU from August 2001 until his suspension in April 2009. Aquila terminated Young in June 2009. Young served as Senior Vice President of TFFU from 1997 to 2009. During the time of the misconduct, Young was also a registered representative associated with Aquila Distributors. He holds Series 7, 24, 53, and 63 licenses.

Background

10. In 1992, Aquila established the TFFU as a municipal bond mutual fund that

invested in tax-exempt obligations of the State of Utah and those of other municipal entities that were not taxed by the State of Utah.

11. Young, who had been involved in public finance in Utah for many years, was instrumental in the creation of the TFFU and was the Fund's first investor. Young served as the primary marketing representative for the Fund and performed all of the outreach to broker-dealers and financial advisers. Young performed this role on an independent contractor basis until 1999, when Aquila Distributors hired him as a senior vice president. Albright was the portfolio manager of Aquila's Kentucky Fund and had experience buying and selling publicly offered and rated bonds.

12. From 1992 until August 2001, Aquila contracted with banks to perform the portfolio management function. In August 2001, the bank that was performing the portfolio management duties resigned as portfolio manager. Aquila started to manage the fund directly and hired Young and Albright to co-manage the TFFU portfolio in August 2001.

13. As co-portfolio managers, both Young and Albright reported to the TFFU Board and to Aquila's CEO who also served as a member of the TFFU Board. Young and Albright also served as officers of the TFFU. Neither Young nor Albright served as an officer of Aquila. However, they were employed and compensated directly by Aquila to manage the TFFU portfolio.

14. Young also served as senior vice president of marketing for Aquila Distributors until April 2009. For matters relating to marketing and distribution, Young reported to the president of Aquila Distributors. Albright had no role with Aquila Distributors. With respect to compliance matters, both Young and Albright reported directly to Aquila's Chief Compliance Officer.

15. As co-portfolio managers, Young and Albright were responsible for the day-to-day management of the TFFU portfolio consistent with the investment guidelines provided in the TFFU's prospectus. They were responsible for identifying investment opportunities in the municipal bond market for the TFFU portfolio and purchasing and selling of securities for the TFFU's portfolio. They were also responsible for monitoring the overall risk profile of the TFFU portfolio and informing the TFFU Board about the creditworthiness of the securities in the TFFU portfolio.

16. Young's plan for the TFFU included acquiring private placements, which the TFFU had not previously done. The TFFU Board perceived non-rated private placement offerings as risky securities and was initially reluctant to invest the Fund's assets in such securities. However, in December 2001, Young and Albright convinced the TFFU Board to authorize them to acquire private placements provided that such private placements did not exceed 10% of the portfolio's assets and that no single private placement holding exceeded $2.5 million. In early 2003, Young and Albright started investing the TFFU portfolio's assets in private placement offerings.

17. In December 2004, Young and Albright proposed that the TFFU Board relax the private placement limits from 10% to 20% of the portfolio's assets and increase the maximum size of any single private placement holding from \$2.5 million to \$5 million. In March 2005, the TFFU Board increased the maximum size to \$5 million which was modified to 5% of the portfolio's assets in September 2005. In December 2005, the TFFU Board also increased the portfolio holdings limit for private placements from 10% to 20%. Consequently, the TFFU's investment in non-rated private placement securities increased between 2003 and April 2009.

18. Young, who was based in Utah, focused on the acquisition of non-rated securities, including private placements. Albright, who was based in Kentucky, focused primarily on buying and selling publicly-traded, rated bonds in the secondary markets.

19. Young was dissatisfied with Aquila's compensation system, which, as a general matter, did not include performance-based compensation or bonuses. Young suggested a performance-based pay system to Aquila's CEO at the time he was hired as a full-time employee in 1999, and thereafter, he raised this issue several times. Aquila, however, did not adopt a performance-based system.

<u>The Credit Monitoring Fees</u>

20. In 2003, at Young's suggestion, Young and Albright began charging issuers of non-rated and private placement bonds that Young and Albright acquired for the TFFU "credit monitoring fees," purportedly to cover costs to monitor the credit risk posed by these unrated securities. The fees, which ranged between 0.5% and 1.0% of the face value of the bonds, were a one-time fee assessed at the closing and paid to Young's company, MCM. Various deal documents, including a certificate of purchase signed Young, indicated that the fees were required by and would be paid to the TFFU. However, the wiring instructions provided by Young instructed the third-party trustees to wire the fees to MCM. After MCM received the fees, Young sent a check for half of the fees to Albright.

21. Between 2003 and April 2009, Young and Albright obtained a total of \$520,626 in credit monitoring fees, which they split equally. In 2008, the amount of credit monitoring fees received by Young and Albright jumped dramatically due to an increase in the number of un-rated bonds acquired by the TFFU. In 2007, Young and Albright received a combined total of \$35,615 in credit monitoring fees. In 2008, they received a combined total of \$256,071.

<u>Any Credit Monitoring Work Performed by Young and Albright was Part of Their Regular Job Responsibilities</u>

22. Although Young performed some credit monitoring functions, including reviewing issuers' financial statements, conducting occasional site visits and monitoring issuers' credit profile, this work was part of his job responsibilities, most of which he performed during regular business hours.

23. Albright did very little credit monitoring for these bonds. After Young identified a bond to bid on and performed due diligence on the issuer's creditworthiness, Albright assisted in calculating the yield, maturity and call features of the private placement bonds, which he did not have to do with publicly-traded rated securities. In addition, Albright monitored the prices of all bonds in the portfolio on a daily basis. If the price of a bond changed more than a particular percentage point, Albright would attempt to ascertain whether the change was driven by the market or by the particular issuer. Albright performed that function for *all bonds* in the TFFU portfolio. Albright performed all of his purported credit monitoring work during normal business hours.

24. In addition, in 2001, at the Board's request, Aquila retained an independent consultant to perform ongoing credit analyses of all bonds in the TFFU portfolio, including non-rated bonds. The independent consultant, who was paid a monthly fee by Aquila, performed analyses of all private placement and other non-rated bonds in the TFFU portfolio throughout the period that Young and Albright charged issuers credit monitoring fees.

<u>Young and Albright Failed to Disclose the Credit Monitoring Fees to Aquila or the TFFU Board</u>

25. Neither Aquila nor the TFFU Board authorized Young and Albright to charge the credit monitoring fees.

26. In fact, Aquila and the TFFU Board were unaware that Young and Albright were charging the fees. Throughout the six-year period they charged and received credit monitoring fees, Young and Albright had regular contact with members of Aquila's senior management, including Aquila's CEO and Chief Compliance Officer, yet never disclosed they were receiving credit monitoring fees. Young and Albright regularly communicated with Aquila's senior management regarding portfolio management activities by email and telephone. Young and Albright also saw the CEO and CCO several times a year at TFFU board meetings. In addition, Young and Albright met with the CEO each year to discuss their compensation. Yet from 2003 to April 2009, neither Young nor Albright ever mentioned that they were receiving credit monitoring fees to the CEO, CCO or anyone at Aquila. Young and Albright even failed to. mention the fees during their annual compensation meetings with the CEO, including their meeting in 2008, a year in which the amount of credit monitoring fees they received jumped from approximately $17,800 per person to $128,035 per person.

27. In addition, during the six years they charged credit monitoring fees, Young and Albright failed to disclose the fees to the TFFU Board and TFFU shareholders. Between 2003 and April 2009, the TFFU Board held quarterly meetings which Young and Albright attended. During these meetings, Young and Albright made presentations to the TFFU Board about private placements and non-rated transactions in the TFFU portfolio. The Board was particularly concerned with private placements and the risks they posed and inquired about the credit risk at every meeting. Young and Albright, however, never mentioned that they were performing purported extra credit monitoring work for which they were being compensated by issuers.

28. Young and Albright's failure to disclose the fees to Aquila management or the

Board is particularly striking given that they were aware that Aquila had retained and was paying an independent consultant to do credit monitoring work. Young and Albright worked closely with the independent consultant, reviewed her quarterly reports and incorporated the reports in the Board packages that they prepared. During the entire time that the independent consultant worked with Young and Albright, neither Young nor Albright ever mentioned to the independent consultant that they were performing credit monitoring work and were getting paid for it. And at every TFFU Board meeting, Young and Albright presented and discussed the independent consultant's work but never disclosed that they were purportedly also performing credit monitoring work for which they were being compensated.

Aquila's Policies and Procedures Prohibited Charging Credit Monitoring Fees

29. Aquila's compliance policies and procedures prohibited Young and Albright's conduct and obligated Young and Albright to disclose the credit monitoring fees prior to April 2009. Aquila's Code of Ethics explicitly prohibited employee conflicts of interests and required portfolio managers to observe their fiduciary duties. In particular, paragraph V(b) of the Code of Ethics prohibited employees from placing their interests above those of Aquila, taking inappropriate advantage of their positions or having actual or potential conflicts of interests or even the appearance of such conflict with advisory clients. Young and Albright signed acknowledgements that they had received, read and understood the Code of Ethics on an annual basis.

Young and Albright Finally Disclosed the Fees in April 2009 and Were Terminated

30. Young and Albright did not disclose the credit monitoring fees to Aquila until April 2009. During the first quarter of 2009, Aquila Distributors implemented additional broker-dealer compliance procedures, which included a requirement that all employees of Aquila Distributors identify all sources of outside income and certify that the information is correct. Instead of completing the attestation, Young flew to New York at his own expense and asked to meet with the CEO and the chairman of Aquila. At the meeting, Young disclosed that he had several sources of outside income that he had not previously reported, including the credit monitoring fees. Subsequently, Albright confirmed to Aquila's senior management that he shared the credit monitoring fees with Young. Aquila suspended Young and Albright in April 2009 and terminated them in June 2009 after conducting an internal investigation.

Violations

31. As a result of the conduct described above, Albright willfully violated Section 17(e)(1) of the Company Act, which prohibits any affiliated person of a registered investment company, or any affiliated person of such an affiliated person, from receiving compensation from any source other than the investment company, in connection with the sale of such company's property. Albright violated this provision when he received credit monitoring fees in connection with the purchase of non-rated bonds in the TFFU portfolio.

32. As a result of the conduct described above, Albright willfully violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client. Albright violated this provision when he improperly obtained credit monitoring fees and failed to disclose the fees to the TFFU Board and shareholders.

Undertakings

33. Respondent Albright has undertaken to provide to the Commission, within 30 days after the end of the one-year bar period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

IV.

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

Accordingly, pursuant to Section 15(b) of the Exchange Act, Sections 203(f) and 203(k) of the Advisers Act, and Section 9(b) and 9(f) of the Company Act, it is hereby ORDERED that:

A. Respondent Albright cease and desist from committing or causing any violations and any future violations of Section 17(e)(1) of the Company Act and Section 206(2) of the Advisers Act;

B. Respondent Albright be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, effective on the second Monday following the entry of this Order, 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;

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

D. Respondent Albright shall pay disgorgement of $260,313, prejudgment interest of $34,476 and a civil money penalty in the amount of $50,000. Respondent shall satisfy this obligation as follows: Respondent shall pay the $50,000 penalty to the United States Treasury and the $294,789 in disgorgement and prejudgment interest to the TFFU or such other appropriate party or parties as the Commission staff may identify in consultation with Respondent, confirmed in writing, prior to payment. Respondent shall pay the penalty of $50,000 within 10 days of this entry of the Order. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312-0003; and (D) submitted under cover letter that identifies Thomas S. Albright as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check or wire transfer confirmation shall be sent to James McGovern, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, Three World Financial Center, Suite 400, New York, NY 10281. Respondent shall pay the $294,789 in disgorgement and prejudgment interest by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order to the TFFU or such other appropriate party or parties as the Commission staff may identify in consultation with Respondent, confirmed in writing, prior to payment as follows: $122,395 within 10 days of the entry of this Order, and 4 payments of $43,098 each every 90 days thereafter with one final fourth payment of $43,100 to be made on the one-year anniversary of the entry of this Order. Respondent shall provide a copy of the money order or check or wire transfer confirmation of each such payment at the time it is made to James McGovern, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, Three World Financial Center, Suite 400, New York, NY 10281. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. § 3717.

Furthermore, if the full amount of any payment described herein is not made by the date the payment is required by the Order, the entire amount of disgorgement, prejudgment interest and civil money penalty plus any interest accrued pursuant to 31 U.S.C. § 3717, minus payments made, if any, is due and payable immediately without further application.

E. Respondent shall comply with the undertakings enumerated in Section III, paragraph 33 above.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63681 / January 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14180

In the Matter of **ABSOLUTEFUTURE.COM,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS 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 AbsoluteFuture.com ("AbsoluteFuture.com" or "Respondent").

II.

After an investigation, the Division of Enforcement alleges that:

A. AbsoluteFuture.com (CIK No. 1061103) was a Nevada corporation with its principal place of business in Bellevue, Washington. AbsoluteFuture.com ceased its business operations and, in June 2005, its assets were liquidated pursuant to Chapter 7 bankruptcy proceedings. In October 2008, the corporate status of AbsoluteFuture.com was permanently revoked by the Nevada Secretary of State. AbsoluteFuture.com has a class of equity securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Its securities presently trade in the grey market under the symbol "AFTI."

B. AbsoluteFuture.com has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission, in that it has not filed an Annual Report on Form 10-K since April 14, 2000, and has not filed any periodic report since November 14, 2000 (*see* Chart of Delinquent Filings, attached hereto as Appendix 1). The Division of Corporation Finance sent a delinquency letter to Respondent requesting compliance with its periodic filing obligations. The Respondent has not filed any periodic report after being sent the delinquency letter.

III.

Section 12(j) of the Exchange Act provides as follows:

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

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

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

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

IV.

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings for AbsoluteFuture.com

Form Type	**Period Ended**	**Due Date**	**Months Delinquent (as of 12/31/2010)**
10-K	12/31/00	03/31/01	117
10-Q	03/31/01	05/15/01	115
10-Q	06/30/01	08/14/01	112
10-Q	09/30/01	11/14/01	109
10-K	12/31/01	03/31/02	105
10-Q	03/31/02	05/15/02	103
10-Q	06/30/02	08/14/02	100
10-Q	09/30/02	11/14/02	97
10-K	12/31/02	03/31/03	93
10-Q	03/31/03	05/15/03	91
10-Q	06/30/03	08/14/03	88
10-Q	09/30/03	11/14/03	85
10-K	12/31/03	03/31/04	81
10-Q	03/31/04	05/15/04	79
10-Q	06/30/04	08/14/04	76
10-Q	09/30/04	11/14/04	73
10-K	12/31/04	03/31/05	69
10-Q	03/31/05	05/15/05	67
10-Q	06/30/05	08/14/05	64
10-Q	09/30/05	11/14/05	61

Form Type	Period Ended	Due Date	Months Delinquent (as of 12/31/2010)
10-K	12/31/05	03/31/06	57
10-Q	03/31/06	05/15/06	55
10-Q	06/30/06	08/14/06	52
10-Q	09/30/06	11/14/06	49
10-K	12/31/06	03/31/07	45
10-Q	03/31/07	05/15/07	43
10-Q	06/30/07	08/14/07	40
10-Q	09/30/07	11/14/07	37
10-K	12/31/07	03/31/08	33
10-Q	03/31/08	05/15/08	31
10-Q	06/30/08	08/14/08	28
10-Q	09/30/08	11/14/08	25
10-K	12/31/08	03/31/09	21
10-Q	03/31/09	05/15/09	19
10-Q	06/30/09	08/14/09	16
10-Q	09/30/09	11/14/09	13
10-K	12/31/09	03/31/10	9
10-Q	03/31/10	05/15/10	7
10-Q	06/30/10	08/14/10	4
10-Q	09/30/10	11/15/10	1.5

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63682 / January 7, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3225 / January 7, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14181

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

I.

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

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

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

As stated below, Sieracki was permanently enjoined on the basis of his consent as part of a settlement without any finding of misconduct.

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 Paragraph 3 of Section III 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. Sieracki, age 54, has been a certified public accountant licensed to practice in the State of California, which license has been canceled upon non-renewal. He served as Chief Financial Officer of Countrywide Financial Corporation ("Countrywide") from 2005 until July 2008.

2. Countrywide, a Delaware corporation, was at all relevant times, a mortgage lender based in Calabasas, California. Its stock was registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and was listed on the New York Stock Exchange. On July 1, 2008, Countrywide merged with Bank of America and is now a wholly owned subsidiary of Bank of America. On July 1, 2008, the NYSE filed a Form 25 to deregister and delist Countrywide's common stock, and on July 22, 2008 Countrywide filed a Form 15 deregistering its common stock under Section 12(g) of the Exchange Act.

3. On June 4, 2009, the Commission filed a complaint against Sieracki in SEC v. Angelo Mozilo, et al. (Civil Action No. CV 09-3994 (JFW) (MANx), in the United States District Court for the Central District of California. By consent, on October 15, 2010, the court entered a judgment permanently enjoining Sieracki from future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, ordering him to pay a $130,000 civil money penalty, and fully and finally disposing of all claims asserted in the complaint against Sieracki.

4. The Commission's complaint alleged, among other things, that Sieracki was aware of increasing credit risk at Countrywide caused by expanded loan underwriting guidelines and loans written as exceptions to those guidelines. The complaint also alleged that Sieracki was aware of concerns expressed internally, including by Countrywide's chief executive officer, regarding the expected performance of Countrywide's Pay-Option ARM loan portfolio. The complaint alleged that at the same time, Countrywide made representations regarding its underwriting and credit risk in periodic filings with the Commission, signed by Sieracki, which were false or rendered misleading by the omission of material information regarding underwriting guidelines, exceptions, and attendant credit risk.

IV.

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

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

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

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

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

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

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63688 / January 10, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3226 / January 10, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14182

In the Matter of **Hudson Highland Group, 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 AND A PENALTY**

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 Hudson Highland Group, Inc. ("Hudson" 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 and a Penalty ("Order"), as set forth below.

III.

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

Summary

This matter involves Hudson's failures to maintain appropriate internal controls and books and records relating to its sales tax liabilities. From the time of Hudson's spin-off in 2003 until 2007, Hudson's North America segment ("HNA") failed to consistently comply with tax laws that required the company to collect sales taxes from its customers and to remit them to the taxing jurisdictions. The reason for these failures is that HNA did not have accounting software capable of calculating the amounts of sales taxes owed. The sales tax laws mandated that if HNA failed to collect and remit the taxes as required, and if HNA's customers did not otherwise pay the taxes, HNA became liable for the outstanding sales taxes, plus potential interest and penalties. HNA's failures to consistently collect and remit the required taxes ultimately required Hudson to pay substantially all of the uncollected taxes ($3.9 million) itself.

Respondent

1. Hudson Highland Group, Inc. was incorporated in Delaware on January 6, 2003. The company was spun off from Monster Worldwide, Inc. on March 31, 2003. Hudson's principal place of business is in New York, NY. Hudson provides professional staffing and talent management services worldwide. Hudson's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the NASDAQ.

Background

2. From the time of Hudson's spin-off from Monster Worldwide, Inc. in March 2003 until January 2007, HNA failed to consistently comply with tax laws that required it to collect sales taxes from its customers, and to remit them to the taxing jurisdictions as their fiduciary.[2] If HNA's customers did not pay the required sales taxes, either at the time of sale or subsequently, HNA became liable for its customers' tax liabilities, as well as potential interest and penalties.

3. HNA failed to consistently collect and remit the sales taxes as required because its accounting software was inadequate. The sales tax rates and the types of HNA services that were taxable varied by jurisdiction, and not all jurisdictions in which HNA did business applied sales tax to services. HNA's accounting software, however, was incapable of automatically applying these

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

[2] Hudson had contracted with a third party to prepare HNA's sales tax returns from the time of the spin-off until the end of 2004. Nevertheless, such arrangement did not relieve Hudson of its responsibility to maintain adequate books and records and internal accounting controls with respect to HNA's sales tax obligations.

variables to calculate the taxes owed. Moreover, HNA's staffing contracts were frequently executed with customers located in one taxing jurisdiction for work to be performed in one or more other taxing jurisdictions. Although the sales taxes required to be paid are based on the location of the work performed, HNA's accounting software did not track this information. HNA also did not track adequately which customers had "direct pay" permits with the taxing jurisdictions, pursuant to which the customers paid the required sales taxes directly rather than through HNA, and which customers had obtained specific exemptions from state sales tax.

4. In September 2003, Hudson's former Assistant Director of Tax began raising concerns to Hudson executives about the company's compliance with sales tax laws in various jurisdictions. Hudson's former Corporate Controller, HNA's General Counsel, and HNA's former CFO and Controller were all informed over the next few months of the issue.

5. HNA's failure to collect sales taxes from its customers resulted in the company itself having to pay the unpaid sales taxes. In January 2004, Hudson's former Assistant Director of Tax suggested to HNA's former CFO and to Hudson's former Corporate Controller that they discuss "accruing roughly $150,000 - $200,000 for various sales tax exposures" in at least four states. HNA had previously recorded a sales tax reserve, but the reserve was not allocated to specific states. HNA did not record any additional reserves in response to the suggestion by the former Assistant Director of Tax. At the time, HNA did not have systems that accurately recorded reserves for sales tax liabilities, nor did it change its systems to begin, as required, charging sales taxes to its clients and remitting them to the taxing jurisdictions.

6. In April 2004, the company hired a Big Four accounting firm ("accounting firm") to undertake a multi-phase review to assist HNA in determining its sales tax liabilities and to help HNA comply with the sales tax laws. The accounting firm did not, however, make meaningful progress on these efforts. The accounting firm was only able to prepare a preliminary report due to a high rate of staff turnover at HNA, which hindered the accounting firm's ability to get the documents it needed for the project, and problems with HNA's implementation of a new PeopleSoft accounting and management reporting system.

7. In November 2005, a pending state sales tax audit led HNA to assign its National Tax Manager, who was the company's own sales tax expert, to provide an estimate to HNA's accounting staff of HNA's sales tax liabilities and to implement an effective process for tracking HNA's sales tax obligations. The sales tax expert found this new assignment difficult because HNA's records were incomplete, requiring her team to reconstruct manually the sales data required to calculate the taxes owed. Even after quantifying the amount of sales taxes that HNA might owe to each taxing jurisdiction, to determine HNA's own potential exposure, the company had to determine whether any of its clients had already paid the required sales tax to the taxing jurisdiction through "direct pay" permits with the taxing authorities or had obtained specific exemptions from sales tax from the taxing authorities.

8. Hudson's CFO, who joined the company in December 2005, learned of HNA's possible sales tax deficiencies in February 2006. Starting in February 2006, Hudson's CFO, its former Corporate Controller, its former Director of Tax, and HNA's former CEO and current and former CFOs, closely monitored the company's efforts to quantify its sales tax liabilities.

9. As HNA completed the quantification of its historical sales tax liabilities, it recorded expenses during the period Q2FY06 through Q3FY07 to settle virtually all of its sales tax liabilities. Before Q2FY06, Hudson's books and records failed to accurately reflect the company's sales tax liabilities in any of the jurisdictions in which the company had failed to comply with the sales tax laws. Hudson's books and records did not accurately reflect the company's sales tax liabilities until Q2FY08. During the period 2006 through the first quarter of 2009, Hudson paid approximately $3.9 million to various jurisdictions to settle its sales tax liabilities incurred during the period 2001 to 2007. HNA recovered from its customers about $450,000 of the required sales taxes.

10. Although HNA hired a tax manager in September 2006 to work exclusively on completing the quantification of sales tax exposures and developing accounting systems to ensure timely payments of sales taxes, the manual system he developed for invoicing sales taxes was not fully implemented by HNA until January 2007. HNA was unable to install a comprehensive software package designed to invoice the appropriate sales tax, report sales tax liabilities, and prepare state sales tax returns until February 2008, following the completion of the PeopleSoft installation.

11. From Hudson's 2003 spin-off from Monster Worldwide, Inc. until 2007, HNA's accounting system was incapable of calculating the amounts of sales taxes that HNA owed without manual intervention.

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

13. As a consequence of Hudson's inadequate internal controls during this period, Hudson's books and records did not accurately reflect its tax liabilities.

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

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Hudson cease and desist from committing or causing any violations and any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

B. Pursuant to Section 21B of the Exchange Act, Respondent shall, within 14 days of the entry of this Order, pay a penalty of $200,000 to the United States Treasury. If timely payment is not made, interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, 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 Hudson 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 Lorin Reisner, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549.

By the Commission.

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. SIPA-170; File No. SIPC-2010-01)

January 10, 2011

Securities Investor Protection Corporation; Order Approving a Proposed Bylaw Change Relating to SIPC Fund Assessments on SIPC Members

On October 8, 2010, the Securities Investor Protection Corporation ("SIPC") filed with the Securities and Exchange Commission ("Commission") a proposed bylaw change pursuant to Section 3(e)(1) of the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. 78ccc(e)(1). Notice of the proposed bylaw change was published in the Federal Register on December 6, 2010.[1] The Commission received no comment letters on the proposed bylaw change. This order approves the proposed bylaw change.

I. Description of Proposed Bylaw Change

Section 4(c)(2) of SIPA requires SIPC to impose assessments upon its member broker-dealers deemed necessary and appropriate to establish and maintain a broker-dealer liquidation fund administered by SIPC (the "SIPC Fund") and to repay any borrowings by SIPC used to liquidate a broker-dealer. Pursuant to this authority, SIPC collects an annual assessment from its members. The amount of the annual assessment is prescribed by SIPA and the SIPC bylaws. When the SIPC Fund is at its targeted level, SIPC collects a minimum assessment as provided in SIPA. The current target level for the SIPC Fund is $2.5 billion.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") amended SIPA to change the minimum assessment from an amount not to exceed $150 to an amount not to exceed 0.02 percent of the gross revenues from the securities business of the SIPC member.[2] Under Article 6 of the SIPC bylaws, SIPC must assess its members a

[1] See Release No. SIPA-169 (November 30, 2010), 75 FR 75711 (December 6, 2010).
[2] The Dodd-Frank Act, Section 929V.

minimum amount ($150) unless certain conditions apply. Because in some cases an assessment of $150 would exceed 0.02 percent of a member's gross revenues, the SIPC Assessments bylaw must be amended to be consistent with the Dodd-Frank Act. First, SIPC has proposed to amend Article 6, Section 1(a)(1)(B) of the SIPC bylaws by replacing "$150" with the term "0.02 percent of the net operating revenues from the securities business." This amendment clarifies that the minimum assessment for members, once the SIPC Fund reaches its target, is 0.02 percent of a member's net operating revenues, rather than $150. Second, SIPC has proposed deleting Section 1(a)(3) of Article 6, which states that $150 was the minimum assessment a SIPC member would be required to pay in any calendar year. These amendments were approved by SIPC's Board of Directors on September 16, 2010.

As indicated above, SIPC's bylaw changes refer to "net operating revenues" instead of "gross revenues." Since 1991, when assessing on a percentage basis (i.e., not a flat $150 minimum assessment), SIPC has based the assessment amount on a percentage of net operating revenues, not gross revenues, from the securities business. In 1991, a SIPC Task Force study found that securities firms no longer structured their business on a gross revenue basis but instead used a net operating revenue basis, which excludes interest expense and dividend expense in accounting for revenue. SIPC bases its assessment on the net revenues associated with that business, which it believes is consistent with SIPA. Basing the assessment on net operating revenues as opposed to gross revenues will decrease the amount of the assessment in most situations. However, under SIPA, SIPC may adjust the basis for collecting assessments and the amount of assessments as long as the assessments are within the parameters prescribed in SIPA.[3] Using a minimum assessment of 0.02 percent of net operating revenues would not cause

[3] 15 U.S.C. 78ddd(c)(2) and 78lll(9).

the amount of the assessment to exceed the maximum amount permitted for the minimum assessment under Section 4(d)(1)(C) of SIPA, as amended by the Dodd-Frank Act.

II. Commission Findings

Section 3(e)(1) of SIPA provides that SIPC must file with the Commission a copy of proposed bylaw changes. That section further provides that bylaw changes shall take effect 30 days after filing, unless the Commission either: (i) disapproves the change as contrary to the public interest or the purposes of SIPA, or (ii) finds that the change involves a matter of such significant public interest that public comment should be obtained. Once the Commission finds that the proposed bylaw change involves a matter of such significant public interest that public comment should be obtained, the Commission may, after notifying SIPC in writing of such finding, require that the proposed bylaw change be considered by the same procedures as a proposed rule change including, among other things, publication in the Federal Register and opportunity for public comment. Prior to approving a proposed bylaw change that has been noticed for public comment the Commission must make a finding that the change is in the public interest and is consistent with the purposes of SIPA.[4]

The Commission finds, pursuant to Section 3(e)(2)(D) of SIPA, that the proposed bylaw change is in the public interest and consistent with SIPA. First, the proposed bylaw change is a necessary consequence of Dodd-Frank. Second, utilizing net operating revenues instead of gross revenues is consistent with industry practice, SIPA, and the SIPC bylaws.

[4] 15 U.S.C. 78ccc(e)(2)(D).

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 3(e)(2)(B) of SIPA, that the proposed bylaw changes (File No. SIPC-2010-01) are approved.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 200

[Release No. 34-63699]

Delegation of Authority to the Chief Accountant

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is amending its rules to delegate authority to the Chief Accountant with respect to proposed rule changes of the Public Company Accounting Oversight Board pursuant to Section 107 of the Sarbanes-Oxley Act of 2002 and Section 19(b) of the Securities Exchange Act of 1934, as follows: to publish notices of proposed rule changes filed by the PCAOB; to approve or disapprove a proposed rule change; and to temporarily suspend a proposed rule of the PCAOB. In addition, the Commission is amending its rules to delegate authority to the Chief Accountant to determine the appropriateness of extending the time periods specified in Section 19(b) and publish the reasons for such determination as well as to effect any such extension and to institute proceedings to determine whether to disapprove a proposal and to provide to the PCAOB notice of the grounds for disapproval under consideration, and to find good cause to approve a proposal on an accelerated basis and to publish the reasons for such determination. This delegation is intended to conserve Commission resources and to maintain the effectiveness and efficiency of the Commission's PCAOB proposed rule filing process.

EFFECTIVE DATE: [Insert date of publication in the Federal Register]

FOR FURTHER INFORMATION CONTACT: Jeffrey S. Cohan, Senior Special Counsel, or John F. Offenbacher, Senior Associate Chief Accountant, at (202) 551-5300, Office of the Chief

Accountant, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7561.

SUPPLEMENTARY INFORMATION:

I. DISCUSSION OF RULE AMENDMENTS

Pursuant to the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"),[1] proposed rules of the Public Company Accounting Oversight Board ("PCAOB") are governed by certain provisions of Section 19 of the Securities Exchange Act of 1934 ("Exchange Act").[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act[3] amended Section 19 of the Exchange Act so that there are new deadlines by which the Securities and Exchange Commission ("Commission") must publish and act upon proposed rule changes submitted by the PCAOB. In recognition of the amendments to Section 19, the Commission is amending its rules governing delegations of authority to the Chief Accountant. The amendments to Rule 30-11 (17 CFR 200.30-11) authorize the Chief Accountant: (1) to publish notice of a PCAOB proposed rule change pursuant to Section 19(b)(1); (2) pursuant to Section 19(b)(2) of the Exchange Act, to approve or disapprove[4] a PCAOB proposed rule change;[5] (3) pursuant to Section 19(b)(2)(A) of

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1 See Section 107 of the Sarbanes-Oxley Act, 15 U.S.C. 7217.

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

3 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

4 15 U.S.C. 78s(b)(2). Section 107(b) of the Sarbanes Oxley Act, 15 U.S.C. 7217(b), and Section 19(b)(2)(C) of the Exchange Act, 15 U.S.C. 78s(b)(2)(C), provide the standards for Commission approval and disapproval of a proposed rule. Specifically, Section 107(b)(3) provides that the Commission "shall approve a proposed rule if it finds that the rule is consistent with the requirements of this Act and the securities laws, or is necessary and appropriate in the public interest or for the protection of investors." Additionally, the Commission may not approve a proposed rule change earlier than 30 days after the date of publication unless the Commission finds good cause for so doing and publishes the reasons for the finding.

5 The amendments also specify that the Office of the Chief Accountant is to notify the Commission no less than five (5) business days before the Chief Accountant intends to exercise his or her authority to approve or disapprove a particular proposed rule change.

the Exchange Act,[6] to extend for a period not exceeding 90 days from the date of publication of notice of the filing of a proposed rule change the period during which the Commission must by order approve or disapprove the proposed rule change; (4) pursuant to Section 19(b)(2)(A) of the Exchange Act,[7] to determine the appropriateness of extending the period during which the Commission must by order approve or disapprove a proposed rule change or institute proceedings to determine whether to disapprove the proposal and publish the reasons for such determination; (5) pursuant to Section 19(b)(2)(B) of the Exchange Act,[8] to extend for a period not exceeding 240 days from the date of publication of notice of the filing of a proposed rule change the period during which the Commission must conclude proceedings to determine whether to disapprove the proposal and to determine whether such longer period is appropriate and publish the reasons for such determination; (6) to temporarily suspend the PCAOB's proposed rule change pursuant to Section 19(b)(3)(C) of the Exchange Act;[9] (7) pursuant to Section 19(b)(2) of the Exchange Act and 19(b)(3) of the Exchange Act, to institute proceedings to determine whether a proposed rule of the PCAOB should be disapproved and to provide to the PCAOB notice of the grounds for disapproval under consideration; and (8) to find good cause to approve a proposal on an accelerated basis and to publish the reasons for such determination.

This delegation is intended to conserve Commission resources and maintain the effectiveness and efficiency of the Commission's process for handling proposed rule changes submitted by the PCAOB. The Commission anticipates that the delegation of authority will help facilitate timely compliance with the amendments to Section 19 of the Exchange Act and the

6 15 U.S.C. 78s(b)(2)(A)

7 15 U.S.C. 78s(b)(2)(A)

8 15 U.S.C. 78s(b)(2)(B)

9 15 U.S.C. 78s(b)(3)(C)

new statutory deadlines prescribed therein. Nevertheless, the Chief Accountant may submit matters to the Commission for its consideration, as he or she deems appropriate.

The Commission finds, in accordance with the Administrative Procedure Act (5 U.S.C. 553(b)(3)(A)), that these amendments relate solely to agency organization, procedures, or practices, and do not relate to a substantive rule. Accordingly, notice, opportunity for public comment, and publication of the amendments prior to their effective date are unnecessary and these changes are effective on [insert date of publication in the Federal Register].

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies).

Text of Amendment

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

PART 200 – ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for Part 200, Subpart A, continues to read in part as follows:

Authority: 15 U.S.C. 77o, 77s, 77sss, 77d, 78d-1, 78d-2, 78w, 78ll(d), 78mm, 80a-37, 80b-11, and 7202 et seq., unless otherwise noted.

* * * * *

2. Section 200.30-11 is amended as follows:

a. Redesignating paragraph (b) as paragraph (c).

b. Adding new paragraph (b).

The addition reads as follows:

§ 200.30-11 Delegation of authority to the Chief Accountant.

* * * * *

(a) * * *

(b) (1) Pursuant to section 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217, and section 19(b) of the Act, 15 U.S.C. 78s(b), and applicable rules of the Commission, to publish notices of proposed rule changes filed by the Public Company Accounting Oversight Board.

(2) Pursuant to section 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217, and section 19(b) of the Act, 15 U.S.C. 78s(b), and applicable rules of the Commission, to approve or disapprove a proposed rule change, and to find good cause to approve a proposed rule change earlier than 30 days after the date of publication of such proposed rule change and to publish the reasons for such finding. The Office of the Chief Accountant shall notify the Commission no less than five (5) business days before the Chief Accountant intends to exercise his or her authority to approve or disapprove a particular proposed rule change.

(3) Pursuant to section 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217, and section 19(b)(2)(A) of the Act, 15 U.S.C. 78s(b)(2)(A), to extend for a period not exceeding 90 days from the date of publication of notice of the filing of a proposed rule change pursuant to section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), the period during which the Commission must by order approve or disapprove the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved and to determine whether such longer period is appropriate and publish the reasons for such determination.

(4) Pursuant to section 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217, section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), and section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to institute proceedings to determine whether a proposed rule change of the Public Company Accounting Oversight Board should be disapproved and to provide to the Public Company Accounting

Oversight Board notice of the grounds for disapproval under consideration. In addition, pursuant to section 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217, and section 19(b)(2)(B) of the Act, 15 U.S.C. 78s(b)(2)(B), to extend for a period not exceeding 240 days from the date of publication of notice of the filing of a proposed rule change pursuant to section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), the period during which the Commission must issue an order approving or disapproving the proposed rule change and to determine whether such longer period is appropriate and publish the reasons for such determination.

(5) Pursuant to section 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217, and section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C), to temporarily suspend a rule of the Public Company Accounting Oversight Board.

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: January 11, 2011

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9171 / January 11, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 63693 / January 11, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3136 / January 11, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29552 / January 11, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14184

In the Matter of **Charles Schwab Investment Management; Charles Schwab & Co., Inc.; and Schwab Investments,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

1. The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Charles Schwab Investment Management; Charles Schwab & Co., Inc.; and Schwab Investments ("Respondents").

II.

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2. In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Section 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

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

Summary

4. These proceedings arise out of the offer, sale, and management of the Schwab YieldPlus Fund (the "Fund" or "YieldPlus Fund"), a fixed-income mutual fund managed by Charles Schwab Investment Management and marketed and distributed by Charles Schwab & Co., Inc., which suffered a significant decline during the credit crisis of 2007-2008. Respondents: (1) offered and sold the Fund as a cash alternative without adequately disclosing the differences between the Fund and the cash investments with which it was compared, which misled investors; (2) deviated from the Fund's concentration policy when it invested more than 25% of Fund assets in non-agency mortgage-backed securities without obtaining a shareholder vote as required by statute; (3) made inaccurate statements concerning the Fund while its NAV declined; and (4) failed to establish and implement internal controls reasonably designed to prevent the misuse of material nonpublic information.[2]

Respondents

5. **Charles Schwab Investment Management, Inc. ("CSIM")** is a San Francisco-based, wholly-owned subsidiary of the Charles Schwab Corporation. CSIM was incorporated in Delaware in October 1989 and has been a registered investment adviser since January 25, 1990. CSIM manages the assets of registered and unregistered investment companies, including the Fund and other Schwab-branded mutual funds.

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

[2] In a related civil proceeding filed by the Commission in the United States District Court for the Northern District of California, CSIM and CS&Co. have consented to pay disgorgement, pre-judgment interest, and civil penalties.

6. **Charles Schwab & Co., Inc.** (**"CS&Co."**) serves as the distributor and transfer agent for the Fund. CS&Co. is a registered broker-dealer, transfer agent, and investment adviser. Various CS&Co. employees, including the product development and management group responsible for marketing the YieldPlus Fund and other Schwab funds, provided services to CSIM and the Fund. CS&Co. is a wholly-owned subsidiary of Schwab Holdings, Inc., which in turn is a wholly-owned subsidiary of the Charles Schwab Corporation. CS&Co. was incorporated in California in 1971.

7. **Schwab Investments** is a no-load, open-end management investment company organized as a Massachusetts business trust and is organized as a series investment company registered under the Investment Company Act as of October 26, 1990. The YieldPlus Fund and the Schwab Total Bond Market Fund are series issued by Schwab Investments.

Other Relevant Entities

8. **Charles Schwab Corporation** (**"CSC"**) is a publicly traded corporation organized under the laws of Delaware and headquartered in San Francisco, California. CSC's securities are registered under Section 12(b) of the Exchange Act and are listed on the New York Stock Exchange. CSC is the parent company of CSIM and CS&Co.

9. **Schwab YieldPlus Fund** (**"YieldPlus Fund" or the "Fund"**) is a series of Schwab Investments and an open-end fund organized as a Massachusetts business trust registered under the Investment Company Act. The Fund is managed by CSIM. The YieldPlus Fund had two classes of securities, Investor Shares and Select Shares.

10. **Schwab Total Bond Market Fund** (**"Total Bond Fund"**) is a series of Schwab Investments and an open-end fund organized as a Massachusetts business trust registered under the Investment Company Act. The Total Bond Fund is managed by CSIM.

Background

11. The YieldPlus Fund, formed in 1999, is an ultra-short bond fund[3] that, until mid-2008, primarily invested in mortgage-backed securities ("MBS"), asset-backed securities, and corporate bonds. As recited in its prospectus, the Fund's investment objective is to seek "high current income with minimal changes in share price." The YieldPlus Fund's assets grew significantly after its formation, becoming CSIM's largest variable net asset value ("NAV") fund[4]

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[3] Ultra-short bond funds are fixed-income funds with durations usually less than one year. Unlike maturity, duration is not a measurement of time; instead, duration is a ratio that reflects a fund's sensitivity to interest rate changes. Ultra-short bond funds generally maintain short durations by investing in fixed income securities with short-term maturities and by using interest rate hedging strategies. See generally http://www.sec.gov/investor/pubs/ultra-short_bond_funds.htm. YieldPlus owned many long-maturity bonds, but the Fund used an interest rate hedging strategy to maintain a low duration and preserve its classification as an ultra-short fund.

[4] The NAV of a fund is a daily calculation of the fund's assets per share, minus its liabilities. To calculate a fund's NAV per share, a fund takes the total current market or fair value of its holdings, subtracts liabilities, and divides by

in 2006. At its peak in 2007, the YieldPlus Fund had $13.5 billion in assets and over 200,000 accounts, making it the largest ultra-short bond fund in the category. For several years, the Fund was one of the best performing funds in the ultra-short category, first earning a 5-star Morningstar rating in late 2004 for its 3-year performance.

12. The Fund suffered a significant decline during the credit crisis of 2007-2008 that led to declines in some bond valuations. During an eight-month period, the Fund's NAV dropped 28% and its assets under management fell from $13.5 billion to $1.8 billion due to redemptions and declining asset values.

Offer and Sale of the YieldPlus Fund

13. From at least 2006 to 2008, CSIM and CS&Co. described the Fund as a cash "alternative" that generated a higher yield with slightly higher risk than a money market fund. Some communications emphasized that the Fund's NAV "may fluctuate minimally." Others stated that the NAV "would fluctuate" but noted that it had fluctuated by only pennies in recent years. The Fund had experienced some volatility from its inception in 1999 through 2002, and then fluctuated by pennies during the next several years. Nevertheless, the statements were misleading because the YieldPlus Fund was not slightly riskier than money market funds, CDs and other cash alternatives to which it was compared. Investments in the Fund are not insured, as are CDs, and the maturity and credit quality of the Fund's securities were significantly different than those of a money market fund. Although the Fund's prospectus informed investors that the Fund was not a money market fund and better explained the differences among these investments, the disclosure was insufficient to remedy the misleading statements and omissions in the offer and sale of the Fund.

14. In 2004, the NASD raised concerns with CS&Co. about advertisements that compared the YieldPlus Fund to money market funds without adequate disclosure of the differences between the products. In response to the NASD's concerns, CS&Co. added the word "slightly" to the advertisements, stating that the Fund was "designed to provide a higher yield with slightly higher risks than a money market fund but with less risk than a long-term bond fund." CS&Co. also added, in some advertisements, a statement that the Fund's "investment value will fluctuate and shares, when redeemed, may be worth more or less than original cost." In its advertisements and other communications, however, it continued to describe the Fund as a cash alternative and did not highlight the differences between the Fund and a money market fund.

15. In 2006, a Commission staff examination included a statement that YieldPlus Fund sales materials did not include balanced disclosure and could mislead investors because they compared the Fund to money market funds without describing the differences between these two investments. Commission staff communicated the conclusion to Schwab Investments, CSIM and CS&Co. In response, CSIM and CS&Co. added additional disclosure in the Fund's prospectus about the differences between the YieldPlus Fund and money market funds but did not include the

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the number of shares outstanding. Variable NAV funds are distinguished from money market funds, which have an NAV per share of a $1.00 that normally does not fluctuate.

additional disclosure in its advertisements and other sales communications until after the Fund's NAV began to decline in 2007.

16. In 2006, a group of high-level executives for CSC and its related entities, referred to as the "Cash Council," held a series of meetings about the many cash alternative products across their operating businesses. Products addressed in the meetings included accounts at Schwab Bank, sweep money market funds, purchased money market funds, and CDs. The Council asked one of its members, and his product placement group at CS&Co., to recommend an "attractive yield product" to be marketed with cash products. They identified the YieldPlus Fund. Following that recommendation, the Council sought to "[m]ake it easier to see information about Yield Plus [sic] on the web, including links to it from pages where we talk about cash and information about it that includes consistently up to date SEC Yield info," and to highlight the Fund's recent limited NAV fluctuation. As a result, various links and content were added to Schwab's website, which typically characterized the Fund as a long-term cash alternative even though it had previously been marketed with short-term and long-term bond funds.

17. Some CS&Co. registered representatives also described the YieldPlus Fund as a cash alternative with minimal price fluctuation when discussing the Fund with investors. Periodically, representatives called customers with fixed-income investments coming due, such as maturing CDs, and highlighted the YieldPlus Fund as an option for investing the proceeds. They emphasized what they described as the Fund's historically narrow NAV fluctuation, and minimized its potential for volatility.

18. As a result of the above, Respondents failed to adequately inform investors about (1) the risks associated with investing in the YieldPlus Fund and (2) the differences between the Fund and other investments.

Understating the Fund's Weighted Average Maturity

19. A fund's weighted average maturity ("WAM") is a measurement of the average length of time until the underlying bonds in a portfolio mature. WAM can be used by investors to evaluate the riskiness of a product; among similar funds, those with a longer WAM generally involve more risk. A fund's duration is different than WAM; duration is a mathematical measure of a fund's sensitivity to interest rate risk, but is not a measurement of time. For the relevant period, the YieldPlus Fund's duration was a lower number than its WAM.

20. Between February 2006 and September 2007, in some communications with investors, Schwab substituted the Fund's duration for its WAM, in some instances without noting the change. The resulting understatement appeared in sales and marketing materials and one Commission filing, a Form N-CSR Annual Report dated August 31, 2007.[5] In other communications provided to investors during the same period, Respondents reported the Fund's correct WAM. These included various semi-annual and annual reports, which were filed with the

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[5] Respondents voluntarily advised the Commission's Enforcement staff of this issue during the course of the investigation.

Commission and sent to shareholders, and quarterly fact sheets that were posted on Schwab's public website.

21. In early 2006, the YieldPlus Fund's WAM increased significantly to over one to two years in length because of a change in the calculation method used by CSIM's new fund accountant. Investors noticed the change. CSIM and CS&Co. then listed the Fund's duration in place of its WAM in the sales materials, including tables that listed statistics for all Schwab's funds and, internal daily reports. Schwab did not replace WAM with duration for any other fund.

22. In some communications, CS&Co. and CSIM noted the replacement with a footnote indicating that duration, not WAM, was listed. However, in tables on the Schwab.com website, one Commission filing, and two issues of *On Investing* magazine, CS&Co. and CSIM did not include the footnote. As a result, for eighteen months, the website indicated that the average maturity of the Fund's bonds was six months when the Fund's WAM actually ranged from at least 1.3 to 2.2 years.

23. In addition, the duration number that Respondents listed was not accurate. Although the Fund's duration fluctuated from 0.4 to 0.6, CS&Co. and CSIM hard-coded the number "0.5" into some tables and documents instead of updating the information on a daily basis. This inaccurately suggested that the Fund's duration (or WAM, when the footnote was omitted) was constant rather than variable.

Deviations From the Bond Funds' Concentration Policy

24. Section 8 of the Investment Company Act requires that funds' registration statements contain a recital of certain investment policies, including a policy regarding concentration of investments in particular industries. Under Section 13(a)(3) of the Investment Company Act, once a fund recites a concentration policy, it must obtain shareholder approval to "deviate from its policy in respect of concentration of investments in any particular industry or group of industries as recited in its registration statement . . .."

25. To comply with Section 8 of the Investment Company Act, Schwab Investments recited a single concentration policy for the taxable bond funds, including the YieldPlus Fund and the Total Bond Fund. The funds stated in their registration statement that they would not concentrate in any industry. They defined concentration as investing more than 25% of their assets in an industry. Before August 2006, the concentration policy specifically stated: "Based on characteristics of mortgage-backed securities, each fund has identified mortgage-backed securities issued by private lenders and not guaranteed by the U.S. government agencies or instrumentalities as a separate industry for purposes of a fund's concentration policy." Because they identified non-agency MBS as an industry, the YieldPlus Fund and the Total Bond Fund could not invest more than 25% of their assets in non-agency MBS without obtaining shareholder approval under Section 13(a).

26. By early 2006, under CSIM's direction, the YieldPlus Fund deviated from the concentration policy by investing more than 25% of Fund assets in non-agency MBS. Before September 2006, Respondents inconsistently classified several securities in filings with the Commission. If those securities had been consistently treated as MBS, Fund filings would have reflected the deviation from its concentration policy by approximately 2-3% of the Fund's assets. In addition, the Fund also exceeded the concentration limit because it excluded certain categories of non-agency MBS, such as commercial MBS, when it calculated its investment in non-agency MBS.

27. In mid-2006, the Fund increased investments in non-agency MBS because of, among other things, the Fund's portfolio managers' concerns about increasing corporate buy-out activity and the credit risks associated with corporate bonds. In August 2006, CSIM requested that the Schwab Investments board of trustees change the concentration policy to reclassify non-agency MBS such that it would not be an industry to allow more than 25% of Fund assets to be invested in non-agency MBS. Without the shareholder approval required by statute, the board of trustees voted on August 29, 2006, to approve the change. The YieldPlus Fund's investment in non-agency MBS increased after the purported change to 50% of assets in the Fund's portfolio, with nearly all of the MBS being rated AAA. By at least October 2006, the Total Bond Fund also invested more than 25% of its assets in non-agency MBS.

28. Schwab Investments did not follow the required procedure for disclosing the purported change to its registration statement. On September 1, 2006, it filed a Form 497 amending the taxable bond funds' prospectus, but not its registration statement as required by the Investment Company Act. In November 2006, Schwab Investments filed an amendment to its registration statement that reflected the purported change to the concentration policy. Amendments involving material changes, such as a change to a fund's concentration policy, must be filed on Form 485A, which typically are reviewed by Commission staff and become effective after 60 days. Schwab Investments, however, filed the amendment on Form 485B, with certifications that the filing did not contain any material changes. Filings on Form 485B typically are effective immediately and not reviewed by Commission staff. Schwab Investments should have filed on Form 485A.

Misrepresentations During the Fund's Decline

29. As the credit crisis unfolded and bond valuations declined in the summer of 2007, the Fund's NAV began to decline and many investors redeemed their holdings. Unlike money market funds, which can rely on maturing securities to generate cash, only $675 million, representing 6% of the Fund's over $11.2 million in assets, were scheduled to mature within the next six months. As a result, the Fund had to sell assets in a depressed market to raise cash to meet redemptions.

30. As the NAV declined, CSIM and CS&Co. held a series of conference calls and issued written materials to investors, independent investment advisers, and CS&Co. registered representatives. CS&Co. representatives also spoke with many individual customers. In these

communications, CSIM and CS&Co. expressed confidence in the Fund; urged investors to have a patient, long-term perspective; and emphasized that most of the Fund's NAV decline represented unrealized, rather than realized, losses.

31. During the decline, CSIM and CS&Co. made a number of material misstatements and omissions concerning the Fund. For example, during two prescheduled conference calls in August 2007, the Fund's then-lead portfolio manager ("Lead Portfolio Manager"), who also was CSIM's Chief Investment Officer for Fixed Income, understated the Fund's redemptions at the time. During the first two weeks of August, investors redeemed almost $1.2 billion from the Fund, or approximately 10% of Fund assets. During this same two-week period, the YieldPlus Fund sold over $2.1 billion in portfolio securities—16% of assets—to raise cash to meet redemptions. The Lead Portfolio Manager monitored redemption levels throughout each day and reviewed a detailed summary each evening. During this time period, on August 8, 2007, another Fund portfolio manager sent an email to the Lead Portfolio Manager, the President of CSIM and others saying "we need flows to stabiliz[e]." On August 11, 2007, the Lead Portfolio Manager sent an email to the President of CSIM saying "[i]f the Advisor community starts to bail out, who [sic] has been stable to this point, we will be in trouble." On Sunday, August 12, 2007, the Lead Portfolio Manager sent an email regarding his deletion of information about the Fund's holdings and assets under management information from a Q&A for the Schwab website. In the email, he said, "I don't want anyone to sense that we are having outflows."

32. On August 14, 2007, the Lead Portfolio Manager held a conference call with registered investment advisers to discuss the Fund. During the question and answer portion of the call, an adviser asked him, "how expensive have your redemptions been since the decline?" During his response, the Lead Portfolio Manager said that some advisers had purchased more shares, and "we've got very, very, very slight negative flows over the course of the last week or two." Two days later, on August 16, 2007, the Lead Portfolio Manager held a conference call with CS&Co. registered representatives. In that call, a representative asked "what are the net outflows of the Schwab Yield Plus fund to date?" During his answer, the Lead Portfolio Manager said, "[i]t's not that much. . . . So outflows have been minimal." These statements were false and misleading. The Fund's outflows, which already had required over $2 billion in asset sales to that point, were not "very, very, very slight" or "minimal." After the conference calls, some CS&Co. representatives communicated the Lead Portfolio Manager's comments to Fund investors.

33. Another example involves a November 2007 internal memorandum that circulated a set of talking points. CSIM and CS&Co. prepared and circulated the talking points to assist CS&Co. representatives in responding to questions about the Fund. Both the President of CSIM and the Lead Portfolio Manager reviewed, and the President approved, the talking points document, which repeated the positive theme, stating, among other things, that "[t]he portfolio management team has confidence in the Fund's strategy" and that "[d]espite the recent spike in bond market volatility, history suggests this is a temporary condition." The talking points document was inconsistent with contemporaneous internal emails discussing the Fund that were sent by the portfolio manager responsible for providing daily updates to management. In one email, a YieldPlus Fund portfolio manager reported to the Lead Portfolio Manager, the President

of CSIM, and other senior executives that raising cash "was like pulling teeth" and that "[l]iquidity is AWFUL ….period." In a second email, the same portfolio manager reported to the Lead Portfolio Manager that "it[']s not better today and likely won't be for some time." In a third email, he reported to the executives that "we are hostage to the market at this point and can't improve the NAV." In light of the Fund's holdings, and the market conditions at the time, CSIM and CS&Co.'s statements were incomplete and misleading.

34. CSIM and CS&Co. made other inaccurate statements and omissions. These included statements that: (1) the Fund was selling securities to raise cash to capitalize on purchasing opportunities in the current market environment and to meet redemptions, when meeting redemptions was the motivation for the sales; and (2) the Fund had a short maturity structure that had mitigated the price erosion experienced by some of the Fund's peers.

Redemptions by Schwab-Related Funds and Individuals

35. Although CS&Co. and CSIM's policies broadly prohibited trading on the basis of material nonpublic information, those entities did not have adequate policies and procedures to prevent the misuse of material nonpublic information about the Fund, taking into consideration the nature of their businesses. For example, CSIM and CS&Co. did not have policies in place to review redemptions of Fund shares by all Schwab-related personnel and funds for compliance with the general policy. Moreover, although certain people (such as the Fund's own portfolio managers) had to obtain pre-approval for personal trades of the Fund's shares, individuals whose responsibilities provided them with material nonpublic information about the Fund had no pre-approval obligations. CSIM and CS&Co. also failed to maintain appropriate information barriers concerning nonpublic and potentially material Fund information. Finally, CSIM and CS&Co. had no specific policies and procedures governing redemptions by portfolio managers who advised Schwab funds of funds. As a result, several Schwab-related funds and individuals were free under CSIM and CS&Co.'s policies and procedures to redeem their own investments in the Fund during the Fund's decline.

36. One instance involved Schwab Charitable, a 501(c)(3) public benefit corporation that is not a subsidiary of CSC. On March 5, 2008, Schwab Charitable's Investment Oversight Committee voted to recommend to its board that the fund redeem its $91 million investment in the YieldPlus Fund due to the Fund's poor performance. The recommendation was scheduled for discussion and vote by the Charitable Fund's board on March 12, 2008, at its next scheduled meeting. On March 7, 2008, however, the fund's Chief Operating Officer ("COO") unilaterally decided to redeem the fund's entire investment before the board approved the decision. Prior to the redemption, the COO had received an email from CSIM that contained a mix of public and nonpublic information regarding the Fund and its recent decline. The email was forwarded to the COO by a CS&Co. employee who had no business reason for receiving it but was a member of Charitable's Investment Oversight Committee.

37. A second instance involved redemptions in March 2008 by the Schwab Target Date Funds, which are CSIM-managed, fund-of-fund mutual funds with primarily retail investors. The

Target Date Funds' senior portfolio manager served as CSIM's Chief Investment Officer for Equities ("CIO-Equities"). The CIO-Equities had access to two potential sources of nonpublic information regarding the Fund when he accelerated the Target Date Funds' redemptions of their YieldPlus investments. First, he participated in internal meetings between CSIM's President and his direct reports. During these meetings, the Lead Portfolio Manager and other executives discussed the YieldPlus Fund, including nonpublic information about the Fund's redemption levels and plans to satisfy redemptions. Second, the CIO-Equities was a member of Charitable's Investment Oversight Committee, and in that capacity learned that Schwab Charitable intended to redeem its YieldPlus Fund investment. The CIO-Equities informed the CSIM President of his intention to redeem and the CSIM President approved the redemption.

Violations

38. Schwab Investments deviated from the bond funds' concentration policy without obtaining shareholder approval when the YieldPlus Fund and the Total Bond Fund invested more than 25% of their assets in non-agency MBS. Accordingly, Schwab Investments willfully violated Section 13(a) of the Investment Company Act. See In re Charles Schwab Corp. Secs. Litig., 2010 WL 1261705 (N.D. Cal. March 30, 2010) (investing more than 25% in non-agency MBS required shareholder vote). CSIM willfully aided and abetted and caused the violations when it directed the investments in MBS in excess of the YieldPlus Fund's 25% limit, proposed the change to the funds' concentration policy, and directed the Total Bond Fund's investment of over one-third of assets in non-agency MBS.

39. CSIM and CS&Co. willfully violated anti-fraud provisions of the Securities Act, Sections 17(a)(2) and (3), when, as described above, they: (1) made materially misleading statements and omissions about the Fund and its risk before the Fund's NAV declined; (2) made materially misleading statements and omissions during the Fund's NAV decline; and (3) materially understated the Fund's WAM from February 2006 to September 2007 in certain communications.

40. CSIM also willfully violated Section 206(4) and Rule 206(4)-8 of the Advisers Act by materially misstating the Fund's WAM and by making materially false and misleading statements about the Fund during its decline.

41. CSIM and CS&Co. willfully aided and abetted and caused violations of Section 34(b) of the Investment Company Act. CSIM and CS&Co. provided substantial assistance to persons making the misstatements and omissions detailed above that appeared in sales materials filed with NASD or FINRA and, consequently, with the Commission. CSIM and CS&Co. also willfully aided and abetted and caused violations of Section 34(b) of the Investment Company Act by providing substantial assistance regarding (1) a Form N-CSR Annual Report dated August 31, 2007, misstating the Fund's WAM; (2) a Registration Statement stating that the YieldPlus Fund would not invest more than 25% of its assets in non-agency MBS at a time when the Fund exceeded that concentration limitation; and (3) a Form 485B falsely certifying that it contained no material changes when it included the unauthorized change to the funds' concentration policy.

42. CSIM and CS&Co.'s policies and procedures were not reasonably designed, given the nature of their business, to prevent the misuse of material nonpublic information about the Fund by Schwab-related personnel and funds. Accordingly, CSIM and CS&Co. willfully violated Sections 204A of the Advisers Act and 15(g) (formerly Section 15(f)) of the Exchange Act, respectively.

Undertakings

Respondents have undertaken to:

A. Correct all disclosures regarding Schwab Investments' taxable bond funds' concentration policy by reinstating disclosure of a 25% limit on investment in non-agency MBS for purposes of its concentration policy.

B. Retain, at CSIM and CS&Co.'s expense and within 30 (thirty) days of the issuance of this Order, a qualified independent consultant (the "Consultant") not unacceptable to the staff of the Division of Enforcement (the "Staff") to: (1) conduct a comprehensive review of Respondents' policies, practices, and procedures to prevent the misuse of material, nonpublic information by or related to its proprietary mutual funds; (2) determine the adequacy, taking into account and consideration the nature of their businesses and the relationship between them, of such policies, practices, and procedures under Section 15(g) of the Exchange Act and Section 204A of the Advisers Act (with special attention to the findings described in paragraphs 35 through 37 above); and (3) prepare the written reports, referenced below, reviewing the adequacy of each Respondent's policies, practices, and procedures and making recommendations regarding how Respondents should modify or supplement their respective policies, practices, and procedures, to prevent the misuse of material, nonpublic information in compliance with Section 15(g) of the Exchange Act and Section 204A of the Advisers Act. Respondents shall provide a copy of the engagement letter detailing the Consultant's responsibilities to Commission staff;

C. Cooperate fully with the Consultant, including providing the Consultant with access to Respondents' files, books, records, and personnel as reasonably requested for the above-mentioned review, and obtaining the cooperation of respective employees or other persons under Respondents' control;

D. Require the Consultant to report to Commission staff on his/her/its activities as the staff shall request;

E. Permit the Consultant to engage such assistance, clerical, legal or expert, as necessary and at a reasonable cost, to carry out his/her/its activities, and the cost, if any, of such assistance shall be borne exclusively by Respondents;

F. Within ninety (90) days of the issuance of this Order, unless otherwise extended by Commission staff for good cause, Respondents shall require the Consultant to complete the review described in subparagraph B above and prepare a written preliminary report ("Preliminary Report") that: (i) evaluates the adequacy under Section 15(g) of the Exchange Act and Section 204A of the Advisers Act of each Respondent's policies, practices, and procedures, taking into account and consideration the nature of their businesses and the relationship between them, to prevent the misuse of material, nonpublic information; and (ii) makes any recommendations about modifications thereto or additional or supplemental procedures deemed necessary to remedy any deficiencies described in the Preliminary Report. Respondents shall require the Consultant to provide the Preliminary Report simultaneously to both Commission staff and Respondents;

G. Within ninety (90) days of Respondents' receipt of the Preliminary Report, Respondents shall adopt and implement all recommendations set forth in the Preliminary Report; provided, however, that as to any recommendation that Respondents consider to be, in whole or in part, unduly burdensome or impractical, Respondents may submit in writing to the Consultant and Commission staff, within thirty (30) days of receiving the Preliminary Report, an alternative policy, practice, or procedure designed to achieve the same objective or purpose. Respondents shall then attempt in good faith to reach an agreement with the Consultant relating to each recommendation that Respondents consider to be unduly burdensome or impractical and request that the Consultant reasonably evaluate any alternative policy, practice, or procedure proposed by Respondents. Within fourteen (14) days after the conclusion of the discussion and evaluation by Respondents and the Consultant, Respondents shall require that the Consultant inform Respondents and Commission staff of his/her/its final determination concerning any recommendation that Respondents consider to be unduly burdensome or impractical. Respondents shall abide by the determinations of the Consultant and, within sixty (60) days after final agreement between Respondents and the Consultant or final determination by the Consultant, whichever occurs first, Respondents shall adopt and implement all of the recommendations that the Consultant deems appropriate;

H. Within fourteen (14) days of Respondents' adoption of all of the recommendations that the Consultant deems appropriate, Respondents shall certify in writing to the Consultant and Commission staff that Respondents have adopted and implemented all of the Consultant's recommendations and that Respondents have established policies, practices, and procedures as required by Section 15(g) of the Exchange Act and Section 204A of the Advisers Act that are consistent with the findings of this Order;

I. Within one hundred and eighty (180) days from the date of the certifications described in subparagraph H above, Respondents shall require the Consultant to have completed a review of Respondents' revised policies and procedures and practices and submit a written final report ("Final Report") to Respondents and Commission staff. The Final Report shall describe the review made of Respondents' revised policies, practices, and procedures and describe how Respondents are implementing, enforcing, and auditing the enforcement and implementation of those policies, practices, and procedures. The Final Report shall include an opinion of the Consultant as to whether the revised policies, practices, and procedures and their implementation and enforcement by Respondents and Respondents' auditing of the implementation and enforcement of those policies, practices, and procedures are reasonably adequate under Section 15(g) of the Exchange Act and Section 204A of the Advisers Act;

J. Respondents may apply to Commission staff for an extension of the deadlines described above before their expiration and, upon a showing of good cause by Respondents, Commission staff may, in its sole discretion, grant such extensions for whatever time period it deems appropriate;

K. To ensure the independence of the Consultant, Respondents shall not have the authority to terminate the Consultant without prior written approval of Commission staff and shall compensate the Consultant and persons engaged to assist the Consultant for services rendered pursuant to this Order at their reasonable and customary rates;

L. Respondents shall require the Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Consultant will require that any firm with which he/she/it is affiliated or of which he/she/it is a member, and any person engaged to assist the Consultant in performance of his/her/its duties under this Order shall not, without prior written consent of Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Respondents, or any of their present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement; and

M. Respondents agree to certify in writing to Commission staff, as of the calendar year ended December 31, 2011, that Respondents have established and continue to maintain policies, practices, and procedures as required by Section 15(g) of the Exchange Act and Section 204A of the Advisers Act that are consistent with the findings of this Order.

N. Certification of Compliance by Respondents: Respondents shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondents agrees to provide such evidence. The certification and supporting material shall be submitted to Robert A. Cohen, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, Sections 203(e) and 203(k) of the Advisers Act, and Section 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent CSIM cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act; Sections 204A and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder; and from committing or causing violations and any future violations of Sections 13(a) and 34(b) of the Investment Company Act.

B. Respondent CS&Co. cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) and (3) of the Securities Act and Section 15(g) of the Exchange Act, and from committing or causing violations and any future violations of Section 34(b) of the Investment Company Act.

C. Respondent Schwab Investments cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Investment Company Act.

D. Respondents CSIM and CS&Co. are censured.

E. Respondents shall comply with the undertakings enumerated above.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9172 / January 11, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 63696 / January 11, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14184

In the Matter of **Charles Schwab Investment Management, Charles Schwab & Co., Inc. and Charles Schwab Corporation** **Respondents.**	**ORDER UNDER SECTION 27A(b) OF THE SECURITIES ACT OF 1933, AND SECTION 21E(b) OF THE SECURITIES EXCHANGE ACT OF 1934, GRANTING WAIVERS OF THE DISQUALIFICATION PROVISIONS**

Charles Schwab Investment Management ("CSIM"), Charles Schwab & Co., Inc. ("CS&Co.") and their parent, Charles Schwab Corporation, (together, "Respondents") have submitted a letter on behalf of themselves and their affiliates, dated December 22, 2010, requesting a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from the settlement of administrative and cease-and-desist proceedings with the Commission. On Tuesday, January 11, 2011, the Commission instituted such proceedings and issued finding that:

1) Respondent CSIM willfully violated Sections 17(a)(2) and (3) of the Securities Act; Sections 204A and 206(4) of the Advisers Act and Rule 206(4)-8 promulgated thereunder; and willfully aided and abetted and caused violations of Sections 13(a) and 34(b) of the Investment Company Act; and
2) Respondent CS&Co. willfully violated Section 17(a)(2) and (3) of the Securities Act and Section 15(g) of the Exchange Act, and aided and abetted and caused violations of Section 34(b) of the Investment Company Act.

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The Commission censured Respondents, and ordered Respondents to cease and desist from committing or causing violations of the above-referenced provisions, and to comply with certain undertakings.

Respondents submitted Offers of Settlement in which they agreed, without admitting or denying the findings except as to jurisdiction, to consent to the entry of an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Section 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order") against them. The Order was issued by the Commission on January 11, 2011.

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

Based on the representations set forth in Respondents' December 22, 2010 request letter, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the issuance of the Order is appropriate and should be granted.

Accordingly, **IT IS ORDERED**, pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act and Section 21E(b)(1)(A)(ii) of the Exchange Act as to Respondents and their affiliates resulting from the issuance of the Order, effective as of January 11, 2011, the date of the issuance of the Order, is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Chairman [illegible] not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT of 1933
Release No. 9173 / January 11, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14184

In the Matter of **Charles Schwab Investment Management and Charles Schwab & Co., Inc.** **Respondents.**	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE RULE 602(c)(3) DISQUALIFICATION PROVISION**

I.

Charles Schwab Investment Management ("CSIM") and Charles Schwab & Co., Inc. ("CS&Co.") (together "Respondents") have submitted a letter, dated December 28, 2010, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from Respondents' settlement of an administrative proceeding commenced by the Commission.

II.

On January 11, 2011, pursuant to Respondents' Offers of Settlement, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Section 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order") against Respondents. Under the Order, the Commission found that Respondent CSIM willfully violated of Sections 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act"); Sections 204A and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8 promulgated thereunder; and willfully aided and abetted and caused violations of Sections 13(a) and 34(b) of the Investment Company Act of 1940 ("Investment Company Act"). Under the Order, the Commission found that Respondent CS&Co. willfully violated Section 17(a)(2) and (3) of the Securities Act and Section 15(g) of the Securities Exchange Act of 1934, and willfully aided and abetted and caused violations of Section 34(b) of the Investment Company Act. The Commission censured Respondents, and ordered certain undertakings. The Commission also authorized staff to file a district court action seeking payment of $118,944,966 in disgorgement, prejudgment interest and civil money penalties, which amounts may be distributed to investors.

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 203(e) of the Investment Advisers Act of 1940. 17 C.F.R. § 230.602(c)(3). Rule 602(e) of the Securities Act provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied." 17 C.F.R. § 230.602(e).

IV.

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

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

By the Commission.

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. 63697 / January 11, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14185

In the Matter of **Campo Electronics, Appliances & Computers, Inc.,** **Capco Energy, Inc.,** **Carmel Energy, Inc.,** **Celexx Corp.,** **CenCor, Inc.,** **Central Realty Investors, Inc., and** **Checkmate Electronics, 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 Campo Electronics, Appliances & Computers, Inc., Capco Energy, Inc., Carmel Energy, Inc., Celexx Corp., CenCor, Inc., Central Realty Investors, Inc., and Checkmate Electronics, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Campo Electronics, Appliances & Computers, Inc. (CIK No. 895693) is a revoked Louisiana corporation located in Covington, Louisiana with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Campo is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended May 31, 1998, which reported a

net loss of over $3.6 million for the prior three months. On June 4, 1997, Campo filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Louisiana, which was converted to Chapter 7, and the case was terminated on October 20, 2003. On November 2, 1998, Campo was granted no action relief by the Division of Corporation Finance that allowed it to file monthly reports in lieu of its periodic reports during the pendency of its bankruptcy, provided the company resumed filing its periodic reports at the conclusion of the bankruptcy proceedings. Campo failed to resume its periodic reports after the bankruptcy case was terminated on October 20, 2003. As of January 6, 2011, the company's common stock (symbol "CMPOQ") was traded on the over-the-counter markets.

2. Capco Energy, Inc. (CIK No. 354767) is a delinquent Colorado corporation located in Houston, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Capco is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB/A for the period ended December 31, 2005, which reported a net loss of over $3.6 million for the prior twelve months. On April 7, 2008, Capco filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Texas, and the case was still pending as of January 6, 2011.

3. Carmel Energy, Inc. (CIK No. 747681) is a Delaware corporation located in Deerfield, Missouri with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Carmel Energy 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. As of January 6, 2011, the company's common stock (symbol "CRMY") was traded on the over-the-counter markets.

4. Celexx Corp. (CIK No. 1096085) is a permanently revoked Nevada corporation located in Coral Springs, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Celexx 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 $624,702 for the prior three months. As of January 6, 2011, the company's common stock (symbol "CLXX") was traded on the over-the-counter markets.

5. CenCor, Inc. (CIK No. 18497) is a dissolved Delaware corporation located in Mission, Kansas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CenCor 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, 1999. On July 19, 1993, CenCor filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Missouri, and the case was terminated on January 28, 2000.

6. Central Realty Investors, Inc. (CIK No. 786714) is a void Delaware corporation located in Orlando, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Central Realty 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, 1993, which reported a net loss of $23,461 for the prior three months.

7. Checkmate Electronics, Inc. (CIK No. 910320) is a withdrawn Georgia corporation located in Roswell, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Checkmate 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, 1998.

B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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.

9. 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.

10. 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, 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 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

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. 63690 / January 11, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3227 / January 11, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-10762

In the Matter of **MICHAEL R. DROGIN, CPA,** **Respondent.**	**ORDER AMENDING ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE**

I.

On May 6, 2003, the Securities and Exchange Commission ("Commission") issued an Order Making Findings and Imposing Remedial Sanctions (the "2003 Order") against Michael R. Drogin, CPA ("Drogin"). The 2003 Order found that Drogin engaged in improper professional conduct under Rule 102(e)(1)[1] of the Commission's Rules of Practice in connection with his audit of the 1999 financial statements of Teltran International Group, Ltd. The 2003 Order denied Drogin the privilege of appearing or practicing before the Commission as an accountant, with the ability to request that the Commission consider reinstatement after two years. The Commission has not reinstated Drogin's privilege to appear or practice before the Commission. As set forth below, Drogin thereafter violated the terms of the 2003 Order.

1 Rule 102(e)(1) of the Commission's Rules of Practice provides in pertinent part that:

The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter: . . . (ii) To be lacking in character or integrity or to have engaged in unethical or improper professional conduct; or (iii) To have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.

II.

Drogin has submitted an Amended Offer of Settlement (the "Amended Offer") in which he consents to the entry of an order amending the 2003 Order to strike Subsections B and C of Section IV of the 2003 Order regarding requests for reinstatement of his privilege to appear or practice before the Commission. Solely for purposes of these proceedings and any other proceedings brought by or on behalf of the Commission, or as 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, Drogin consents to the entry of this Order Amending Order Making Findings and Imposing Remedial Sanctions Pursuant to Rule 102(e) of the Commission's Rules of Practice ("Order"), as set forth below.

III.

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

A. Respondent

Drogin resides in New York and is licensed as a Certified Public Accountant in New York and New Jersey. From January 1998 through early 2009, Drogin was a partner in the accounting firm Liebman, Goldberg & Drogin, LLP ("LGD"). The 2003 Order denied Drogin the privilege of appearing or practicing before the Commission as an accountant. The Commission has not reinstated Drogin's privilege to appear or practice before it as an accountant.

B. Facts

Beginning no later than the fall of 2005 and continuing into late 2008, while he was a partner of LGD, Drogin violated the 2003 Order by performing audit, review and other accounting work in connection with filings made by three issuers with the Commission. In 2005 and 2006, Drogin participated in auditing the financial statements of one of the companies, which were included in registration statements and amendments filed with the Commission, including a Form SB-2 filed in September 2005. In 2007, Drogin participated in auditing the financial statements of all three issuers, which were incorporated in various filings with the Commission, including an annual report, a proxy statement, and registration statements filed by two of the issuers. Drogin also reviewed quarterly and current filings made with the Commission by the three issuers. In several instances, Drogin advised management of the respective companies regarding disclosures contained in those filings. When one of the issuers restated its prior period consolidated financial statements to properly reflect the classification of stock warrants receivable, Drogin participated in the audit of the restated financial statements, which were included in the issuer's amended 2006 Form 10-K-SB filed with the Commission in November 2007.

In addition to performing audit and review work, Drogin assisted two of the issuers in responding to comments from the staff of the Commission's Division of Corporation Finance on the three registration statements described above. Further, Drogin periodically provided advice to the three issuers concerning accounting and disclosures issues, which was then reflected in the financial statements and disclosures included in various filings that these companies made with the Commission.

In March and April 2008, Drogin issued audit reports for the financial statements of the three issuers, stating that each issuer's financial statements were prepared in conformity with GAAP and fairly presented the financial position of the respective companies. These audit reports were incorporated into the issuers' 2007 annual reports on Form 10-K filed with the Commission, as well as an amended securities registration statement on Form S-1/A filed by one of the issuers in April 2008. In each instance, Drogin issued the audit report without having performed an audit of the financial statements. Drogin nevertheless represented in each audit report that an audit had been performed in accordance with applicable auditing standards and provided a reasonable basis for the unqualified report. Drogin's audit reports also misrepresented that the amounts and disclosures in the financial statements had been examined on a test basis and the accounting principles used and significant estimates made by management had been assessed.

C. Drogin's Violations

Drogin's performance of audit, review, and other services for the three issuers from the fall of 2005 through late 2008 constitute appearing or practicing before the Commission, in violation of the 2003 Order. Rule 102(f) broadly defines "practicing before the Commission" to include "[t]he preparation of any statement, opinion or other paper by any . . . accountant . . . filed with the Commission in any registration statement, notification, application, report or other document with the consent of such . . . accountant . . .." The purpose of Rule 102 is to protect the integrity of the Commission's processes, *see Touche Ross & Co. v. S.E.C.*, 609 F.2d 570, 582 (2d Cir. 1979) and, accordingly, covers a wide range of conduct related to the disclosure process under the securities laws.

Between 2005 and 2008, Drogin appeared or practiced before the Commission within the meaning of Rule 102(f) in violation of the 2003 Order by, among other things: participating in the audit of financial statements that were subsequently included in filings with the Commission (including annual reports and registration statements); reviewing quarterly and current reports; participating in the preparation of responses to comment letters from the Division of Corporation Finance concerning registration statements; providing accounting advice to the issuers that was then reflected in financial statements the issuers filed with the Commission; and issuing audit reports on behalf of LGD for the three issuers in 2008. Accordingly, Drogin repeatedly violated the 2003 Order over a period of several years.

Further, as described above, Drogin issued three audit reports in 2008 without having completed audits of the issuers' financial statements. Therefore, each of the three audit reports Drogin issued in March and April 2008 contained false or misleading representations concerning the performance of audits of the respective financial statements. As a result, Drogin willfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. With respect to the two issuers that had a class of securities registered with the Commission pursuant to Section 12, Drogin also willfully aided and abetted violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 thereunder.

IV.

Based on the foregoing, the Commission finds that Drogin appeared or practiced before the Commission in violation of the 2003 Order. The Commission further finds that Drogin willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and willfully aided and abetted violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-1 promulgated thereunder.

V.

In view of the foregoing, the Commission deems it appropriate to amend Section IV of the 2003 Order as agreed to in Drogin's Amended Offer.

Accordingly, IT IS HEREBY ORDERED that:

A. Subsections B and C of Section IV of the 2003 Order, regarding requests for reinstatement of Drogin's privilege to appear or practice before the Commission as an accountant, are stricken in their entirety.

B. Subsection A of Section IV of the 2003 Order, which denies Drogin the privilege of appearing or practicing before the Commission as an accountant, remains in effect.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63691 / January 11, 2011

Admin. Proc. File No. 3-14136

In the Matter of Sutton Resources Ltd.	ORDER DISMISSING PROCEEDINGS

On November 23, 2010, we issued an Order Instituting Proceedings ("OIP") against Sutton Resources Ltd. ("Sutton Resources") under Section 12(j) of the Securities Exchange Act of 1934.[1] The OIP alleged that Sutton Resources had "a class of securities registered with the Commission pursuant to Exchange Act Section 12(g)" and that Sutton Resources was "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, 2001 . . . ."

On December 8, 2010, the Division of Enforcement (the "Division") moved to dismiss Sutton Resources from the proceeding.[2] The Division states that, in March and April 1999, Sutton Resources attempted to file with the Commission hard copies of Form 15 to terminate the issuer's registration under Exchange Act 12(g).[3] The Division explains, however, that, "for unknown reasons, the Form 15 was not filed on the Commission's EDGAR database." The Division adds that, "[g]iven these circumstances, the Division of Corporation Finance ("Corporation Finance") has recommended to the Division that Sutton Resources' Form 15 should be treated as filed on EDGAR, and that the Division should not pursue this pending action against Sutton Resources pursuant to Exchange Act Section 12(j)."

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1 15 U.S.C. § 78*l*(j).

2 The OIP originally named Sutton Resources and four other issuers. According to the Division, "Sutton Resources is the only remaining respondent in this proceeding as the securities of the other four respondents have already been revoked."

3 Pursuant to Exchange Act Rule 12g-4(a)(1), 17 C.F.R. § 240.12g-4(a)(1), a Section 12 issuer may, under certain conditions, terminate its periodic reporting obligation by filing a certification with the Commission on Form 15.

The Division accordingly asks that the Commission dismiss the proceeding "because [Sutton Resources] has no securities registered under Exchange Act Section 12 to be suspended or revoked." In support, the Division includes a letter from Shearman & Sterling LLP, counsel for Barrick Gold Corporation, to the Office of the Secretary dated December 1, 2010. According to the letter, Barrick Gold "acquired approximately 97.4% of Sutton [Resources'] outstanding common shares in a tender offer that expired on March 26, 1999." Counsel for Barrick Gold explains that Sutton Resources filed two Forms 15 in 1999 and includes date-stamped copies of supporting documents. Under these circumstances, we find it appropriate to grant the Division's motion and dismiss Sutton Resources from the proceeding.[4]

Accordingly, it is ORDERED that the proceeding with respect to Sutton Resources Ltd. be, and it hereby is, dismissed.

By the Commission.

Elizabeth M. Murphy
Secretary

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4 *See BCI Telecom Holding, Inc.*, Securities Exchange Act Rel. No. 62649 (Aug. 4, 2010), 99 SEC Docket 31002, 31003 (dismissing Section 12(j) proceeding where respondent no longer had a class of securities registered under Section 12 of the Exchange Act); *TelcoBlue, Inc.*, Exchange Act Rel. No. 58061 (June 30, 2008), 93 SEC Docket 7335, 7335 (same).

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63689 / January 11, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14183

In the Matter of ALTERNATIVE CONSTRUCTION TECHNOLOGIES, INC., Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against Alternative Construction Technologies, Inc. ("Alternative Construction" 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 Proceedings Pursuant to Section 12(j) of the Securities Exchange Act of 1934, Making Findings, and Revoking Registration of Securities ("Order"), as set forth below.

III.

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

A. Alternative Construction (CIK No. 0001337566) is a Florida corporation with its common stock registered pursuant to Section 12(g) of the Exchange Act. It currently exists as a shell company and is quoted on the "pink sheets" market under the symbol ACCY.PK. On May 6, 2009, Alternative Construction was delisted from the Bulletin Board pursuant to NASD Rule 6530 for delinquent filings. On September 25, 2009, Alternative Construction filed with the Florida Department of State to become inactive and is now listed as administratively dissolved.

B. Alternative Construction has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission, in that: (i) it failed to file an Annual Report on Form 10-K since the report for the fiscal year ended December 31, 2006[1]; and (ii) it has failed to file any quarterly reports on Form 10-Q since the report for the fiscal quarter ended September 30, 2008.

IV.

Section 12(j) of the Exchange Act provides as follows:

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

In view of the foregoing, the Commission finds that it is necessary and appropriate for the protection of investors to impose the sanction specified in Respondent's Offer.

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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1 As noted in the Form 8-K filed by Alternative Construction on January 3, 2009, the audit report in Alternative Construction's 2007 annual report was withdrawn by the audit firm, thereby rendering the 2007 annual report, filed March 7, 2008, insufficient to satisfy Alternative Construction's Exchange Act reporting requirements for 2007.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63704 / January 12, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14187

In the Matter of
MICHEL-JEAN GERAUD,
Respondent.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, AND NOTICE OF HEARING

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From March 2008 through July 2008, Geraud was the operating manager and controlled the day to day operations of GPS Management, Inc. ("GPS Management"), a telemarketing company engaged in the offer and sale of membership interests, or shares, known as Units, in Petroleum Unlimited, LLC and Petroleum Unlimited II, LLC (collectively "Petroleum Unlimited"). Geraud, indirectly through telemarketers he managed, solicited investors to purchase Petroleum Unlimited securities in exchange for sales commissions. Geraud trained the sales agents and monitored their calls as they pitched the investment. He also provided leads for them to cold call. Geraud received a portion of GPS Management's receipts, which were based solely on the offering proceeds from the sales of Units of Petroleum Unlimited. GPS Management has never been registered with the Commission in any capacity. During this period, Geraud was neither

registered as a broker-dealer nor associated with a registered broker-dealer. Geraud, 34 years old, is a resident of Lighthouse Point, Florida.

B. ENTRY OF THE RESPONDENT'S CRIMINAL CONVICTION

2. On August 24, 2010, Geraud pleaded guilty to one count of conspiracy to commit mail fraud in violation of Title 18 United States Code, Section 371 before the United States District Court for the Southern District of Florida, in United States v. Michael Geraud, Case No.10-cr-80070 (S.D. Fla.). On the same day, he also pleaded guilty to one count of conspiracy to defraud the United States in a tax evasion scheme. See United States v. Michael Geraud, Case No. 10-cr-60091 (S.D. Fla.). On November 2, 2010, a judgment in each criminal case was entered against Geraud. For each of the counts; he was sentenced to a 60 month prison term followed by three years of supervised release, to run concurrently.

3. The count of criminal information in United States v. Michael Geraud, Case No.10-cr-80070 (S.D. Fla.), for which Geraud was convicted alleged, among other things, that Geraud, in connection with the offer and sale of Petroleum Unlimited's securities, defrauded investors and obtained money and property by, among other things, misrepresenting the company's use of offering proceeds, and failing to disclose exorbitant sales commissions.

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 hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

IV.

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

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

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

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63714 / January 13, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3138 / January 13, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14189

In the Matter of

JAMES J. CAPRIO

Respondent.

CORRECTED 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 James J. Caprio ("Caprio" 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 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. From January 2004 to November 2005, Caprio was a registered representative in the Boca Raton office of Brookstreet Securities Corp. ("Brookstreet"). Brookstreet was a broker-dealer and investment adviser dually registered with the Commission. Caprio holds series 4, 7, 24, 63, and 65 licenses. Caprio, age 47, resides in Weston, Florida.

2. On January 3, 2011, a final judgment was entered by consent against Caprio, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in the civil action entitled Securities and Exchange Commission v. William Betta, Jr., et al., Civil Action Number 9:09-cv-80803-KAM, in the United States District Court for the Southern District of Florida.

3. The Commission's complaint alleged that, in connection with the offer, sale, or purchase of certain types of Collateralized Mortgage Obligations ("CMOs"), Caprio told his customers that the CMOs in which they would invest were safe, secure, liquid investments that were suitable for retirees, retirement accounts, and investors with conservative investment goals. Contrary to what he told customers, between 2004 and 2005, Caprio invested his customers' funds in risky types of CMOs.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Caprio'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 Caprio be, and hereby is barred from association with any broker, dealer, or investment adviser, with the right to reapply for association after ten years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63724 / January 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14191

In the Matter of **BNY MELLON SECURITIES LLC,** **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 BNY Mellon Securities LLC ("Respondent" or "Mellon Securities").

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 Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise out of Respondent's failure reasonably to supervise the order desk manager on its institutional order desk and traders under his supervision from November 1999 through March 2008. The institutional order desk executed orders to purchase and sell securities on behalf of Mellon Securities' affiliate, Mellon Investor Services LLC ("MIS"), an administrator for various employee stock purchase plans, employee stock option plans, direct stock purchase and sale plans, and similar plans (collectively, the "Plan Customers"). Throughout the relevant period, Mellon Securities' order desk manager failed to meet his duty of best execution to certain Plan Customers by executing many of their orders at stale or inferior prices, which in many instances were outside of the National Best Bid and Offer ("NBBO")[2] at the time of execution, in cross trades with a favored handful of accounts held by hedge funds and individuals (together, the "hedge fund(s)"). The order desk manager directed traders under his supervision to do the same.

2. The cross trades were all executed on a regional stock exchange that permitted Member Firms to capture and freeze the NBBO market data for a security for up to three minutes. Generally, a Mellon Securities trader would call a Member Firm to capture the NBBO for a particular security while simultaneously viewing quotations for the security to determine whether and, if so, at what price to execute the cross trade. For Plan Customer sales, Mellon Securities' traders in many instances sought and obtained lower prices to benefit the hedge funds and, conversely, for Plan Customer purchases, they sought and obtained higher prices, again to benefit the hedge funds. In this way, the order desk in many instances advantaged the hedge fund customers and deprived the Plan Customers of best execution of their orders.

3. MIS paid Respondent two cents per share for Plan Customer orders. The hedge funds paid Respondent, generally, between two and six cents per share. When the order desk crossed an order, Respondent received full commissions from both sides of the transaction. The hedge funds' commission rates varied with each trade and, customarily, were set by the hedge funds at the end of each day's trading. The order desk's annual bonus pool depended in part upon the commissions it generated, and the order desk manager determined how he and the traders under his supervision shared in the bonus pool.

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

[2] National best bid and national best offer means, with respect to quotations for an NMS Security, the best bid and best offer for such security that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. 17 C.F.R. § 600(b)(42).

Respondent

4. Mellon Securities, a Delaware corporation with its principal place of business in Jersey City, New Jersey, is a broker-dealer registered with the Commission. Mellon Securities is a legacy entity of Mellon Financial Corporation of Pittsburgh ("Mellon Financial").

5. In 2009, Bank of New York Mellon Corporation ("BNY Mellon"), the ultimate parent of Mellon Securities, sold the assets of Mellon Securities to a separate (but affiliated) broker-dealer. In August 2009, BNY Mellon withdrew Mellon Securities' broker-dealer registrations from all states except New Jersey. Today, Mellon Securities exists only as a shell entity; it has no employees and no business operations.

Other Relevant Entities

6. MIS, a New Jersey corporation with its principal place of business in Jersey City, New Jersey, is a registered transfer agent and administrator for the Plan Customers. It, too, is a legacy entity of Mellon Financial and subsidiary of BNY Mellon.

7. BNY Mellon, a Delaware corporation with principal executive offices in New York, New York, was created in July 2007, when the Bank of New York Company acquired Mellon Financial.

Background

8. From November 1999 through March 31, 2008, Respondent provided trade execution services to the more than seven hundred issuers whose stock plans were administered by MIS. Consistent with Respondent's best execution obligations to the Plan Customers, the order desk had authorization to handle all Plan Customer orders as market not-held orders, meaning it had discretion as to the time of execution but was required to execute Plan Customer orders within prevailing market prices. Generally, Plan Customer orders for the purchase or sale of 2,000 or more shares of a security were routed to the order desk for special handling. As Plan Customer orders arrived at the order desk, the order desk manager and traders solicited orders from the hedge funds for the purpose of crossing the orders. The order desk manager directed his traders to cross as much of the Plan Customer orders routed to the order desk as possible, and that is what they did.

The Validated Cross Window

9. In December 2006, the regional exchange through which Mellon Securities' cross trades were executed and reported added a functionality to its order management system called the validated cross window. The intended purpose of the validated cross window was to support timely reporting of cross trades while simultaneously ensuring the transaction did not trade through the NBBO for compliance with Rule 611 of Regulation NMS, the Order Protection Rule, and certain regional exchange rules. (A trade through occurs when a security is traded at a price outside of the NBBO prevailing at the time of execution.) The validated cross window remained in use until the end of the relevant period.

10. The validated cross window validated a market, meaning the NBBO, by capturing and freezing a snapshot of the NBBO market data for a security ("Snapshot NBBO") at the moment a Member Firm broker typed the security's symbol into the system. At the same moment, a window expiration timer was initiated. The timer gave the broker up to three minutes to fill in required fields, including quantity and price, and to submit the trade for execution and reporting.

11. Once submitted for execution and reporting, the system would ensure that the proposed cross trade did not trade through the Snapshot NBBO.[3] If the cross trade satisfied all requirements, the trade was accepted by the system and reported to the consolidated tape; if not, the trade was rejected.

12. Instead of submitting a trade for execution and reporting, a Member Firm broker could refresh the window, meaning he could capture another subsequent Snapshot NBBO, and initiate a new window expiration timer. (The system did not limit the number of times a window could be refreshed.) The Member Firm broker also could allow a window to expire at the end of the timer.

<u>Using Trade Tickets to Validate Markets</u>

13. Prior to the introduction of the validated cross window, the regional exchange used trade tickets to validate markets. This system, although manual, was in many instances used in the same way by the order desk traders to cross orders at prices favorable to the hedge funds, and unfavorable to the Plan Customers. Once a Member Firm broker stamped a trade ticket, the broker had up to one minute to clear the post, that is, to make sure the cross trade would not trade through any outstanding orders held by the specialist on the exchange. If the cross trade would clear the post, the broker could execute it at the NBBO prevailing at the time of the stamp, or any other price that prevailed before the minute expired.

14. The regional exchange time stamp showed only the hour and minute, not seconds. Thus, the "minute" a broker had to clear the post could, in actuality, be up to nearly two minutes. If in these two minutes, a broker preferred a subsequent price in the market, he could execute at that price or, by stamping a new ticket, capture the new price. If he stamped a new ticket to capture the new price, he would have another two minutes in which to decide whether to execute a trade.

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[3] To ensure compliance with the Order Protection Rule, the system should have ensured that the proposed cross trade did not trade through the NBBO prevailing in the market at the moment of execution, not the Snapshot NBBO. In practice, however, that is not how the regional exchange's system functioned.

The Order Desk's Conduct

15. The order desk manager and, at his direction, traders under his supervision in many instances used the validated cross window to work the Plan Customers' not-held orders in a manner designed to benefit the hedge funds and deprive the Plan Customers of best execution, generally, in one of two ways. In the first scenario, they used the ability to capture and freeze prices to chase better prices for the hedge funds. In the second scenario, they executed trades at stale prices, more favorable to the hedge funds than prices prevailing in the market at the time the trade was executed.

16. For example, when the order desk crossed a Plan Customer order to sell securities with a hedge fund order to buy those same securities, if the security *fell in price* after a Member Firm broker first captured a Snapshot NBBO for the order desk, the broker would in many instances refresh the validated cross window to capture the new, lower price, *i.e.*, a new Snapshot NBBO, and reset the window expiration timer. If the price of the security continued to fall, the Member Firm broker, working at the behest of the order desk, would in many instances lock in new, lower prices to advantage the hedge fund, until the order desk decided to execute the trade. This could be done within a second of capturing the previous Snapshot NBBO or at any point prior to the end of the window expiration timer. The Snapshot NBBO for a security could be captured anywhere from a few times to a few dozen times before the order desk directed the Member Firm broker to execute and report the trade. On the other hand, if the security *rose in price* after a Member Firm broker captured a Snapshot NBBO for the order desk, the order desk would in many instances direct the broker to execute and report the trade at the stale, lower price, to advantage the hedge fund.

17. An analysis of more than 8,500 cross trades indicates that the order desk manager and, at his direction, traders under his supervision used the validated cross window to chase better prices for the hedge funds and/or to execute trades at stale prices more favorable to the hedge funds more than eighty percent of the time.

18. The order desk's practices were the same prior to the introduction of the validated cross window, only the mechanics differed. Prior to the introduction of the validated cross window, the order desk routinely asked its Member Firm brokers to capture more than one NBBO for a trade, and used the ability to capture and freeze prices to achieve better prices for the hedge funds.

19. As a result of the conduct described above, from November 1999 through March 31, 2008, the order desk manager and traders violated Section 17(a) of the Securities Act of 1933 ("Securities Act").

Respondent's Failure to Supervise

20. Mellon Securities' written supervisory procedures ("WSP") created a best execution committee and required it to meet quarterly to assess the quality of execution being obtained by the order desk. Mellon Securities also had established procedures relating to the best execution of market not-held orders that required the order desk manager to conduct a daily best execution review of executions on regional exchanges. However, Mellon Securities' supervisory

procedures were unreasonable in two important respects. First, Mellon Securities failed to establish reasonable procedures for the best execution committee concerning how to follow up on red flags raised in best execution exception reports. Second, Mellon Securities did not have procedures in order to determine whether the order desk manager was fulfilling his responsibility to conduct a daily best execution review of executions on regional exchanges.

21. Quarterly reports prepared for Mellon Securities' best execution committee compared Mellon Securities' execution statistics with industry averages. One of the statistics tracked by the reports was the frequency with which Mellon Securities executed trades in listed securities outside of the prevailing NBBO, or "outside the quote." According to the reports, Mellon Securities executed orders outside the quote at a rate greater than industry averages for repeated quarters, beginning at least as early as the third quarter of 2003, and at a rate two to three times of the industry averages for every quarter beginning with the fourth quarter of 2006.

22. The order desk manager and traders in many instances caused trades to be executed outside of the prevailing NBBO, resulting in Mellon Securities' anomalous "outside the quote" statistics; however, Mellon Securities failed to establish reasonable procedures for the best execution committee concerning how to follow up on the best execution exception reports. If Mellon Securities had had reasonable procedures concerning how to follow-up on the red flags raised in the exception reports, it likely would have prevented and detected the violations by the order desk manager and traders.

23. The order desk manager and traders used the ability to capture and freeze prices in many instances to benefit the hedge funds at the expense of the Plan Customers and, thus, failed to meet their duty of best execution with respect to the Plan Customers' market not-held orders. Mellon Securities' WSP required the order desk traders to use their professional judgment, consistent with their best execution obligations to customers, to determine the time and manner of execution of market not-held orders based on current market conditions and, at a minimum, to provide the best price a customer likely could obtain on the open market. However, the only ongoing monitoring and review of the effectiveness of these procedures in detecting or preventing violations was a daily best execution review by the order desk manager of executions on regional exchanges. The order desk manager never conducted such a review and Mellon Securities did not have procedures to determine whether he was fulfilling his responsibility to do so. If Mellon Securities had had such procedures in place, it would have learned the order desk manager never conducted such a review, and likely would have prevented and detected the order desk manager's and traders' violations.

24. As a result of the conduct described above, from November 1999 through March 31, 2008, Respondent failed reasonably to supervise the order desk manager and traders on its institutional order desk within the meaning of Section 15(b)(4)(E) of the Exchange Act with a view to preventing and detecting violations of Section 17(a) of the Securities Act.

Cooperation and Remedial Efforts

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

26. On March 31, 2008, within three days of discovering that the Commission had charged one of the hedge funds in an unrelated matter, Respondent suspended cross-trading activity. BNY Mellon immediately commenced an internal investigation of the order desk's activities.

27. On May 2, 2008, the order desk manager was terminated for cause.

28. On July 22, 2008, BNY Mellon reported the matter to Commission staff.

Undertakings

29. Mellon Securities has undertaken to retain, within 30 days of the entry of this Order, at its own expense, an Independent Distribution Consultant, not unacceptable to the Division of Enforcement, to devise a Distribution Plan to distribute the Fair Fund established in Section IV, below. Mellon Securities shall require the Independent Distribution Consultant to develop a Distribution Plan to administer and distribute the monetary sums ordered to be paid pursuant to Section IV(C) below (and any other monetary sums ordered by the Commission or any federal court related to the conduct described in this Order) in a manner that compensates fairly and proportionately the Plan Customers for losses attributable to cross trades conducted on their behalf by the Respondent from November 1999 through March 2008. Mellon Securities (which for the limited purpose of the undertakings set forth herein, paragraphs 31 through 35, shall include, where appropriate, BNY Mellon) shall cooperate fully with the Independent Distribution Consultant and shall provide the Independent Distribution Consultant with access to its files, books, records, and personnel as reasonably required to develop the Distribution Plan.

30. Mellon Securities shall require the Independent Distribution Consultant to submit to Mellon Securities and the staff of the Commission the Distribution Plan within 120 days of the entry of this Order.

31. With respect to any determination or calculation of the Independent Distribution Consultant with which Mellon Securities or the staff of the Commission does not agree, such parties shall attempt in good faith to reach an agreement within 150 days of the entry of this Order. In the event that Mellon Securities and the staff of the Commission are unable to agree on an alternative determination or calculation, within 180 days of the entry of this Order, they shall each advise, in writing, the Independent Distribution Consultant of any determination or calculation from the Distribution Plan that it considers to be inappropriate and state in writing the reasons for considering such determination or calculation inappropriate. After consideration of any written submissions made by Mellon Securities or the staff of the Commission, final determinations or calculations rest with the Independent Distribution Consultant.

32. Within 195 days of the entry of this Order, Mellon Securities shall require the Independent Distribution Consultant to submit the Distribution Plan for the administration and distribution of disgorgement and penalty funds pursuant to the Commission's Rules on Fair Fund and Disgorgement Plans. Following a Commission order approving a final plan of disgorgement, as provided in the Rules on Fair Fund and Disgorgement Plans, Mellon Securities shall require the Independent Distribution Consultant to take all necessary and appropriate steps to administer the final plan for distribution of the fair fund.

33. Mellon Securities shall require the Independent Distribution Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Distribution Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Mellon Securities, or any of its present or former affiliates, directors, officers, employees or agents acting in their capacity as such. The agreement will also provide that the Independent Distribution Consultant will require that any firm with which he or she is affiliated or of which he or she is a member, and any person engaged to assist the Independent Distribution Consultant in the performance of his or her duties under this Order shall not, without prior written consent of Andrew M. Calamari, Associate Regional Director, Division of Enforcement, New York Regional Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Mellon Securities, 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.

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

IV.

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

Accordingly, pursuant to Section 15(b)(4) of the Exchange Act, it is hereby ORDERED that:

A. Respondent is censured.

B. Respondent shall, within 14 days of the entry of this Order, pay disgorgement of \$19,297,016 and prejudgment interest of \$3,748,431, and a civil money penalty in the amount of \$1,000,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to Commission Rule of Practice 600 and/or 31 U.S.C. § 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312-0003; and (D) submitted under cover letter that identifies BNY Mellon Securities LLC as a

Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and wire transfer, 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 10281-1022.

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

D. Respondent acknowledges that the Commission is not imposing a civil penalty in excess of $1,000,000 based upon its cooperation in a Commission investigation and/or related enforcement action. If at any time following the entry of this Order, the Division of Enforcement ("Division") obtains information indicating that Respondent knowingly provided materially false or misleading information or materials to the Commission or in a related proceeding, the Division may, at its sole discretion and without prior notice to the Respondent, petition the Commission to reopen this matter and seek an order directing that the Respondent pay an additional civil penalty. Respondent may not, by way of defense to any resulting administrative proceeding: (1) contest the findings in this Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

E. Respondent shall comply with the undertakings enumerated in Section III, above.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9174 / January 14, 2011

SECURITIES EXCHANGE ACT OF 1934
Release No. 63725 / January 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14192

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), and Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Mark Shaw ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of

III.

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

Summary

1. These proceedings arise out of Respondent's more than eight-year best execution fraud in his capacity as institutional order desk manager for BNY Mellon Securities LLC ("Mellon Securities"). From November 1999 through March 31, 2008, Shaw manipulated time delays in systems for executing and reporting agency cross trades on a regional exchange to advantage a handful of accounts held by individuals or hedge funds (together, the "hedge fund(s)"), at the expense of accounts belonging to various employee stock purchase plans, employee stock option plans, direct purchase and sale plans, and similar plans (collectively, the "Plan Customer(s)"). Throughout the relevant period, Shaw repeatedly deprived certain Plan Customers of best execution of their orders by using the ability to capture and freeze prices to chase better prices for the hedge funds and to execute trades at stale prices more favorable to the hedge funds than the prices prevailing in the market at the time of execution. Shaw directed traders under his supervision to do the same.

2. The cross trades were all executed and reported on a regional exchange that permitted a Member Firm to capture and freeze the National Best Bid and Offer[2] ("NBBO") market data for a security for up to three minutes. Generally, Shaw and traders under his supervision would call the Member Firm to capture the NBBO for a particular security while simultaneously viewing quotations for the security to determine whether and, if so, at what price to execute the cross trade. For Plan Customer sales, Shaw and traders under his supervision in many instances sought and obtained lower prices to benefit the hedge funds and, conversely, for Plan Customer purchases, they sought and obtained higher prices, again to benefit the hedge funds. In many instances the cross trades were executed outside of the NBBO.

3. Shaw's compensation depended in part upon the commissions generated by the order desk. The order desk was paid commissions for both sides of each cross trade, with the hedge funds sometimes paying as much as six cents per share.

Respondent

4. Mark Shaw, age 53, of Brooklyn, New York, was a registered representative with Mellon Securities and its institutional order desk manager from March 1999 through May 2, 2008, when he was terminated for the conduct that is the subject of this proceeding. Currently, Shaw is

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

[2] The National best bid and national best offer means, with respect to quotations for an NMS Security, the best bid and best offer for such security that are calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. 17 C.F.R. § 600(b)(42).

not associated with any broker or dealer registered with the Commission. He holds Series 4, 6, 7, 24, 55, and 63 licenses.

Other Relevant Entities

5. Mellon Securities, a Delaware corporation with its principal place of business in Jersey City, New Jersey, is a broker-dealer registered with the Commission.

6. Mellon Investor Services LLC ("MIS"), a New Jersey corporation with its principal place of business in Jersey City, New Jersey, is a registered transfer agent and administrator for the Plan Customers.

Background

7. From November 1999 through March 31, 2008, Respondent supervised Mellon Securities' institutional order desk, which provided trade execution services to more than seven hundred issuers whose stock plans were administered by MIS. Shaw had authorization from MIS to handle all Plan Customer orders as market not-held orders, consistent with his best execution obligations to the Plan Customers. (A market not-held order gives a trader discretion as to the time of execution but the order must be executed within prevailing market prices.) Generally, Mellon Securities routed Plan Customer orders for the purchase or sale of 2,000 or more shares of a security to Shaw and traders on the order desk for special handling. As Plan Customer orders arrived at the order desk, Shaw and order desk traders solicited orders from the hedge funds for the purpose of crossing the orders. Shaw directed traders under his supervision to cross as much of the Plan Customer orders as possible, and that is what they did.

The Validated Cross Window

8. In December 2006, the regional exchange through which Mellon Securities' cross trades were executed and reported added a functionality to its electronic order management system called the validated cross window. The intended purpose of the validated cross window was to support timely reporting of cross trades while simultaneously ensuring the transaction did not trade through the NBBO for compliance with Rule 611 of Regulation NMS, the Order Protection Rule, and certain regional exchange rules. (A trade through occurs when a security is traded at a price outside of the NBBO prevailing at the time of execution.) The validated cross window remained in use until the end of the relevant period.

9. The validated cross window validated a market, meaning the NBBO, by capturing and freezing a snapshot of the NBBO market data for a security ("Snapshot NBBO") at the moment a Member Firm broker typed the security's symbol into the system. At the same moment, a window expiration timer was initiated. The timer gave the Member Firm broker up to three minutes to fill in required fields, including quantity and price, and to submit the trade for execution and reporting.

10. Once submitted for execution and reporting, the system would ensure that the proposed cross trade did not trade through the Snapshot NBBO.[3] If the cross trade satisfied all requirements, the trade was accepted by the system and reported to the consolidated tape; if not, the trade was rejected.

11. Instead of submitting a trade for execution and reporting, the Member Firm broker could refresh the window, meaning he could capture another subsequent Snapshot NBBO, and initiate a new window expiration timer. (The system did not limit the number of times a window could be refreshed.) The Member Firm broker also could allow a window to expire at the end of the timer.

Using Trade Tickets to Validate Markets

12. Prior to the introduction of the validated cross window, the regional exchange used trade tickets to validate markets. Shaw and traders he supervised in many instances used this manual system in much the same way that they used the validated cross window to cross orders at prices favorable to the hedge funds and unfavorable to the Plan Customers. Once a Member Firm broker stamped a trade ticket, the broker had up to one minute to clear the post, that is, to make sure the cross trade would not trade through any outstanding orders held by the specialist on the exchange. If the cross trade cleared the post, the broker could execute it at the NBBO prevailing at the time of the stamp, or any other price that prevailed before the minute expired.

13. The regional exchange time stamp showed only the hour and minute, not seconds. Thus, the "minute" a broker had to clear the post could, in actuality, be up to nearly two minutes. If in these two minutes, Shaw or a trader under his supervision preferred a subsequent price in the market, he could direct the Member Firm broker to execute at that price or, by stamping a new ticket, to capture the new price. If the Member Firm broker stamped a new ticket to capture the new price, Shaw or the trader under his supervision would have another two minutes in which to decide whether, and at what price, to execute a trade.

Respondent's Conduct

14. Shaw in many instances used the validated cross window to work the Plan Customers' not-held orders in a manner designed to benefit the hedge funds and deprive Plan Customers of best execution, generally, in one of two ways. In the first scenario, Shaw used the ability to capture and freeze prices to chase better prices for the hedge funds. In the second scenario, Shaw executed trades at stale prices more favorable to the hedge funds than prices prevailing in the market at the time the trade was executed. Moreover, Shaw directed traders under his supervision to do the same.

15. For example, when Shaw crossed a Plan Customer order to sell securities with a hedge fund order to buy those same securities, if the security *fell in price* after a Member Firm

[3] To ensure compliance with the Order Protection Rule, the system should have ensured that the proposed cross trade did not trade through the NBBO prevailing in the market at the moment of execution, not the Snapshot NBBO. In practice, however, that is not how the regional exchange's system functioned.

broker first captured a Snapshot NBBO for Shaw, the broker would in many instances refresh the validated cross window to capture the new, lower price, *i.e.*, a new Snapshot NBBO, and reset the window expiration timer. The Member Firm broker, working at Shaw's behest, would in many instances continue to lock in new, lower prices every time the price fell. This could be done within a second of capturing the previous Snapshot NBBO or at any point prior to the end of the window expiration timer. The NBBO for a security could be captured anywhere from a few times to a few dozen times to advantage the hedge fund before Shaw directed the Member Firm broker to execute and report the trade. On the other hand, if the security *rose in price* after a Member Firm broker captured a Snapshot NBBO for Shaw, Shaw would in many instances direct him to execute and report the trade at the stale, lower price to advantage the hedge fund.

16. An analysis of more than 8,500 cross trades indicates that Shaw and traders under his supervision used the validated cross window to chase better prices and/or execute trades at stale prices that were more favorable to the hedge funds than prices prevailing in the market at the time of execution more than eighty percent of the time.

17. Shaw's practices and the directions he gave to traders under his supervision were the same prior to the introduction of the validated cross window, only the mechanics differed. Prior to the introduction of the validated cross window, Shaw routinely asked Mellon Securities' Member Firm brokers to capture more than one NBBO for a trade, and used the ability to capture prices to achieve better prices for the hedge funds.

18. Shaw also sat as a member of Mellon Securities' best execution committee, responsible for monitoring the execution quality of Plan Customer orders. Throughout the relevant period, when the best execution committee was confronted with anomalous execution statistics, Shaw failed to inform the other members of the committee of the likely reason, namely, his own conduct, and instead concealed it.

19. The order desk generated commissions from both sides of each cross trade. Typically, MIS paid Mellon Securities two cents per share for Plan Customer orders. The hedge funds paid Mellon Securities, generally, between two and six cents per share, with the hedge funds setting their own commission rates at the end of each trading day. Shaw's annual bonuses depended in part upon the commissions earned by the order desk.

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

IV.

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

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

A. Respondent Shaw cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

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

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

D. Respondent shall, within 14 days of the entry of this Order, pay disgorgement of $195,300 and prejudgment interest of $23,291, and a civil money penalty in the amount of $150,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to Commission Rule of Practice 600 and/or 31 U.S.C. § 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312-0003; and (D) submitted under cover letter that identifies Mark Shaw as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and wire transfer, 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 10281-1022.

E. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the disgorgement, interest and penalties referenced in paragraph D above. Such disgorgement, interest, and penalties may be distributed by the Fair Fund established in *In the Matter of BNY Mellon Securities LLC*, AP File No. [_____],* filed simultaneously herewith. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that he shall not, after offset or reduction in any Related Investor Action based on Respondent's payment of disgorgement in this action, argue that he is entitled to, nor shall he

* AP File No. to be filled in when available.

further benefit by offset or reduction of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63726 / January 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14193

In the Matter of **CARY R. KAHN,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING**

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. From September 2002 through January 2009, Respondent was the manager and general partner of the Double Eagle Fund, an unregistered investment company. For a portion of the time in which he engaged in the conduct underlying the information described below, Respondent was associated with broker-dealers registered with the Commission. Respondent, 57 years old, was a resident of Boulder, Colorado, when he operated the Double Eagle Fund.

2. On July 20, 2004, the Commission entered an Order Making Findings and Imposing Remedial Sanctions by Default, Admin. Proc. File No. 3-11468, in which Kahn was

ordered to cease-and-desist from violating Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. He was also ordered to disgorge $12,186.21, plus $1,217.54 in prejudgment interest. Kahn failed to comply with the disgorgement order and the Commission filed a complaint in U. S. District Court for the District of Colorado, Civil Action No. 04-Z-2692 (BNB). The U.S. District Court entered the default judgment in favor of the Commission on March 11, 2005. Kahn has not paid the ordered disgorgement or interest.

B. RESPONDENT'S CRIMINAL CONVICTION

3. On March 24, 2010, Kahn pled guilty to the felony of mail fraud in violation of Title 18 United States Code, Section 1341 before the United States District Court for the District of Colorado, in United States v. Cary Richard Kahn, Crim. Case No. 10-CR-00116-WYD. On June 28, 2010, a judgment in the criminal case was entered against Kahn. He was sentenced to a prison term of sixty (60) months, and five (5) years of supervision upon his release from prison, and ordered to make restitution in the amount of $1,812,559.11.

4. The criminal information to which Kahn pled guilty alleged, among other things, that between September 3, 2002 and January 22, 2009, Kahn defrauded investors and obtained money and property by means of materially false and misleading statements in connection with the purchase and sale of securities and in connection with the sale of "flex options" or "option conversions." The information alleged that, as part of the scheme, Kahn represented himself as an experienced and successful securities trader in order to obtain approximately $2,121,098.70 from investors. The information further alleged that Kahn misrepresented to the investors in his Double Eagle Fund that he would use their money to buy and sell securities and that they could expect profits of fourteen to eighteen percent per year. In addition, the information alleged that Kahn sold some investors "flex options" and "option conversions," with guaranteed returns of between fifteen and nineteen percent within either six months or one year. The information also alleged that Kahn failed to use most of the investor money to trade securities, converted most of the money to his own use and benefit, used a portion of the money to make payments to other investors, and sent investors account statements misrepresenting profits earned as a result of his trading.

III.

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

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

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b) of the Exchange Act.

IV.

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

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

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

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3140 / January 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14190

In the Matter of EVELYN LITWOK, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AND NOTICE OF HEARING

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Litwok was an unregistered investment adviser, from in or about June 1994, through, in or about, October 1997, residing and operating investment funds in East Hampton, New York. Litwok was the principal of several corporations, also unregistered investment advisers, through which she conducted her investment advisory business, including Kohn Investment Management, Inc., Kohn Capital Management, Inc.-33 and Kohn Investment Management II, Inc. From 1984 to March 1994, Litwok was associated with various broker-dealers as a registered

representative and held Series 7, Series 63 and Series 15 licenses. Litwok, 55 years old, is a resident of Marlborough, New Jersey.

B. RESPONDENT'S CRIMINAL CONVICTION

2. On February 26, 2009, a federal jury convicted Litwok of one count of mail fraud in violation of Title 18 United States Code, Sections 1341 and 1342, and three counts of tax evasion in violation of Title 26 United States Code, Section 7201, in the United States District Court for the Eastern District of New York (United States v. Evelyn Litwok, CR 02-00-427 (S-1)-01 (LDW)). On May 11, 2010, the District Court sentenced Litwok to a prison term of 24 months followed by five years of supervised release and ordered her to pay restitution in the amount of $23,551.

3. The counts of the criminal information to which Litwok was convicted alleged, among other things, (1) that Litwok defrauded Vigilant Insurance Company, a subsidiary of Chubb Insurance Company ("Chubb"), and obtained money by means of materially false and fraudulent pretenses, representations and promises, as a result of her submission of an insurance claim to Chubb for reimbursement of lodging expenses; and (2) that Litwok knowingly and willfully attempted to evade income tax due and owing by her to the United States of America for the calendar years 1995, 1996, and 1997. The misconduct occurred during the period in which Litwok was associated with an investment adviser.

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 hereof are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act.

IV.

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

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

Service List

Rule 141 of the Commission's Rules of Practice provides that the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Notice of Hearing ("Order"), on the Respondent.

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

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

Cynthia A. Matthews, Esq.
New York Regional Office
Securities and Exchange Commission
3 World Financial Center
Suite 400
New York, NY 10281

Ms. Evelyn Litwok
USM#48523-053
FPC Alderson
Federal Prison Camp
Glen Ray Rd. Box A
Alderson, WV 24910

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 her upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 210 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Paredes
Disapproved

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3141 / January 14, 2011

INVESTMENT COMPANY ACT OF 1940
Release No. 29569 / January 14, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14194

In the Matter of MICHAEL R. PELOSI, Respondent.	ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Michael R. Pelosi ("Respondent" or "Pelosi").

II.

After an investigation, the Division of Enforcement alleges that:

A. SUMMARY

1. This matter concerns the misrepresentation of account performance returns by Pelosi, then a portfolio manager at registered investment adviser Halsey Associates, Inc. ("Halsey") in New Haven, Connecticut.

2. From 2005 through August of 2008, Pelosi knowingly or recklessly misreported account performance returns to his investment-advisory clients. Pelosi repeatedly provided false account performance returns to clients in quarterly and annual correspondence by exaggerating account gains and minimizing performance losses. Pelosi misrepresented performance returns across various asset classes, and consistently inflated the total account performance returns for quarterly and twelve month periods.

3. On August 14, 2008, Halsey principals Kenneth Julian and James Zoldy first confronted Pelosi about the discrepancies between the performance returns that he reported in his client letters and the returns in the official account records. Pelosi initially denied altering performance returns, and deflected any responsibility for errors to the firm's administrative staff or system errors. Immediately after the meeting, Pelosi deleted electronic copies of client correspondence, which was detected by the Halsey administrative staff and ultimately restored. On August 15, 2008, hard copies of Pelosi's client correspondence also disappeared from the Halsey offices.

4. Later on August 15, 2008, Pelosi recanted his denial and admitted to Julian that he changed performance results to clients and that he had lied to his partners about sending out altered performance results. Pelosi then submitted two written apologies expressing shame and remorse for his conduct.

5. By virtue of his conduct, Pelosi willfully violated Sections 206(1) and 206(2) of the Advisers Act.

B. RESPONDENT

6. *Michael R. Pelosi*, age 46, currently a resident of Middlebury, Connecticut, was a Vice President and portfolio manager at Halsey from approximately April of 2005 until August 27, 2008. At the time of his departure from Halsey, Pelosi owned approximately 20% of the adviser.

C. OTHER RELEVANT ENTITY AND PERSONS

7. *Halsey Associates, Inc.* is an investment adviser incorporated in Connecticut. It is headquartered in New Haven, Connecticut and has been registered as an investment adviser with the Commission since 1978.

8. *Kenneth J. Julian* is the President and Chief Compliance Officer of Halsey. Julian joined Halsey in 1997, and today owns approximately 49% of the adviser.

9. *James S. Zoldy* is the Chairman and Treasurer of Halsey. Zoldy joined Halsey in 1993, and today owns approximately 51% of the adviser.

D. ALLEGATIONS

Pelosi's Responsibilities as a Portfolio Manager

10. In April 2005, Pelosi joined Halsey as a Vice President and portfolio manager and, after his first year of employment, acquired an approximately 13% ownership interest in the adviser.

11. When Pelosi joined Halsey, he brought with him approximately twenty clients from another registered investment adviser representing approximately $60 to $70 million in assets under management.

12. Pelosi was the sole portfolio manager for his clients' accounts at Halsey.

13. During Pelosi's association with Halsey, clients regularly received quarterly correspondence with account information.

14. Within the quarterly correspondence, Halsey clients received a letter from the portfolio manager that disclosed the performance of the account, activity within the account, and a general appraisal of the economy.

15. Clients also received account statements, which summarized assets and their respective values within the account, and a detailed portfolio appraisal, which listed securities holdings and values.

16. Clients did not receive a separate performance report from Halsey. The only place Halsey reported account performance information to clients was within the body of the letter from the portfolio manager.

17. During Pelosi's association with Halsey, the portfolio manager who managed the account was responsible for preparing and signing the client letters.

18. Administrative staff at Halsey assisted the portfolio managers with the preparation of the client correspondence, but the portfolio managers were ultimately responsible for the content of the correspondence, including the performance data.

Pelosi Misrepresented Performance Returns to Clients

19. Between 2005 and August 2008, Pelosi repeatedly exaggerated account gains and minimized performance losses to his various clients.

20. Pelosi misrepresented performance returns across various asset classes, and consistently inflated the total account performance returns for quarterly and twelve-month periods.

21. Halsey calculated performance returns to the hundredths of a percent (e.g., 0.00%). Pelosi's performance returns varied significantly from the true performance returns calculated by Halsey.

22. An analysis of Pelosi's client letters shows that, over the course of more than three years, Pelosi reported annual portfolio performance results in more than 250 instances and quarterly performance results in more than 210 instances. Of these performance representations, Pelosi inflated performance results more than 75% of the time. The size of the inflated results ranged from 0.01 percentage point (1 basis point) to

more than 4.64 percentage points (464 basis points) and, in more than half of the instances, the results were overstated by more than 0.25% (25 basis points).

Halsey Confronted Pelosi about Performance Misrepresentations

23. In approximately the end of 2007 or beginning of 2008, administrative staff first identified discrepancies between Pelosi's performance data to clients and the performance data calculated by Halsey. When the administrative staff questioned Pelosi about the discrepancies between his performance data and the performance data of the firm, Pelosi stated that he had a different way of calculating performance.

24. In approximately the end of June or beginning of July 2008, Halsey administrative staff again observed discrepancies between Pelosi's performance data to clients and the performance data of the firm. At this time, Halsey administrative staff had taken greater responsibilities regarding the preparation of client correspondence, which included preparing the initial draft and inputting performance data into the letters. Between approximately the end of June or beginning of July 2008 until August 1, 2008, Halsey administrative staff began to more closely monitor Pelosi's letters to clients and make copies of outgoing correspondence where his performance data varied from the firm's data. The administrative staff did this to protect themselves in the event that the client questioned the figures at a later time.

25. On approximately August 1, 2008, Halsey administrative staff alerted Zoldy about the irregularities in performance reporting to clients by Pelosi. Between August 1, 2008 and August 14, 2008, Zoldy and Julian conducted an initial internal inquiry and determined that there was a pattern of misreporting in Pelosi's client letters and other communications.

26. On August 14, 2008, Halsey principals Julian and Zoldy first confronted Pelosi about discrepancies between the performance returns in his correspondence to clients and the Halsey account records.

27. Pelosi initially denied altering performance returns, and deflected any responsibilities for errors to the firm's administrative staff or system errors.

28. Immediately after the meeting, Julian and Zoldy instructed the administrative staff to collect all of Pelosi's correspondence so they could further investigate discrepancies in performance reporting.

29. As the administrative staff was compiling these records, Pelosi deleted electronic copies of his client correspondence.

30. The administrative staff detected the deletion of the letters almost immediately, and reported it to Zoldy.

31. Zoldy confronted Pelosi about the deleted correspondence, and Pelosi claimed that he accidently deleted the letters while trying to print a large block of them. Pelosi was asked to leave the premises following the deletion of the files.

32. Halsey was able to restore the deleted electronic files from the back-up tapes.

33. At the close of the business day on Thursday, August 14, 2008, hard copies of Pelosi's client correspondence were collected and provided to Julian, who stored them in his office. Julian was the last Halsey employee to leave the office that day.

34. When Julian returned to the office on Friday, August 15, 2008, approximately half of the Pelosi client correspondence was missing from his office.

35. Julian questioned Pelosi about the missing letters, and Pelosi denied any involvement with their disappearance. Julian subsequently asked Pelosi to leave the office.

36. Shortly after being asked to leave, Pelosi contacted Julian and asked to meet with him outside the offices of Halsey. Julian agreed to meet Pelosi outside the Halsey offices.

37. Outside the Halsey offices, Pelosi admitted to Julian that he changed the performance figures in his client correspondence. Pelosi did not provide any reasons for why he changed the performance figures.

38. Pelosi also apologized for deleting the electronic copies of his client correspondence.

39. Later on August 15, 2008, Pelosi emailed Julian and wrote:

> Beyond being embarrassed and ashamed over the matter at hand, I am deeply ashamed that I didn't just tell you yesterday in the conference room. I think I had truely (sic) deluded myself into believing that it had happened in isolated instances, but when I saw for myself, I lost it.

40. On Monday, August 18, 2008, Pelosi returned to the Halsey office and provided another written apology to Julian and Zoldy. In this letter, Pelosi wrote:

> I cant (sic) tell you how many times I've wished my initial reaction was different when we met in the conference room. I was panicked, I stopped thinking clearly, and I had sincerely convinced myself that any changes that I made were isolated. I cant (sic) explain how I felt when I realized they weren't…

> I'm embarrassed and ashamed by the performance issue, but I cringe at my behavior after the meeting...
>
> I am overwhelmed with regret. I could not be more sorry (sic). It was a very dumb thing to do, but it was a mistake... Nothing like this will happen again. I hope you can believe that and I hope you think I'm worth a second chance.

41. On August 27, 2008, Halsey and Pelosi signed a separation agreement, terminating Pelosi's association and ownership with the firm. Under the terms of the agreement, Pelosi immediately resigned from his position with Halsey, but was compensated through September 30, 2008.

E. VIOLATIONS

44. As further set forth above, Pelosi willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit any investment adviser from defrauding any client or prospective client.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof 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 9(b) of the Investment Company Act and Section 203(f) of the Advisers Act including, but not limited to, civil penalties pursuant to Section 203(i) of the Advisers Act;

C. Whether, pursuant to Section 203(k) of the Advisers Act, Respondent should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 206(1) and 206(2) of the Advisers Act.

IV.

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

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

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

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63720 / January 14, 2011

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3139 / January 14, 2011

Admin. Proc. File No. 3-13280

In the Matter of

DON WARNER REINHARD

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Civil Injunction

Former associated person of registered broker-dealer and investment adviser was enjoined from violating the antifraud provisions of the federal securities laws. *Held*, it is in the public interest to bar Respondent from association with any broker, dealer, or investment adviser.

APPEARANCES:

Don Warner Reinhard, pro se.

Edward D. McCutcheon and *Robert K. Levenson* for the Division of Enforcement.

Appeal filed: July 20, 2010
Last brief received: November 2, 2010

I.

Don Warner Reinhard, formerly the sole owner and president of Magnolia Capital Advisors, Inc. ("Magnolia"), a registered investment adviser, and formerly associated with Paragon Financial Group, Inc. ("Paragon"), a registered broker-dealer, appeals from the decision of an administrative law judge barring him from association with any broker, dealer, or investment adviser based on his having been enjoined by default, in 2008, from violating the antifraud provisions of the securities laws.[1] We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

A. Civil Injunction

In October 2008, Reinhard was permanently enjoined from future violations of antifraud and other provisions of the federal securities laws, namely Section 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5;[2] Sections 206(1), (2)[3] and 207[4] of the Investment Advisers Act of 1940; and aiding and abetting violations of Advisers Act Section 204 and Advisers Act Rule 204-2(a)(7).[5] The permanent injunction was entered against Reinhard following the entry of a default judgment against him.[6]

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1 *Don Warner Reinhard*, Supplemental Initial Decision Rel. No. 396 (Jun. 1, 2010), 98 SEC Docket 28878.

2 Securities Act Section 17(a), 15 U.S.C. § 77q(a), Exchange Act Section 10(b), 15 U.S.C. § 78j(b), and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5, prohibit fraudulent conduct in connection with securities transactions.

3 Advisers Act Sections 206(1) and (2), 15 U.S.C. §§ 80b-6(1) and (2), make it unlawful to defraud a client or a prospective client.

4 Advisers Act Section 207, 15 U.S.C. § 80b-7, prohibits the willful making of any untrue statement of material fact, or omission of any material fact, in a report or application required to be filed under Advisers Act Sections 203 or 204.

5 Advisers Act Section 204, 15 U.S.C. § 80b-4, and Advisers Act Rule 204-2(a)(7) thereunder, 17 C.F.R. § 275.204-2(a)(7), requires investment advisers to maintain books and records, including written communications relating to their securities recommendations and orders, and to provide copies of these records as directed by the Commission.

6 *SEC v. Reinhard*, No. 4:07-CV-529-RH/WCS (N.D. Fla. Oct. 3, 2008), *aff'd*, No. 09-10213-CC (11th Cir. Oct. 28, 2009).

In the injunctive proceeding, Reinhard, acting *pro se*, challenged the sufficiency of service and made other procedural objections but did not answer the Commission's complaint. In his Order for Entry of Judgment, the district court judge found that a process server had delivered the complaint and summons to Reinhard on February 13, 2008 but "Reinhard answered the door [and] then slammed it," whereupon the process server left the complaint and summons on Reinhard's front porch. In March 2008, Reinhard moved for an extension of the time to respond to the complaint and the judge granted the motion, directing Reinhard to respond by April 18, 2008.[7] Reinhard did not respond by April 18 but, rather, moved on May 6, 2008 for a further sixty-day extension. On the same day, the judge denied Reinhard's motion for another extension.

The Commission applied for a default judgment on June 9, 2008, which the clerk entered on June 12, 2008. On June 24, 2008, Reinhard objected to the Commission's application for a default judgment. On July 8, 2008, the Commission moved for entry of a default judgment. On July 13, 2008, the judge rejected Reinhard's opposition and granted the Commission's motion for entry of a default judgment.

The court relied on the Commission's complaint in entering judgment. The complaint alleged that, from at least January 2002 through August 2003, Reinhard had, through Magnolia Capital Advisers, "made false and misleading statements and omissions of material fact to his approximately 138 clients in connection with the offer and sale of collateralized mortgage obligations ('CMO's)." These false and misleading statements included "misrepresent[ing] the safety of the highly-leveraged CMO's he purchased for his clients' accounts and the account of . . . a hedge fund he controlled as its general partner." The complaint also alleged that Reinhard "lulled his hedge fund clients into keeping their investments with the hedge fund by providing them with false quarterly account statements showing materially inflated account valuations," and that "[t]hrough all this activity, Reinhard's clients and hedge fund investors lost $6 million." In addition, the complaint asserted that, during a period when the market value of the CMO investments had declined, Reinhard "engaged in a fraudulent scheme to artificially increase the equity in certain brokerage accounts and to avoid margin calls . . . by temporarily 'parking' the CMO investments in the accounts of third parties, while falsely reporting the nature of the transactions to his broker-dealer and clearing firm."

Following a telephonic hearing in which Reinhard participated, the judge entered a permanent injunction against Reinhard on October 3, 2008. In that order, the court held that "Mr. Reinhard in effect admitted the fraud alleged in the complaint." The judge held an evidentiary hearing on December 8, 2008 to rule on various motions filed by Reinhard[8] and to determine the

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[7] In his order granting Reinhard's motion, the judge stated that "[n]o further extensions will be granted."

[8] On October 16, 2008, Reinhard filed a motion to quash the service of process. He (continued...)

appropriate amount of disgorgement, prejudgment interest, and civil penalty to be paid by Reinhard. Reinhard participated in this hearing and cross-examined the Commission's witness.

The judge found that "[t]he complaint identified the period of the fraud as beginning at least January 2002 and continuing through August 2003," and that the government's proof at trial established that Reinhard received commissions of approximately $5.9 million from the transactions at issue. The judge ordered Reinhard to disgorge this amount, as well as to pay an award of interest of approximately $2.26 million on the disgorgement amount and a civil penalty of $120,000 -- for a total judgment of approximately $8.2 million. On October 28, 2009, the Eleventh Circuit affirmed the district court decision.[9]

B. Criminal Conviction

On May 13, 2009, Reinhard entered into a plea agreement with the U.S. Attorney for the Northern District of Florida (the "Plea Agreement") regarding various counts of criminal misconduct (the "2009 Conviction").[10] In the Plea Agreement, Reinhard stated that he was pleading guilty to these counts because "he is in fact guilty of the charges contained" in these counts and he acknowledged that, "were the case to go to trial, the government could present evidence to support these charges beyond a reasonable doubt." Reinhard further agreed that he was entering into the Plea Agreement "knowingly, voluntarily and upon the advice of counsel." The parties also executed a supporting agreement, signed by Reinhard and his attorney, in which they set out the factual basis for Reinhard's guilty plea (the "Factual Basis for Plea Agreement").[11]

The Factual Basis for Plea Agreement identifies various misconduct as the basis for Reinhard's guilty plea, including:

- In 2003, Reinhard had applied to a bank for a loan of approximately $250,000 to finance his purchase of a boat. As part of his loan application, he had submitted his purported 2001 federal income tax return. This purported tax return

[8] (...continued)
filed additional evidentiary and procedural motions in November 2008, including requesting a hearing on his motion to quash service. On November 26, 2008, the judge denied one of Reinhard's procedural motions and, on December 8, 2008, denied the remainder.

[9] *SEC v. Reinhard*, No. 09-10213, 2009 U.S. App. LEXIS 23744 (11th Cir. Oct. 28, 2009) (*per curiam*).

[10] Reinhard's then-counsel also signed the Plea Agreement.

[11] The Factual Basis for Plea Agreement was also signed by Reinhard and his then-counsel.

was not, however, a copy of the actual return he filed for 2001, and it falsely listed his adjusted gross income as $944,322 and his total tax as $253,996, while his actual return listed his adjusted gross income as $389,700 and his total tax as $37,498.

- Reinhard filed a bankruptcy petition in 2006 but failed to disclose "numerous significant assets," although he had represented to the bankruptcy trustee that he had reported all the assets he owned. The omitted assets included the boat mentioned above, artwork he had purchased for approximately $40,000, and certain investment accounts. Reinhard also failed to disclose certain of his liabilities, lease obligations and gifts (including gifts valued at approximately $40,000 to his girlfriend).

- Reinhard transferred two unreported assets following the filing of his bankruptcy petition, including artwork that he sold for $24,000, of which approximately $20,000 was deposited to Reinhard's girlfriend's bank account -- an account that was not disclosed to the bankruptcy court.

- Reinhard under-reported Schedule E income on his 2001 federal income tax return by reporting a fraudulent expense of $554,622, the expense purportedly being incurred to reimburse investors for losses they had incurred in one of Reinhard's ventures when, in fact, the evidence reveals that no such payment was made to the investors. As a result of this false statement, Reinhard underpaid his taxes by $216,498.

- On his 2005 federal income tax return, Reinhard falsely stated that his cost basis in investment properties that he sold in that year was $3.2 million, when it was actually $1.14 million. Reinhard later benefitted from the incorrect basis information when he used his overstated losses from the 2005 return to offset his reported taxable income on his 2002 tax return, which he was required to file by the bankruptcy court. As a result of his use of the false information from the 2005 return, Reinhard reported a taxable loss of approximately $1.17 million for 2002, instead of correctly reporting taxable income of approximately $729,000. Also, by submitting this false 2002 tax return to the bankruptcy court, Reinhard concealed from the court the fact that he had generated substantial capital gains.

Pursuant to the Plea Agreement and the Factual Basis for Plea Agreement, Reinhard pled guilty on May 13, 2009 to seven counts of the criminal indictment against him, including: (i) making false statements on a loan application in violation of 18 U.S.C. § 1014;[12] (ii) making

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[12] 18 U.S.C. § 1014 prohibits "knowingly mak[ing] any false statement or report . . . for the purpose of influencing in any way the action of" a banking institution "upon any (continued...)

false statements to the bankruptcy trustee and aiding and abetting the making of such statements in violation of 18 U.S.C. §§ 152(3) and 2;[13] (iii) transferring assets and concealing them from the bankruptcy trustee in violation of 18 U.S.C. § 152(7);[14] and (iv) making false statements on an income tax return in violation of 26 U.S.C. § 7206(1) and (2).[15] Reinhard was sentenced to 51 months' imprisonment for five of the counts and 36 months' imprisonment for the other two counts, the sentences to run concurrently. In addition, he was ordered to pay restitution of $667,890.28 and a special assessment of $700. He is currently incarcerated in the Beaumont, Texas Federal Correctional Complex.

C. Administrative Proceedings

1. Initial Decision and Remand Order

On October 27, 2008, proceedings were instituted based on the default injunction. On February 12, 2009, the law judge issued an Initial Decision barring Reinhard from associating with any broker, dealer or investment adviser.[16] Reinhard appealed. In February 2010, we issued an order (the "Remand Order") holding that, while the statutory basis for the imposition of sanctions was satisfied in that Reinhard was enjoined from violating the antifraud and other provisions of the federal securities laws while in an associated capacity, we were concerned about whether the record was "sufficient to address, in a meaningful manner, the public interest"

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12 (...continued)
application, . . . loan . . . agreement or . . . any change or extension of any of the same . . . ."

13 18 U.S.C. § 152(3) prohibits a person from "knowingly and fraudulently mak[ing] a false declaration, certificate, verification, or statement under penalty of perjury" in a bankruptcy matter. 18 U.S.C. § 2 declares that a person who aids or abets another in the commission of a crime against the United States, or willfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, will be punishable as a principal. Reinhard also pled guilty to aiding and abetting the concealment of a material fact in violation of 18 U.S.C. § 1001.

14 18 U.S.C. § 152(7) prohibits a person from "knowingly and fraudulently transfer[ring] or conceal[ing] any of his property . . . in contemplation of a case under" the bankruptcy laws or "with intent to defeat the provisions" of the bankruptcy laws.

15 26 U.S.C. § 7206(1), as relevant here, prohibits the submission of an income tax statement which the filer "does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(2) makes it unlawful to "[w]illfully" assist in the preparation of an income tax return "which is fraudulent or is false as to any material matter. . . ."

16 *Don Warner Reinhard*, Initial Decision Rel. No. 370 (Feb. 12, 2009), 95 SEC Docket 14218.

because the injunction was entered by default with no litigated or agreed upon findings of fact.[17] The Remand Order noted that the Supreme Court has held that "[i]n the case of a judgment entered by . . . default, none of the issues is actually litigated [and that] [t]herefore [issue preclusion or collateral estoppel] does not apply with respect to any issue in a subsequent action."[18] The Remand Order further stated that "[i]n determining the need for assessment of sanctions in the public interest, we, like the law judge, are guided by the factors identified in *Steadman v. SEC*."[19] The parties were directed, on remand, to introduce additional evidence regarding these factors.

2. Supplemental Initial Decision and Appeal to Commission

The law judge then considered the case again pursuant to the Remand Order. On March 22, 2010, the law judge held a prehearing conference in which she requested that Reinhard state, by May 6, 2010, why his 2009 conviction should not be considered in evaluating whether sanctions should be imposed in the public interest in light of the *Steadman* factors. At the prehearing conference, Reinhard contended that the conviction was not relevant to the administrative proceeding, but did not file any additional pleadings with the law judge. On June 1, 2010, the law judge issued a Supplemental Initial Decision, again barring Reinhard from associating with any broker, dealer, or investment adviser based on the default permanent injunction entered against him.[20] In her Supplemental Initial Decision, the law judge took official notice of Reinhard's 2009 criminal conviction in assessing the public interest. The law judge held that, "[e]ven disregarding the injunction . . . his criminal conduct shows a lack of honesty

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17 *Don Warner Reinhard*, Securities Exchange Act Rel. No. 61,506 (Feb. 4, 2010), 97 SEC Docket 25269, 25273.

18 *Arizona v. California*, 530 U.S. 392, 414 (2000) (quoting *Restatement (Second) of Judgments*, § 27 cmt. e, p. 257 (1982)); *but see Harold F. Harris*, Exchange Act Rel. No. 53122A (Jan. 13, 2006), 87 SEC Docket 362, 369 (preclusive effect given to default injunction where district court's accompanying findings took account of "substantive defenses argued by Respondents" in late-filed answer); *Thomas J. Donovan*, 58 S.E.C. 1032, 1035 (2005) (imposing sanctions based on default injunction, where law judge conducted hearing accepting testimony and other evidence related to underlying misconduct and the public interest); *Lamb Bros., Inc.*, 46 S.E.C. 1053, 1058-59 (1977) (sanctions imposed based on default injunction but "allegations made in the injunctive suit [were] remade" in administrative proceeding and "an evidentiary record with respect to those matters was developed").

19 97 SEC Docket at 25273 (citing to *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979). The relevant public interest factors are identified and discussed in Section III a. below.

20 *Don Warner Reinhard*, Initial Decision Rel. No. 396 (June 1, 2010), 98 SEC Docket 28878.

and indicates that he is unsuited to function in the securities industry." On July 28, 2010, we issued an order granting Reinhard's request for review. In this order, we asked the parties to address in their briefs "whether the order instituting proceedings ["OIP"] should be amended to reflect Reinhard's criminal conviction and the relevance of that conviction to the Commission's consideration of the public interest." In response, both parties argued that the OIP should not be amended to reflect the 2009 Conviction. Reinhard contended that amendment is not appropriate because, in his view, the 2009 Conviction is not relevant to the public interest. The Division of Enforcement, on the other hand, maintained that the "OIP does not need to be amended [because] [t]he default permanent injunction entered against Reinhard provides a statutory basis for these proceedings, and the OIP does not need to include a criminal conviction for a Law Judge to consider [the conviction] in determining whether it is in the public interest to order a bar." Under the circumstances, we have determined that there is no need to amend the OIP.[21] On October 8, 2010, we issued a second order in which we gave the parties "express notice that the Commission may consider the 2009 Conviction in assessing the public interest." We further advised the parties that they would be given "a further opportunity to discuss any mitigating circumstances and any other issues related to that conviction," through the opportunity to file additional briefs on the matter.

III.

Under Exchange Act Sections 15(b)(4) and (6)[22] and Advisers Act Sections 203(e) and (f),[23] we may impose remedial sanctions on a person associated with a broker, dealer, or investment adviser consistent with the public interest if, among other things, the associated person has been permanently enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities. We find, and Reinhard does not dispute, that Reinhard was an associated person and that he was permanently enjoined from engaging in conduct in connection with the purchase or sale of securities. Accordingly, the statutory requirements for the imposition of sanctions were satisfied here.

a. The Exchange Act and the Advisers Act authorize us to censure, place limitations on, suspend, or bar an associated person based on these findings if we find that such sanction is in the public interest.[24] In analyzing the public interest we consider, among other things: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations,

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21 See *Robert Bruce Lohmann*, 56 S.E.C. 573, 583 n.20 (2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions").

22 15 U.S.C. §§ 78*o*(b)(4) and (6).

23 15 U.S.C. §§ 80b-3(e) and (f).

24 15 U.S.C. § 78*o*(b)(6)(A); 15 U.S.C. § 80b-3(f).

the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[25] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[26] Based on our consideration of these factors, we believe that the bar imposed by the law judge was amply warranted.

According to the Factual Basis for Plea Agreement, Reinhard made repeated false statements on a loan application, to a bankruptcy court, and on his tax returns. Moreover, the false statements were not mere minor or ministerial errors, as Reinhard maintains, but significant in amount and scope. For example, Reinhard included a bogus tax return in a loan application that falsely listed his adjusted gross income as $944,322 and his total tax as $253,996 when, in fact, his actual return listed his adjusted gross income as $389,700 and his total tax as $37,498. He also reported a fraudulent expense of $554,622 on his 2001 tax return, which allowed him to underpay his taxes by $216,498, and on his 2002 income tax return falsely claimed a net operating loss of $4,126,540 that was used to offset his reported income of $3.2 million. These are, as Enforcement correctly states, "crimes of dishonesty." His criminal misconduct included making false statements to the government and others concerning financial matters and involved concealing assets and lying about their existence and disposition. This misconduct is highly relevant in our inquiry where we are required to consider the public interest and determine whether an individual is fit to work in an industry where honesty and rectitude concerning financial matters is critical.[27]

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25 *James C. Dawson*, Investment Advisers Act Rel. No. 3057 (July 23, 2010), 98 SEC Docket 30697, 30699-700, *Scott B. Gann*, Exchange Act Rel. No. 59729 (Apr. 8, 2009), 95 SEC Docket 15818, 15823 (citing *SEC v. Steadman*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981)), *aff'd*, No. 09-60435 (5th Cir. 2010) (per curiam)).

26 *David G. Ghysels*, Exchange Act Rel. No. 62937 (Sept. 20, 2010), 99 SEC Docket 32610, 32614, *appeal filed*, No. 10-4634 (2d Cir. Nov. 12, 2010); *Dawson, supra.*

27 The fact that Reinhard's criminal misconduct did not involve violations of the federal securities laws is not determinative for our analysis. Exchange Act Section 15(b)(4)(B) and Advisers Act Section 203(e)(2)(A) authorize Commission action if the respondent has been convicted of "any felony" involving "the taking of a false oath, the making of a false report, . . . [or] perjury." As we recently stated:

> 'The securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants.' Indeed, the importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or securities business.

(continued...)

Also significant to our inquiry is the fact that Reinhard's misconduct occurred over an extensive period of time and involved a high degree of scienter. As the Factual Basis for Plea Agreement shows, Reinhard's criminal activity occurred between 2003 through 2007 and involved numerous false filings and statements. Moreover, all of the crimes to which Reinhard pled guilty required that he have acted intentionally or knowingly.[28] Finally, while Reinhard expressed his "remorse" for his actions, he also challenges the facts underlying his conviction, as discussed in section b. below, suggesting an unwillingness to appreciate the wrongfulness of what he did.

b. Reinhard appears to concede that some sanction is warranted -- he proposes in his pleadings that, in settlement of this proceeding, he be suspended "for a period of 60 months beginning on the date of the SEC default judgement on October 3, 2008" -- but objects to a permanent bar as excessive.[29] According to Reinhard, a 60-month suspension is "more than sufficient given a default judgement and a plea agreement based on unintentional errors & mistakes." In particular, he objects to the consideration of his 2008 guilty plea in evaluating the public interest, arguing that the facts underlying his criminal conviction "do <u>not</u> lead to concern of the public interest" [emphasis in original].

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[27] (...continued)
Gary M. Kornman, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14255-56, *petition denied*, 592 F.3d 173 (D.C. Cir. 2010) (quoting *Bruce Paul*, 48 S.E.C. 126, 128 (1985)). *See also Ahmed Mohamed Soliman*, 52 S.E.C. 227, 231 (1995) (holding that criminal conviction for tax law violations involving "fraud and deceit" is a "serious" offense which "shows a lack of honesty and judgement and indicates that [respondent was] unsuited to function in the securities industry"); *Benjamin Levy Sec., Inc.*, 46 S.E.C. 1145, 1147 (1978) (holding that respondent's conduct in "play[ing] a key role in a deliberate fraud practiced on the [Small Business Administration] and [a] bank" constituted "serious misconduct" and supported the law judge's decision to bar respondent from association with any broker-dealer or investment adviser).

[28] *See supra* notes 12-15 and accompanying text.

[29] Reinhard does not explain his reasons for suggesting a 60 month suspension. Alternatively, Reinhard seeks a stay of this proceeding pending his release from prison. We deny Reinhard's stay request. *Cf. David G. Ghysels, Order Denying Motions to Correct Manifest Errors of Fact and Denying Motions to Stay and for a Fact-Finding Hearing*, Admin. Proc. Rel. No. 648 (Jan. 10, 2010), 97 SEC Docket 25011, 25014 (holding that "pending appeal [of conviction] is not a valid reason for delaying the resolution" of follow-on administrative proceeding); *Charles Trento*, 57 S.E.C. 346-47 (2004) (denying request of incarcerated respondent to set aside law judge's decision pending appeal of his conviction). *See also Jose P. Zollino*, Exchange Act Rel. No. 55107 (Jan. 16, 2007), 89 SEC Docket 2598 (administrative proceeding adjudicated and decided while respondent was incarcerated).

Reinhard further argues that "[t]he actual counts that I pled guilty to are not the identical counts as outlined in the Factual Basis of the Plea Agreement." He claims that the discrepancies between the two "are substantiated in the language used when presenting the plea to the judge . . . and in the objections and changes made in the sentence hearing," and would be evident if the transcripts of these events were to be reviewed.[30] He further asserts that the factual record from the plea hearing and the sentencing hearing "proves . . . that [his] plea was based upon unintentional errors and mistakes by [Reinhard] and [his] legal counsel" that "solely dealt with the filing and appropriate ammending [sic] of documents."[31]

As we have repeatedly held, Reinhard is collaterally estopped from attacking the facts underlying his conviction.[32] Moreover, Reinhard cannot now dispute the accuracy of the findings

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[30] For example, with respect to the assertion in the Factual Basis for Plea Agreement that he had submitted a false tax return to a bank overstating his adjusted gross income in support of his loan application, Reinhard claims that "the issue on the [2001] tax return is one of a deduction and there was *not* a new loan or a loan application of any kind involved," rather "[i]t was simply an administrative function of a 'change of terms' agreement because of new collateral and [he] even paid the principle [sic] down by approximately $95,000 [emphasis in original]." Also, as to the statement in the Factual Basis for Plea Agreement that he had filed a false tax return in 2001 by reporting a fraudulent expense of $554,622, Reinhard states that the distributions to his limited partners "were actually made in 2002 and 2003 and therefore could be deducted in 2002 and 2003 instead of 2001."

[31] Among other things, he challenges the facts set forth in the Factual Basis for Plea Agreement by arguing that: (i) the omissions in the various schedules and statements he filed with the bankruptcy court "should have been ammended [sic] by [his] bankruptcy attorney;" (ii) the purportedly false cost basis in his 2005 tax return for which he had pled guilty was, in fact, "accurate" but he "[did] not have the supporting documentation to prove the cost basis used;" and (iii) the distributions made to his limited partners, while not made in 2001 as his tax return for that year indicated, were, in fact, paid in 2002 and 2003 as shown in additional supporting materials provided to the Internal Revenue Service since the Plea Agreement was signed and the sentencing hearing held. Reinhard further claims that the government "acknowledged at the sentence hearing that there was *not* a fraud involving a loan application," and that the government agrees "that an incorrect tax return was supplied to the bank for administrative purposes during a change in collateral of an existing loan [emphasis in original]." Reinhard similarly seeks to minimize the significance of his tax return violations.

[32] *See, e.g., Kornman*, 95 SEC Docket at 14257 (finding criminal conviction based on guilty plea has collateral estoppel effect precluding relitigation of issues in Commission proceedings); *Phillip J. Milligan*, Exchange Act Rel. No. 61790 (Mar. 26, 2010), 98 SEC Docket 26791, 26796-97 (holding that a respondent in a follow-on proceeding may not challenge the findings made in an underlying criminal or injunctive proceeding). *See also Robert Blakeney*

(continued...)

set out in the Factual Basis for Plea Agreement. He and his then-attorney signed this agreement as well as the Plea Agreement. These agreements were entered into as part of a settlement where the U.S. Attorney agreed to dismiss the remaining sixteen counts of the indictment and not to file any further criminal charges against Reinhard arising out of the same transactions and occurrences to which he pled guilty. As noted, Reinhard acknowledged in the Plea Agreement that "were the case to go to trial, the government could present evidence to support these charges [*i.e.*, the ones to which he pled guilty] beyond a reasonable doubt." Moreover, by signing the Plea Agreement and Factual Basis for Plea Agreement, Reinhard waived any objections he may have had to the facts set out in the latter agreement and became bound by the facts recited therein.[33]

c. Reinhard asks that we "show mercy on [him] and [his] future as [his] current 51 month prison sentence is more than sufficient punishment." However, as we previously noted, "[t]he specified administrative and criminal remedies are designed to serve different purposes, one to determine whether respondent[] should be barred or suspended from association . . . or censured, and the other to determine whether [respondent] should be fined or imprisoned."[34] Thus, we do not view his criminal sentence as mitigative of the appropriate sanction to be imposed in the public interest in this administrative proceeding.

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[32] (...continued)
Stevenson, 48 S.E.C. 89, 90 n.4 (noting that it is "well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case [and that] [f]or purposes of applying that principle, this Commission and the United States have been regarded as one and the same." [citations omitted]).

Reinhard also challenges the validity of the civil injunction order, asserting that "the Commission did not prove that [he] broke or violated any securities laws in obtaining this default judgement." He attributes his civil injunction and the $8.2 million judgment against him to "egregious errors" of Bear Stearns that caused him to be a "victim as well as [his] clients," and argues that imposing a bar on him in this administrative proceeding would be "in effect punishing [him] for the errors of Bear Stearns." If Reinhard wished to challenge these allegations, he should have done so before the court.

[33] *See United States v. Lomeli-Mences*, 567 F.3d 501, 507 (9th Cir. 2009) (holding that, having admitted to certain facts in "both his written plea agreement and oral change of plea proceedings," defendant could not challenge these facts on appeal); *United States v. Newman*, 148 F.3d 871, 876 (holding that defendant was deemed to have admitted facts in signed plea agreement and waived any subsequent challenge to them).

[34] *Richard N. Cea*, 44 S.E.C. 8, 25 (1969).

The "securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[35] Here, by his repeated acts of false filings and dishonest conduct over several years and his refusal to appreciate the wrongfulness of his misconduct, Reinhard has demonstrated his unfitness for employment in the industry. The imposition of a bar reflects the importance of "deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions."[36] By barring Reinhard from associating with broker-dealers and investment advisers, these sanctions address the risks of allowing Reinhard to remain in the securities industry, serving as a "legitimate prophylactic remedy consistent with [our] statutory obligations"[37] to "protect[] investors and the integrity of the markets by preventing those convicted of crimes from acting in the capacity of a securities professional."[38]

Accordingly, we hold that it is in the public interest to bar Reinhard from association with any broker, dealer, or investment adviser. An appropriate order will issue.[39]

By the Commission (Chairman SCHAPIRO and Commissioners CASEY, WALTER, AGUILAR, and PAREDES).

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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[35] *Conrad P. Seghers,* Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2304; *see also Charles Phillip Elliott*, 50 S.E.C. 1273, 1276 (1992) (stating that the securities industry is "a business that presents many opportunities for abuse and overreaching"), *aff'd*, 36 F.3d 86 (11th Cir. 1994) (per curiam).

[36] *Ghysels*, 99 SEC Docket at 32621 (quoting *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005)).

[37] *Kornman*, 592 F.3d at 189.

[38] *Ghysels*, 99 SEC Docket at 32621 (quoting *William F. Lincoln*, 53 S.E.C. 452, 461 (1998)); *see also SEC v. Palmisano*, 135 F.3d 860, 866 (2d Cir. 1998) (finding that "deterrence of securities fraud serves other important nonpunitive goals, such as encouraging investor confidence, increasing the efficiency of financial markets, and promoting the stability of the securities industry").

[39] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or are in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63720 / January 14, 2011

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3139 / January 14, 2011

Admin. Proc. File No. 3-13280

In the Matter of

DON WARNER REINHARD

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Don Warner Reinhard be barred from association with any broker, dealer or investment adviser.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 201, 202 and 240

[Release No. 34-63723]

RULES OF PRACTICE

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[1] amended Section 19(b) of the Securities Exchange Act of 1934 ("Exchange Act"),[2] which governs the handling of proposed rule changes submitted by self-regulatory organizations ("SROs"). Among other things, the Dodd-Frank Act's amendments to Section 19 of the Exchange Act require the Securities and Exchange Commission ("Commission") to promulgate rules setting forth the procedural requirements of proceedings to determine whether a proposed rule change should be disapproved. In satisfaction of this requirement, the Commission is adopting new Rules of Practice to formalize the process it will use when conducting proceedings to determine whether an SRO's proposed rule change should be disapproved under Section 19(b)(2) of the Exchange Act. The new rules are intended to add transparency to the Commission's conduct of those proceedings and address the process the Commission will follow to institute proceedings and provide notice of the grounds for disapproval under consideration as well as provide interested parties with an opportunity to submit written materials to the Commission. In addition, the Commission is making conforming changes to Rule 19b-4 under the Exchange Act in recognition of the new Rules of Practice. Further, pursuant to Section 107 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"), the

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1 Pub. L. No. 111-203 (July 21, 2010).

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

provisions of paragraphs (1) through (3) of Section 19(b) of the Exchange Act govern the proposed rules of the Public Company Accounting Oversight Board ("PCAOB").[3] The Commission is amending Regulation P to add a rule providing that these new Rules of Practice also formalize the process the Commission will use when conducting proceedings to determine whether a PCAOB proposed rule should be disapproved.

EFFECTIVE DATE: [Insert date of publication in Federal Register]

FOR FURTHER INFORMATION CONTACT: Richard Holley III, Assistant Director, at (202) 551-5614, Kristie Diemer, Special Counsel, at (202) 551-5613, and Arisa Tinaves, Special Counsel, at (202) 551-5676, Division of Trading and Markets, or Jeffrey S. Cohan, Senior Special Counsel, at (202) 551-5300, Office of the Chief Accountant, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is adding to its Rules of Practice[4] to establish procedures for instituting proceedings to determine whether an SRO's proposed rule change should be disapproved under Section 19(b) of the Exchange Act (§ 201.700 et seq.) and is making corresponding changes to Rule 19b-4 under the Exchange Act (15 U.S.C. 78f(b)(4)). The Commission is also adding Rule 170 to Regulation P[5] to provide that § 201.700 et seq. establishes procedures for instituting proceedings to determine whether a PCAOB proposed rule should be disapproved.

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3 See 15 U.S.C. 7217.

4 17 CFR 201 et seq.

5 17 CFR 202.100 et seq.

I. Discussion of Rule Amendments

A. Background

Section 916 of the Dodd-Frank Act amended Section 19(b) of the Exchange Act, which governs the Commission's handling of proposed rule changes submitted by SROs, including national securities exchanges, the Financial Industry Regulatory Authority ("FINRA"), and registered clearing agencies.[6] Notably, the amendments to Section 19(b) in Section 916 of the Dodd-Frank Act established new statutory deadlines applicable to the Commission's publication and review of proposed SRO rule changes.[7]

Among other things, amended Section 19(b) imposes a requirement that an SRO's proposed rule change be sent by the Commission to the Federal Register for publication within 15 days of the date on which the SRO posted its proposed rule change on its website.[8] Further, Section 916(a) of the Dodd-Frank Act amended Section 19(b)(2) of the Exchange Act to require the Commission, within 45 days of the "publication date" of notice of a proposed rule change, to either approve a proposed rule change, disapprove a proposed rule change, or institute

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6 Pursuant to Section 107 of the Sarbanes-Oxley Act, the provisions of paragraphs (1) through (3) of Section 19(b) of the Exchange Act also govern proposed rules of the PCAOB.

7 Pursuant to Rule 30-3(a) (17 CFR 200.30-3(a)), the Commission has delegated authority to the Division of Trading and Markets for certain functions related to the handling of proposed rule changes filed by SROs under Section 19 of the Exchange Act.

8 See Section 19(b)(2)(E) of the Exchange Act (15 U.S.C. 78s(b)(2)(E)), as added by Section 916(a) of the Dodd-Frank Act. The 15-day period commences when the SRO, "after filing a proposed rule change with the Commission," posts its proposal on a publicly available website. See id. Separately, Rule 19b-4(l) under the Exchange Act requires the SRO to post a proposal on its website within two business days after filing the proposal with the Commission. See 17 CFR 240.19b-4(l). If the Commission fails to send the notice to the Federal Register by the applicable deadline, then the "publication date" would be deemed to be the date on which the SRO website publication was made. See 15 U.S.C. 78s(b)(2)(E).

proceedings to determine whether the proposed rule change should be disapproved.[9] With the exception of the ability to disapprove a proposed rule change without first instituting proceedings, the authority to either approve a proposed rule change or institute proceedings to determine whether a proposed rule change should be disapproved is not new.

In addition, the Dodd-Frank Act removed the concept of "abrogation" of a filing that an SRO designated to be effective immediately upon filing with the Commission. Prior to the Dodd-Frank Act, the Commission had the authority, within 60 days of the date of filing, to summarily abrogate a proposed rule change filed for immediate effectiveness under former Section 19(b)(3)(A) of the Exchange Act[10] if the Commission determined that such action was necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[11] Abrogation suspended the effectiveness of an immediately effective proposal and obligated the SRO, if it desired to proceed with its proposed rule change, to refile the proposal for notice, comment, and Commission consideration under Section 19(b)(2) of the Exchange Act. Section 916(c) of the Dodd-Frank Act amended Section 19(b)(3)(C) of the Exchange Act and replaced abrogation with a process in which the Commission may "temporarily suspend" a proposed rule change (if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act) and then must institute

9 See Exchange Act Section 19(b)(2)(A)(i). The initial 45-day period may be extended by either the Commission or the SRO for up to an additional 45 days to a maximum of 90 days total. See 15 U.S.C. 78s(b)(2)(A)(ii). If the Commission subsequently fails to act within the applicable time frame, then the proposed rule change will be "deemed to have been approved." See 15 U.S.C. 78s(b)(2)(D).

10. See 15 U.S.C. 78s(b)(3)(A).

11 See former Section 19(b)(3)(C); former 15 U.S.C. 78s(b)(3)(C).

proceedings under Section 19(b)(2)(B) to determine whether to approve or disapprove the SRO rule change.[12]

Prior to the Dodd-Frank Act's amendments to Section 19, proceedings to determine whether to disapprove a proposed rule change were rarely begun and even more rarely concluded.[13] Rather, an SRO typically modified or withdrew a proposal when it understood the Commission or its staff had concerns that could lead it to institute such proceedings. The Dodd-Frank Act's amendments to Section 19 may increase the number of proceedings that the Commission determines to institute because, among other things, the new authority to "temporarily suspend" an immediately effective filing obligates the Commission to institute proceedings to determine whether to disapprove the SRO rule change with the imposition of the suspension. That provision, together with the new statutory deadlines applicable to Commission review and publication of an SRO's proposed rule change, will further increase the Commission's workload. Consequent constraints on Commission resources would be compounded to the extent that the Commission continues to receive an increasing number of proposed rule changes from an increasing number of SROs.

B. Rule Amendments

As required by Section 19(b)(2)(F) of the Exchange Act (added by Section 916(a) of the Dodd-Frank Act), the Commission is promulgating new Rules of Practice setting forth the procedural requirements for proceedings to determine whether to disapprove an SRO's proposed

12 See 15 U.S.C. 78s(b)(3)(C). Section 19(b)(3)(C) further provides that a temporary suspension is not reviewable under Exchange Act Section 25 nor is it deemed to be "final agency action."

13 See, e.g., infra note 16 (citing to a 1984 disapproval proceeding order).

rule change.[14] Specifically, the Commission is adopting rules to outline the procedures that it will follow when exercising its authority under Section 19(b)(2)(A)(i)(II) of the Exchange Act, pursuant to which the Commission either (1) may institute proceedings to determine whether a proposed rule change filed under Section 19(b)(2) should be disapproved or (2) shall institute such proceedings to determine whether to disapprove an immediately effective proposed rule change filed under Section 19(b)(3)(A) that the Commission determined to temporarily suspend.

The procedural rules that the Commission now is adopting are intended to implement the mandate imposed by the Dodd-Frank Act.[15] The rules also are intended to bring transparency to the conduct of proceedings to disapprove a proposed rule change under Section 19(b) of the Exchange Act and reflect the process that the Commission generally has followed when it has had occasion to conduct such proceedings.[16] Among other things, the new rules outline the process that the Commission will follow to provide to the SRO notice of the grounds for disapproval under consideration.[17]

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14 See 15 U.S.C. 78s(b)(2)(F). Section 19(b)(2)(F) also requires the Commission, as part of its effort to promulgate rules setting forth the procedural requirements for proceedings to determine whether to disapprove an SRO's proposed rule change, to have "consult[ed] with other regulatory agencies." Id. In satisfaction of this requirement, Commission staff has consulted with staff from the Commodity Futures Trading Commission, the Federal Reserve Board, and the Office of the Comptroller of the Currency.

15 Rules 700 and 701 are not affected by the other Rules of Practice contained in part 201, except as specifically provided for in Rule 700. See amendment to Rule of Practice 100 ("Scope of the Rules of Practice") adding new subparagraph (b)(3).

16 See, e.g., Securities Exchange Act Release No. 21439 (October 31, 1984), 49 FR 44577 (November 7, 1984) (File Nos. SR-CBOE-84-15 and SR-CBOE-84-16) (Order Instituting Proceedings to Determine Whether to Disapprove Rule Changes).

17 Though in a proceeding to determine whether to disapprove a proposed rule change the Commission is required to publish notice of its grounds for disapproval under consideration, the Commission could ultimately either disapprove or approve the proposal following conclusion of the proceedings. See Exchange Act Section 19(b)(2)(C); 15 U.S.C. 78s(b)(2)(C) (setting forth the standards applicable to Commission approval or disapproval of a proposed rule change). See also infra note 27.

While the new rules are not within the scope of the existing Rules of Practice, they do incorporate three existing Rules of Practice by reference: Rule 103 (Construction of Rules), 104 (Business Hours), and 160 (Time Computation). Rule 103, among other things, specifies that the Rules of Practice "shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding."[18] It also states that counsel for a party may take any action required or permitted to be taken by such party.[19] Rule 104 sets forth the business hours of the Commission, which will be applicable to the filing of papers with the Commission.[20] Rule 160 governs the computation of time periods, which will be applicable when the Commission establishes, for example, deadlines by which comments must be received.[21]

Consistent with Exchange Act Section 19(b)(2)(B), when instituting proceedings to determine whether to disapprove an SRO's proposed rule change, the new rules state that the Commission shall provide notice to the SRO and to the public of the grounds for disapproval under consideration. This notice shall include a brief statement of the matters of fact and law that the Commission is considering in determining whether to disapprove the rule filing.[22] In

18 See 17 CFR 201.103(a).

19 See 17 CFR 201.103(c)(3).

20 See 17 CFR 201.104.

21 See 17 CFR 201.160. Among other things, Rule 160 addresses compliance with deadlines that fall on a Saturday, Sunday, or federal holiday.

22 As stated in Rule 700(e), the Commission is not required to amend its notice of the grounds for disapproval under consideration to consider additional matters of fact and law beyond what was set forth in its notice of the grounds for disapproval under consideration.

addition to publication of such notice in the Federal Register, the rules provide that the Commission also will serve a copy of the notice to the SRO that filed the proposed rule change.[23]

As reflected in new Rule 700(b)(1), such notice of the grounds for disapproval under consideration may be provided either simultaneously with the initial publication by the Commission of the notice of the SRO's proposed rule change in the Federal Register, or it may be published separately in the Federal Register subsequent to the initial publication by the Commission of the notice of the SRO's proposed rule change in the Federal Register. Providing for publication of the grounds for disapproval under consideration <u>simultaneous with</u> the initial publication of the proposed rule change in the Federal Register recognizes that a proposed rule change may initially raise questions as to whether the Commission would be able to approve the proposal as consistent with the Exchange Act and the rules and regulations thereunder applicable to the SRO. Simultaneous publication will allow the Commission to highlight prominently for public comment issues on which it seeks comment in an efficient manner when the proposal is first noticed for public comment. In addition, it will allow the Commission to proceed without additional delay to act on a proposed rule change in a more efficient manner. Alternatively, providing for publication of the grounds for disapproval under consideration <u>subsequent to</u> the initial publication of the proposed rule change in the Federal Register recognizes that commenters or the Commission may identify an issue with a proposal after a proposal was published for comment that warrants the institution of proceedings to determine whether to disapprove the proposal. Further, as a consequence of the short timeframe for noticing a proposal that is established in revised Section 19(b) of the Exchange Act, the Commission may

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23 Specifically, in addition to Federal Register publication, notice will be served to the contact person listed on the cover page of the Form 19b-4 filing filed with the Commission. <u>See</u> Rule 700(b)(1)(iii).

be compelled to publish filings that are later found to raise concerns under the Exchange Act, in which case the Commission may decide to institute proceedings subsequent to the initial publication of the proposed rule change in the Federal Register.[24]

When instituting proceedings, Section 19(b)(2)(B)(i)(II) of the Exchange Act requires the Commission to provide the SRO with an opportunity for a hearing. Accordingly, new Rule 700(c) outlines the conduct of the proceedings and establishes the opportunity for the SRO that filed the proposed rule change, as well as any other interested parties, to be heard on the matter. Specifically, Rule 700(c) states that all parties, including the SRO, will be given a specified amount of time (as indicated in the notice of the grounds for disapproval) to submit supporting or opposing materials, in writing, for the Commission's consideration in determining whether to approve or disapprove a proposed rule change.[25] In particular, the SRO that submitted the proposed rule change could file a written statement in support of its proposed rule change demonstrating, in specific detail, how such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the

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24 As required by Section 19(b)(2)(E) of the Exchange Act (added by Section 916(a) of the Dodd-Frank Act), the Commission must send notice of an SRO's proposed rule change to the Federal Register for publication within 15 calendar days of the date on which the SRO posts its proposed rule change on its website. Failure to meet the 15 calendar day statutory timeframe results in the "publication date" being deemed to be the day on which the SRO posted its proposal on its website. Because the 45-day statutory deadline for Commission action is keyed off of the "publication date," and because failure to act by that deadline results in a proposal being "deemed approved," failure to notice a proposal within 15 calendar days can effectively reduce the time that the Commission and commenters have to fully consider a proposal.

25 A request for an opportunity for an oral presentation of views should be submitted as a written request to the Secretary of the Commission and should include a reference to the proposed rule change's file number. See Exchange Act Rule 19b-4(g). The Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views. See Rule 700(c)(2).

SRO.[26] The statement could include a response to each of the grounds for disapproval under consideration as well as any specific representations or undertakings (e.g., representations or undertakings concerning the SRO's plans for surveillance or enforcement of a proposed new trading rule).

At the conclusion of the initial opportunity to submit written materials, the rules provide an opportunity for the SRO whose proposed rule change is under consideration to respond to any comments received on its proposal (i.e., a "rebuttal period").[27] The rules state that any failure by the SRO to respond to comments received on the proposal may result in the Commission not having a sufficient basis to make an affirmative finding as to whether the SRO's proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to the SRO.[28]

Further, the new rules state that the Commission may consider any failure by the SRO to provide all of the information required by Form 19b-4 in the manner required by the Form, as well as any failure to explain how the proposed rule change is consistent with the requirements of the Exchange Act and the applicable rules and regulation thereunder or any failure by the SRO to provide a complete response to the Commission's grounds for disapproval under

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26 Notably, the instructions to Form 19b-4 require an SRO to present, in a clear and comprehensible manner, how every proposed rule change it files with the Commission is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the SRO. These standards are reflected in Rule 700(b)(3).

27 The Commission will indicate in the notice of the grounds for disapproval the specified amount of time for the rebuttal period. See Rule 700(c)(3).

28 The standard for approval of a proposed rule change is that the Commission "shall approve a proposed rule change… if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations issued under [the Exchange Act] that are applicable to [the SRO]." 15 U.S.C. 78s(b)(2)(C)(i). The standard for disapproval is that the Commission "shall disapprove a proposed rule change of [an SRO] if it does not make [such finding]." 15 U.S.C. 78s(b)(2)(C)(ii).

consideration, in determining whether to approve or disapprove the proposed rule change.[29] In particular, such failure may result in the Commission not having a sufficient basis to make an affirmative finding that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to the SRO.

After conclusion of the initial comment period and the rebuttal period, the opportunity for interested parties to comment on the proposed rule change would close. Thereafter, the Commission would issue a written order either approving or disapproving the SRO's proposed rule change that sets out the reasons for the Commission's determination.[30]

The new rules also specify the record that the Commission will consider in the context of a proceeding to determine whether to disapprove an SRO's proposed rule change. Specifically, Rule 700(d)(3) states that the Commission will determine the matter on the basis of the record, which shall include the SRO's proposed rule change filed on Form 19b-4, any written materials received from any party on the proposed rule change, and any written materials that reflect communications between the Commission and any interested parties.[31] Further, the rules reflect

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29 In addition, a filing that does not comply with all applicable requirements, including the requirements of Form 19b-4, may be rejected as not properly filed under the circumstances outlined in Section 19(b)(10) of the Exchange Act. See Section 19(b)(10) of the Exchange Act, 15 U.S.C. 78s(b)(10) (setting forth the rule of construction relating to the filing date of proposed rule changes and the ability of the Commission to reject incomplete filings). Specifically, as stated in the general instructions to Form 19b-4, any filing that does not comply with the requirements of Form 19b-4 may be returned to the SRO and any filing so returned shall for all purposes be deemed not to have been filed with the Commission. See also Rule 0-3 under the Exchange Act, 17 C.F.R. 254.0-3 ("[t]he date on which papers are actually received by the Commission shall be the date of filing thereof if all of the requirements with respect to the filing have been complied with...").

30 See Rule 701; see also Exchange Act Section 19(b)(2)(C); 15 U.S.C. 78s(b)(2)(C).

31 In the event that an oral presentation of supporting or opposing views is ordered by the Commission, the written transcript of the remarks would become part of the record.

that written materials shall be filed with the Secretary of the Commission and that all materials received will generally be made publicly available.

Further, the Commission is making conforming edits to Rule 19b-4 in light of new Rules of Practice 700 and 701. In particular, the Commission is removing existing paragraph (g) of that rule, which references the opportunity for interested persons to be heard in the context of a proceeding to determine whether to disapprove a proposed rule change, and is replacing it with a cross reference to new Rules of Practice 700-701.[32] In addition, the Commission is amending paragraph (l) of Rule 19b-4 concerning the obligation of an SRO to post and maintain a copy of each proposed rule change on its website to provide specific guidance to the SRO as to when to remove a proposed rule change that is disapproved by the Commission. Currently, Rule 19b-4(l) does not specifically reference a Commission disapproval order as one of the potential final actions on a proposal.

Finally, the Commission is adding Rule 170 to Regulation P[33] to provide that § 201.700 et seq. establishes the procedures for instituting proceedings to determine whether a PCAOB proposed rule should be disapproved. Specifically, and consistent with Section 107 of the Sarbanes-Oxley Act, new Rule 170 clarifies that § 201.700 et seq applies to proposed rules of the PCAOB as fully as if it were a proposed rule change of a "registered securities association". Rule 170, like Section 107(b)(4)(A) of the Sarbanes-Oxley Act, substitutes the approval criteria to be "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors…." Further, given that the PCAOB is not

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32 Rule 19b-4(g) is consistent with the process outlined in new Rules of Practice 700 and 701. However, to avoid any confusion or overlap, the Commission is amending the Rule 19b-4(g) to cross reference the new Rules of Practice.

33 17 CFR 202.100 et seq.

explicitly subject to Rule 19b-4, Rule 170 also clarifies the requirement for the PCAOB to demonstrate that a proposed rule is "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors."[34]

II. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with the Administrative Procedure Act ("APA"),[35] that the new rules and rule amendments relate solely to agency organization, procedures or practices. Accordingly, these new rules and rule amendments are not subject to the provisions of the APA requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act,[36] therefore, does not apply. Similarly, because these rules relate to "agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties," analysis of major status under the Small Business Regulatory Enforcement Fairness Act is not required.[37] The new rules and rule amendments do not contain any new collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[38] Rather, the new rules and rule amendments govern a process that the Commission will be able to institute when an SRO's proposed rule change submitted on Form 19b-4 failed to provide the Commission with a sufficient basis to make a finding whether the proposed rule change was or was not consistent with the Exchange Act and the rules and regulations thereunder

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34 15 U.S.C. 7217(b)(4)(A).

35 5 U.S.C. 553(b)(3)(A).

36 5 U.S.C. 601 et seq.

37 5 U.S.C. 804(3)(C).

38 44 U.S.C. 3501 et seq.

applicable to the SRO. The required scope of information that an SRO must submit to the Commission to explain each proposed rule change and demonstrate that each proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder is established in existing Form 19b-4, and the rules and rule amendments do not contain any additional collection of information requirements beyond what SROs are already required to provide to the Commission.

III. Consideration of the Costs and Benefits of the Rule Amendments and Burden on Competition

The Commission is sensitive to the costs and benefits imposed by its rules and has identified certain costs and benefits of these rules. The rules and rule amendments that the Commission is adopting are intended to implement the mandate imposed by the Dodd-Frank Act. The benefits of the new rules and rule amendments also include increased transparency of the Commission's conduct of proceedings to determine whether to disapprove an SRO's proposed rule change. New Rules 201.700 and 701 and new Rule 170 under Regulation P establish procedures for the Commission to follow when instituting and conducting proceedings to determine whether to disapprove a proposed rule filing. The new rules and rule amendments provide procedures for the Commission, SROs, the PCAOB, and the public concerning the administration of certain of the Commission's responsibilities under Section 19 of the Exchange Act and Section 107 of the Sarbanes-Oxley Act, and reflect a process that is intended to help ensure that only those proposed rule changes that are consistent with the Exchange Act and title I of the Sarbanes-Oxley Act, respectively, are permitted.

There also are potential costs of the new rules. An SRO or the PCAOB may incur costs as a result of the new rules, for example, when submitting written material in support of its proposed rule change or providing a response to any adverse comments received. However, the

Commission believes that such costs typically are already incurred by the SROs when filing proposed rule changes on Form 19b-4, particularly since Form 19b-4 contains comprehensive and rigorous requirements that an SRO must follow when presenting, explaining, and offering a thorough legal analysis of each proposed rule change. Further, SROs already typically submit responses to adverse substantive comments received during the rule filing process. Similarly, the PCAOB has incurred costs by presenting, explaining, and offering similarly rigorous legal analysis of each of its proposed rules.

Further, because the new rules and rule amendments relate to agency organization, procedures or practice, the Commission believes that they will have no adverse impact on capital formation, nor are they expected to have any potential adverse impact on efficiency. In particular, the new rules and rule amendments are intended to add transparency to the Commission's institution and conduct of proceedings to determine whether to disapprove a proposed rule change. To the extent that interested parties identify issues and present information that informs the Commission's decision-making with respect to a particular proposed rule change that itself may affect capital formation or price efficiency, then the Commission's new rules and rule amendments could, in turn, promote capital formation and efficiency.

Section 23(a) of the Exchange Act[39] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Exchange Act 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.

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39 15 U.S.C. 78w(a).

The new rules and rule amendments implement the Dodd-Frank Act statutory changes to the rule change process and are intended to enhance transparency with respect to the Commission's conduct of proceedings under the Exchange Act to determine whether to disapprove an SRO's proposed rule change or a proposed rule of the PCAOB. The new rules, which set forth the administrative procedures concerning the Commission's conduct of such proceedings, apply equally to all SROs, including all national securities exchanges, FINRA, and clearing agencies that are required to submit proposed rule filing changes with the Commission. We note that many of the substantive requirements of the new rules come directly from the amendments to Exchange Act Section 19(b) by the Dodd-Frank Act. In addition, these rules are intended to codify and reflect the typical process that the Commission has followed when conducting proceedings to determine whether to disapprove an SRO's proposed rule change. Therefore, the Commission does not expect the rules to have an anti-competitive effect. To the contrary, the new rules provide all interested parties with an opportunity to express their views to the Commission concerning an SRO's proposed rule change or a proposed rule of the PCAOB that the Commission is considering potentially disapproving. To that extent, the new rules are expected to promote competition and help ensure that SRO rules are consistent with the Exchange Act and the rules and regulations thereunder and PCAOB rules and standards are consistent with the Sarbanes-Oxley Act and the rules and regulations thereunder.

IV. Statutory Basis and Text of Rules

The Commission is amending its Rules of Practice and Rule 19b-4 pursuant to authority set forth in the Exchange Act, including Sections 19(b) and 23(a). The Commission is amending Regulation P pursuant to authority set forth in the Sarbanes-Oxley Act, including Sections 3(b) and 107and the Exchange Act, including Sections 19(b) and 23(a).

List of Subjects in 17 CFR Parts 201, 202 and 240

Administrative practice and procedures.

Text of Amendments

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

PART 201 – RULES OF PRACTICE

1. The authority citation for part 201 is amended by adding authority citations for §201.700 to 201.702 to read as follows:

   Authority: 15 U.S.C. 77s, 77sss, 78w, 78x, 80a–37, and 80b–11; 5 U.S.C. 504(c)(1). Sections 201.700 to 201.702 are also issued under sec. 916, Pub. L. 111-203, 124 Stat. 1376.

2. Section 201.100 is amended by adding new paragraph (b)(3) to read as follows:

   §201.100 Scope of the rules of practice.

   * * * * *

   (b) * * *

   (3) Initiation of proceedings for SRO proposed rule changes under 17 CFR 201.700-701, except where made specifically applicable therein.

   * * * * *

3. Add Sections 201.700 and 201.701 to read as follows:

Sec. 201.700 Initiation of proceedings for SRO proposed rule changes.

(a) *Rules of Practice incorporated herein.* For purposes of these Rules of Practice contained at 17 CFR 201.700-701, the following Rules of Practice are incorporated by reference:

(1) Rule 103, 17 CFR 201.103 (Construction of Rules);

(2) Rule 104, 17 CFR 201.104 (Business Hours); and

(3) Rule 160, 17 CFR 201.160 (Time Computation).

(b) *Institution of proceedings; notice and opportunity to submit written views.*

(1) *Generally.* If the Commission determines to initiate proceedings to determine whether a self-regulatory organization's proposed rule change should be disapproved, it shall provide notice thereof to the self-regulatory organization that filed the proposed rule change, as well as all interested parties and the public, by publication in the Federal Register of the grounds for disapproval under consideration.

(i) *Prior to notice.* If the Commission determines to institute proceedings prior to initial publication by the Commission of the notice of the self-regulatory organization's proposed rule change in the Federal Register, then the Commission shall publish notice of the proposed rule change simultaneously with a brief summary of the grounds for disapproval under consideration.

(ii) *Subsequent to notice.* If the Commission determines to institute proceedings subsequent to initial publication by the Commission of the notice of the self-regulatory organization's proposed rule change in the Federal Register, then the Commission shall publish separately in the Federal Register a brief summary of the grounds for disapproval under consideration.

(iii) *Service of an order instituting proceedings.* In addition to publication in the Federal Register of the grounds for disapproval under consideration, the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the grounds for disapproval under consideration to the self-regulatory organization that filed the proposed rule change by serving notice to the person listed as the contact person on the cover page of the Form 19b-4 filing. Notice shall be made by delivering a copy of the order to such contact person either by any method specified in 17 CFR 201.141(a) or by electronic means including email.

(2) *Notice of the grounds for disapproval under consideration.* The grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission instituted the proceedings, including the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change. The Commission may consider during the course of the proceedings additional matters of fact and law beyond what was set forth in its notice of the grounds for disapproval under consideration.

(3) *Demonstration of consistency with the Exchange Act.* The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b-4, the Form is designed to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those

requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient. Instead, the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.

(c) *Conduct of hearings.*

(1) *Initial comment period in writing.* Unless otherwise specified by the Commission in its notice of grounds for disapproval under consideration, all interested persons will be given an opportunity to submit written data, views, and arguments concerning the proposed rule change under consideration and whether the Commission should approve or disapprove the proposed rule change. The self-regulatory organization that submitted the proposed rule change may file a written statement in support of its proposed rule change demonstrating, in specific detail, how such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization, including a response to each of the grounds for disapproval under consideration. Such statement may include specific representations or undertakings by the self-regulatory organization. The Commission will specify in the summary of the grounds for disapproval under consideration the length of the initial comment period.

(2) *Public availability of materials received.* During the conduct of the proceedings, the Commission generally will make available publicly all written comments it receives without change. In its notice setting forth the grounds for disapproval under consideration for a proposed rule change, the Commission shall inform interested parties of the methods by which they may view all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552.

(3) *Record before the Commission.* The Commission shall determine each matter on the basis of the record. The record shall consist of the proposed rule change filed on Form 19b-4 by the self-regulatory organization, including all attachments and exhibits thereto, and all written materials received from any interested parties on the proposed rule change, including the self-regulatory organization that filed the proposed rule change, through the means identified by the Commission as provided in paragraph (1), as well as any written materials that reflect communications between the Commission and any interested parties.

(e) *Amended notice not required.* The Commission is not required to amend its notice of grounds for disapproval under consideration in order to consider, during the course of the proceedings, additional matters of fact and law beyond what was set forth in the notice of the grounds for disapproval under consideration.

§201.701 Issuance of order.

At any time following conclusion of the rebuttal period specified in Section 201.700(b)(4), 17 CFR 201.700(b)(4), the Commission may issue an order approving or disapproving the self-regulatory organization's proposed rule change together with a written statement of the reasons therefor.

PART 202 – INFORMAL AND OTHER PROCEDURES

4. The authority citation for part 202 continues to read as follows:

Authority: 15 U.S.C. 77s, 77t, 78d-1, 78u, 78w, 78ll(d), 79r, 79t, 77sss, 77uuu, 80a-37, 80a-41, 80b-9, 80b-11, and 7201 et seq., unless otherwise noted.

5. Add section 202.170 to read as follows:

§202.170 Initiation of disapproval proceedings for PCAOB proposed rules.

Initiation of disapproval proceedings for proposed rules of the Public Company Accounting Oversight Board are subject to the provisions of Section 201.700 and 201.701 of this chapter as fully as if it were a *registered securities association*, except that:

(a) For purposes of proposed rules of the Public Company Accounting Oversight Board, subsection (b)(3) of 201.700 is revised to read as follows: *Demonstration of Consistency with the Sarbanes-Oxley Act of 2002.* The burden to demonstrate that a proposed rule is consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder, or as necessary or appropriate in the public interest or for the protection of investors, is on the Public Company Accounting Oversight Board. In its filing the Public Company Accounting Oversight Board must explain in a clear and comprehensible manner why the proposed rule change is consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002 and the rules and regulations thereunder, or as necessary or appropriate in the public interest or for the protection of investors. A mere assertion that the proposed rule change is consistent with those requirements is not sufficient. Instead, the description of the proposed rule, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure by the Public Company Accounting Oversight

Board in its proposed rule filing with the Commission may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder, or as necessary or appropriate in the public interest or for the protection of investors.

(b) Each reference to *the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization* shall be read as *title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors.*

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

6. The authority for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll(d), 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, unless otherwise noted.

7. Section 240.19b-4 is amended by revising paragraphs (g), (l)(1) and (l)(4) to read as follows:

§240.19b-4 Filings with respect to proposed rule changes by self-regulatory organizations.

* * * * *

(g) Proceedings to determine whether a proposed rule change should be disapproved will be conducted pursuant to 17 CFR 201.700-701 (Initiation of Proceedings for SRO Proposed Rule Changes).

* * * * *

(l) * * *

(1) In the case of a proposed rule change filed under section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)), the Commission approves or disapproves the proposed rule change or the self-regulatory organization withdraws the proposed rule change, or any amendments, or is notified that the proposed rule change is not properly filed; or

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(4) In the case of a proposed rule change, or any amendment thereto, that has been disapproved, withdrawn or not properly filed, the self-regulatory organization shall remove the proposed rule change, or any amendment, from its website within two business days of notification of disapproval, improper filing, or withdrawal by the SRO of the proposed rule change.

* * * * *

By the Commission.

EMM
Elizabeth M. Murphy
Secretary

Date: January 14, 2011

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-63727; File No. S7-03-11

RIN 3235-AK91

TRADE ACKNOWLEDGMENT AND VERIFICATION OF SECURITY-BASED SWAP TRANSACTIONS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: In accordance with Section 764(a) of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is proposing rule 15Fi-1 under the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a et seq., which would require security-based swap dealers and major security-based swap participants to provide trade acknowledgments and to verify those trade acknowledgments in security-based swap transactions.

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);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-03-11 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 S7-03-11. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Joseph Furey, Assistant Chief Counsel; Darren Vieira, Special Counsel; or Ignacio Sandoval, Attorney, at (202) 551-5550, Office of Chief Counsel, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing rule 15Fi-1 pursuant to Section 15F of the Exchange Act.[1]

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1 15 U.S.C. 78o-8.

I. Background

Section 764 of the Dodd-Frank Act,[2] enacted on July 21, 2010, added Section 15F to the Exchange Act.[3] Among other things, Section 15F requires security-based swap ("SBS") dealers and major SBS participants (collectively, "SBS Entities") to register with the Commission, and directs the Commission to prescribe rules applicable to SBS Entities.

Section 15F(i)(1) of the Exchange Act provides that SBS Entities must "conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all security-based swaps." Section 15F(i)(2) of the Exchange Act provides that the Commission must adopt rules governing documentation standards for SBS Entities. Proposed rule 15Fi-1 would prescribe standards related to timely and accurate confirmation and documentation of SBS, as further described below.

Market participants currently issue a "trade acknowledgment" (sometimes referred to by industry participants as a "draft confirmation" or an "alleged trade") to memorialize the economic and related terms of an SBS transaction, regardless of the means by which the transaction was executed. If an SBS transaction is not reduced to writing, a court may have to supply contract terms upon which there was no previous agreement. For this reason, prudent practice requires that, after coming to an agreement on the terms of a transaction, the parties document the transaction in a complete and definitive written record so there is legal certainty about the terms of their agreement in case those terms are later disputed. Therefore, industry best practices incorporate a

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2 Pub. L. 111-203, 124 Stat. 1376 (2010).

3 15 U.S.C. 78o-8.

process by which the parties verify that the trade acknowledgment accurately reflects the terms of their trade.[4] This process, through which one party acknowledges an SBS transaction and its counterparty verifies it, is the confirmation process, which results in the issuance of a confirmation that reflects the terms of the contract between the parties.[5] This confirmation includes any transaction-specific modifications to master agreements between the parties that might apply to the transaction, such as the International Swaps and Derivatives Association ("ISDA") Master Agreement and Schedule. A confirmation is thus a written or electronic record of an SBS transaction that has been sent by one party and verified by the other where that record has been manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty.

In the past few years, market participants and regulators have paid particular attention to the timely confirmation of SBS transactions. The Government Accountability Office has found that, since 2002, the trading volume of SBS such as credit derivatives has expanded rapidly, causing stresses on the operational infrastructure of market participants, which in turn caused the participants' back office systems to fail for a period of time to confirm the increased volume of trades.[6] The GAO viewed the lack of automation and the purported assignment of positions by transferring parties to

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4 See Part II.D, below, for a discussion of verification.

5 Confirmations may also be used by SBS Entities to make certain disclosures, or to disclaim certain obligations, to a counterparty. Required disclosures by an SBS Entity will be addressed separately in proposed "external business conduct" rules for SBS Entities.

6 U.S. Government Accountability Office ("GAO"), Credit Derivatives: Confirmation Backlogs Increased Dealers' Operational Risks, But Were Successfully Addressed After Joint Regulatory Action, GAO-07-716 (2007) at pages 3-4 ("GAO Confirmation Report"). As of September 2005, the accumulated backlog of unconfirmed over-the-counter credit derivatives trades was 150,000.

third parties without notice to their counterparties as the primary factors contributing to this backlog.[7] The GAO found that if new transactions are left unconfirmed, there is no definitive written record of the contract terms. Thus, in the event of a dispute, the terms of the agreement must be reconstructed from other evidence, such as email trails or recorded trader conversations. The GAO noted that this process is cumbersome and may not be wholly accurate. Moreover, if purported transfers of SBS transactions are made without giving notice to the remaining parties and obtaining their consent, disputes may arise as to which parties are entitled to the benefits and subject to the burdens of the transaction. The GAO found that these circumstances created significant legal and operational risk for market participants.[8] These risks, as well as other operational issues associated with the over-the-counter derivatives market, have been the focus of reports and recommendations by the President's Working Group,[9] and of ongoing efforts led by the Federal Reserve Bank of New York ("FRBNY") to enhance operational capacity in the over-the-counter derivatives market and improve operational performance, by increasing automation, promoting timely confirmation of trades, and ending practices such as the purported unilateral transferring of SBS transactions.[10]

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7 Several factors reduced the risk of unconfirmed trades due to unilateral assignment, including: (1) the tendency for end-users to assign contracts to dealers who were generally more credit-worthy than the end-user; (2) dealers refusing to release posted collateral until the dealer verified the assignment, and; (3) a novation protocol in the ISDA Master Agreement that required counterparties to obtain the written consent of their counterparties before assigning a trade. Id at pages 17-18.

8 Id. at pages 12-15.

9 See, e.g., Press Release, President's Working Group on Financial Markets, Progress Summary on OTC Derivatives Operational Improvements (November 2008).

10 See, e.g.. FRBNY, Summary of OTC Derivatives Commitments (March 1, 2010).

To promote the efficient operation of the SBS market, and to facilitate market participants' management of their SBS-related risk, the Commission is proposing a confirmation process in rule 15Fi-1. The proposed rule will govern the delivery of SBS trade acknowledgments and the verification of those trade acknowledgments, as described more fully below. In developing this proposed rule, the Commission has consulted with other financial regulators, including the Commodity Futures Trading Commission and the Board of Governors of the Federal Reserve System.

The Commission understands that proposed rule 15Fi-1, as well as other proposals that the Commission may consider in the coming months to implement the Dodd-Frank Act, if adopted, could significantly affect — and be significantly affected by — the nature and scope of the security-based swaps market in a number of ways. For example, the Commission recognizes that if the measures it adopts are too onerous for existing participants or new entrants, they could hinder the further development of a market for SBS by unduly discouraging participation by SBS Entities. On the other hand, if the Commission adopts rules that are too permissive, they may not adequately protect investor interests or promote the purposes of the Exchange Act. We also are aware that the further development of the SBS market may require the Commission to revise its confirmation standards for SBS transactions. We urge commenters, as they review our proposal, to consider generally the role that regulation may play in fostering or limiting the development of the market for SBS (or the role that market developments may play in changing the nature and implications of regulation) and specifically to focus on this issue with respect to the proposed trade acknowledgment and verification rule for SBS Entities.

II. Discussion of the Proposed Rule

Proposed Exchange Act rule 15Fi-1 would require SBS Entities to provide to their counterparties a trade acknowledgment, to provide prompt verification of the terms provided in a trade acknowledgment of transactions from other SBS Entities, and to establish, maintain, and enforce policies and procedures that are reasonably designed to obtain prompt verification of the terms provided in a trade acknowledgment. We are proposing to define several key terms in the rule to have the meaning that we believe is commonly attributed to those terms by industry participants. Thus, as discussed above, we propose to define the term "trade acknowledgment" to mean a written or electronic record of an SBS transaction sent by one party to the other.[11] As used in the proposed rule, the term "verification" would mean the process by which a trade acknowledgment has been manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty.[12] Thus, a "confirmed" SBS transaction would mean a transaction in which the parties have produced a trade acknowledgment that is agreed to by both parties and that has been verified.[13]

Proposed rule 15Fi-1 would require certain SBS Entities that purchase or sell any SBS to provide an electronic trade acknowledgment to the applicable counterparty containing certain required information – discussed in Part II.C, below – within the prescribed timeframe. By requiring counterparties to provide trade acknowledgments of and to verify SBS transactions in a timely way, proposed rule 15Fi-1 is intended to promote the principles of Exchange Act Section 15F(i)(1).

11 See proposed Rule 15Fi-1(a)(10).

12 See proposed Rule 15Fi-1(a)(13).

13 See proposed Rule 15Fi-1(a)(4).

Request for Comment

The Commission requests comment on all aspects of the proposed definitions of trade acknowledgment, verification and confirmation.

A. Trade Acknowledgment Requirement

1. Events Triggering the Trade Acknowledgment Obligation

Proposed rule 15Fi-1(b) would require an SBS Entity that purchases or sells any security-based swap to provide a trade acknowledgment to its counterparty. The terms "purchase" and "sale" are defined in Section 3(a) of the Exchange Act.[14] As amended by the Dodd-Frank Act, those definitions as applied to SBS transactions include any "execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap."[15] Because the rule would apply solely to an SBS Entity that "purchases" or "sells" an SBS, the proposed rule would be effectively limited to "principal transactions" in which the SBS Entity is a counterparty to the transaction and is acting for its own account.

Request for Comment

The Commission requests comment on all aspects of the proposal as to the events that would trigger an obligation to provide a trade acknowledgment.

1. Are there circumstances, other than purchases or sales of SBS, when SBS Entities should be required to provide SBS trade acknowledgments to their counterparties?

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14 15 U.S.C. 78c(a)

15 Dodd-Frank Act Sections 761(a)(3) and (4), amending Exchange Act Sections 3(a)(13) and (14), respectively; 15 U.S.C. 78c(a)(13) and (14).

2. What are the current market practices with respect to confirming SBS transactions?
3. How would current industry practices for confirming transactions be affected by the proposed rule?
4. How should policies and procedures to verify trade acknowledgments differ from current market practices, if at all?
5. What are the advantages or disadvantages of the proposed rule compared to current market practices? What additional costs would these differences entail?
6. Do participants currently have operations and/or departments in place to comply with the proposed requirements?
7. Do the benefits of promptly providing a trade acknowledgment justify the additional costs, and, if not, why not?
8. Many, if not most, types of securities transactions are complete upon settlement of the trade (usually shortly following execution), and the purchaser and seller have no continuing obligations to one another. In contrast, parties to SBS transactions have ongoing obligations to each other that could continue for years, depending on the term of the SBS transaction. The Commission has proposed to require parties to SBS transactions to report to an SBS data repository certain life-cycle events, some of which are included in the definition of purchase and sale and some of which, like corporate actions (e.g., mergers, dividends, stock splits, or bankruptcy), are

not.[16] The Commission understands that some parties may agree to notification upon life-cycle events, and that certain vendors track some of this information with regard to securities underlying certain credit default swaps. The Commission also notes that exchanges and other industry utilities currently publish similar information (e.g., ex-dividend dates, bankruptcies) with respect to the cash and derivatives markets. Should the Commission also require delivery of a trade acknowledgment and verification of any types of corporate actions? To what extent is it the industry custom currently to require notification to be provided about changes or life-cycle events in the security, loan, or narrow-based index that underlies an SBS? Should the proposed rule require trade acknowledgments for these changes or events?

9. Should the proposed rule require different procedures for terminations than for other purchases and sales? What are the current practices with respect to sending notices of termination? What information should be provided in an acknowledgment of a termination?

2. Who Provides the Trade Acknowledgment

The Commission proposes using Section 13A(a)(3) of the Exchange Act as a model to determine which counterparty is responsible for providing the trade acknowledgment in the transaction. Section 13A(a)(1) provides that each SBS that is not accepted for clearing by a clearing agency or derivatives clearing organization must be

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16 See Regulation SBSR - Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 63346 (Nov. 19, 2010), 75 FR 75207 (Dec. 2, 2010) ("SBSR Proposing Release").

reported to a swap data repository or to the Commission.[17] Section 13A(a)(3) specifies which party is obligated to make such reports – an SBS dealer, a major SBS participant, or a counterparty to the transaction – and it does not require both parties to report the same transaction.[18] Generally, Section 13A(a)(3) places the reporting burden on the party that is expected to transact in SBS more frequently. Similarly, the Commission proposes requiring only a single trade acknowledgment in any transaction, and requiring that, in a transaction to which an SBS Entity is a party, the party responsible for providing the trade acknowledgment would be determined in the same manner as the party responsible for reporting the transaction to an SBS data repository or to the Commission. Therefore, in a transaction where only one counterparty is an SBS dealer or major SBS participant, the SBS dealer or major SBS participant would be responsible for providing the trade acknowledgment. In a transaction between an SBS dealer and a major SBS participant, the SBS dealer would be responsible for providing the trade acknowledgment. In a transaction where both parties are SBS dealers, or both parties are major SBS participants, the counterparties would be responsible for selecting which party must provide the trade acknowledgment.[19]

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17 15 U.S.C. 78m-1(a)(1).

18 15 U.S.C. 78m-1(a)(3).

19 The Commission considered requiring all SBS Entities to provide SBS trade acknowledgments in each transaction to which they are a party, but preliminarily has determined not to propose this approach. Under that approach, in a situation where only one party is an SBS Entity, that party would provide the trade acknowledgment to its counterparty. In effect, this is similar to how broker-dealers are required to provide confirmations to their customers under Exchange Act rule 10b-10. However, the customers are under no obligation pursuant to rule 10b-10 to confirm their transactions with broker-dealers. In situations where both parties were SBS Entities, each party would cross-acknowledge the transaction by providing a duplicate trade acknowledgment to the other party. However, requiring cross-acknowledgment could be needlessly burdensome and may

Although the responsible counterparty would have the obligation to provide the trade acknowledgment, that counterparty could use a third-party to fulfill this obligation. The Commission expects that many transactions will be confirmed by "matching services" provided through a clearing agency.[20] We use matching service in this release to refer only to services through which two parties enter a new transaction.

A clearing agency is providing matching services if it captures trade information regarding a securities transaction, performs an independent comparison of that information, and issues a confirmation[21] of the transaction. The Commission believes that the use of clearing agencies' matching services would promote the principles of Exchange Act Section 15F(i), and the Commission wishes to encourage SBS Entities to use these matching services. Accordingly, paragraph (b)(2) of the proposed rule would provide that an SBS Entity will have satisfied its requirement to provide a trade

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interfere with more efficient means of acknowledging transactions. Additionally, legal uncertainty could result if for some reason the trade acknowledgments did not match and neither party noticed or challenged the discrepancy.

20 Under the proposed rule, the term "clearing agency" would mean a clearing agency registered pursuant to section 17A of the Exchange Act, 15 U.S.C. 78q-1. See proposed Rule 15Fi-1(a)(3). A clearing agency that captures trade information regarding a securities transaction and performs an independent comparison of that information which results in the issuance of legally binding matched terms to the transaction is providing matching services. See, also, Exchange Act Release No. 39829 (April 6, 1998), 63 FR 17943 (April 13, 1998) (File No. S7-10-98) ("A vendor that provides a matching service will actively compare trade and allocation information and will issue the affirmed confirmation that will be used in settling the transaction.").

21 "Confirmation" means a trade acknowledgment that has been subject to verification. See proposed Rule 15Fi-1(a)(4).

acknowledgment if a clearing agency, through its facilities, produces a confirmation of the SBS transaction.[22]

A clearing agency may also serve as a central clearing counterparty ("CCP") in SBS transactions. In a CCP arrangement, if the original counterparties to a bilateral SBS transaction are clearing members, they novate their bilateral trade to the clearing agency (acting as a CCP). In such a novation to a CCP, each counterparty terminates its contract with the other and enters into a new contract on identical terms with the CCP. In this way, the CCP becomes buyer to one counterparty and seller to the other.[23] The novation would constitute a purchase from or a sale to the clearing agency. While the purchase or sale would require a trade acknowledgment under paragraph (b)(1) of the proposed rule, paragraph (b)(2) of the proposed rule would permit the CCP to satisfy the SBS Entity's obligation to provide a trade acknowledgment to its counterparty, both for the initial bilateral transaction between an SBS Entity and its counterparty that are clearing members, and for the subsequent purchases or sales that result from the novation to the CCP.

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22 In the course of clearing and settling SBS transactions, clearing agencies would need much or all of the information that is required on a trade acknowledgment, and therefore, the clearing agency would have in place systems to receive and process the information on a trade acknowledgment. The Commission notes that clearing agencies must: register with the Commission and submit their rules for review and approval by the Commission; meet minimum standards of care; have the capacity to enforce their rules and discipline their participants; and have chief compliance officers to oversee compliance with their statutory and regulatory obligations. The Commission believes that clearing agencies are thus equipped to manage the operations necessary to provide trade acknowledgments in the course of their work clearing and settling SBS transactions.

23 See Exchange Act Release No. 59527 (Mar. 6, 2009).

Request for Comment

The Commission solicits comment on all aspects of the allocation of responsibility between the parties for providing the trade acknowledgment.

10. Does the proposed rule appropriately allocate the responsibility to provide a trade acknowledgment?
11. Would permitting the parties to agree which party would provide a trade acknowledgment in all transactions, instead of only in transactions between two SBS dealers or two major SBS participants, be preferable?
12. Should the rule require each SBS Entity that is a party to an SBS transaction to provide a trade acknowledgment to its counterparty?
13. Should the rule allow persons other than clearing agencies, such as SBS execution facilities, to provide trade acknowledgments on behalf of SBS Entities?
14. Does the description of the use of matching services, above, accurately describe current market practice, including market practice in such forums as the inter-dealer market? If not, what current practices are not encompassed by the description?
15. Should clearing agencies be permitted to provide trade acknowledgments on behalf of SBS Entities in transactions where the clearing agency was not responsible for clearing the transaction through a matching process? If so, under what conditions?

B. Time to Provide a Trade Acknowledgment

The Commission believes that confirming SBS transactions shortly after execution should help to promote the stability of the SBS market by preventing documentation backlogs from creating uncertainty over SBS Entities' exposure to SBS.[24] There will be a lag between the time when an SBS is executed (i.e., the point at which both parties become irrevocably bound to a transaction under applicable law),[25] and when the transaction is confirmed (i.e., when a trade acknowledgment of the transaction is provided and verified). Requiring prompt provision of trade acknowledgments of electronically executed or processed SBS transactions should help SBS Entities to submit timely and accurate reports with respect to those transactions to SBS data repositories. However, the Commission believes that the goal of promptly providing trade acknowledgments must be tempered by the difficulty of achieving that goal, particularly for customized agreements that are not executed or processed[26] electronically.

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24 The term "execution" would mean the point at which the parties become irrevocably bound to a transaction under applicable law. See proposed Rule 15Fi-1(a)(6).

25 In the SBS context, an oral agreement over the telephone will create an enforceable contract, and the time of execution will be when the parties to the telephone call agree to the material terms.

26 The term "processed electronically," with respect to an SBS transaction, would mean entered into a security-based swap dealer or major security-based swap participant's computerized processing systems after execution to facilitate clearance and settlement. See proposed Rule 15FI-1(a)(9). A clearing agency may process electronically its members' SBS transactions, as discussed further below.

Promptly providing a trade acknowledgment would assure that the parties know the terms of their executed agreement.[27] Accordingly, the Commission proposes that the maximum times for providing a trade acknowledgment of SBS transactions would vary depending upon whether transactions are electronically executed or electronically processed, but would not exceed 24 hours following execution. The Commission preliminarily believes that the prescribed times should be sufficient for SBS Entities to provide trade acknowledgments without permitting unnecessary delay. Specifically, proposed rule 15Fi-1(c)(1) would require any SBS transaction to be confirmed promptly, but in any event:

- For any transaction that has been executed and processed electronically, a trade acknowledgment must be provided within 15 minutes of execution.
- For any transaction that is not electronically executed, but that will be processed electronically, a trade acknowledgment must be provided within 30 minutes of execution.
- For any transaction that the SBS Entity cannot process electronically, a trade acknowledgment must be provided within 24 hours following execution.

The Commission encourages SBS Entities to minimize the number of manual transactions processed, and to process electronically all SBS transactions if it is reasonably practicable to do so. However, the Commission understands that an SBS Entity may have the ability to process electronically only certain SBS transactions. For example, an SBS Entity may have the ability to process electronically certain

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27 Promptly acknowledging a transaction would also enable parties to comply with the required time within which data must be reported to an SBS data repository. See SBSR Proposing Release, note 16 supra.

standardized SBS transactions in certain asset classes, or transactions that it executes on an exchange or SBS execution facility, but may lack the ability to process electronically SBS transactions in other asset classes or that are executed by other means.[28] The Commission also understands that an SBS Entity's ability to process a transaction electronically may be limited by its counterparty's abilities. For example, an SBS Entity may have the ability to clear an SBS transaction through a matching facility, but if its counterparty lacks access to the matching facility, it would need to process transactions with that counterparty through non-computerized means.

Thus, proposed rule 15Fi-1(c)(2) would require an SBS Entity to process electronically an SBS transaction if the SBS Entity has the ability to do so. In other words, an SBS Entity could not delay providing a trade acknowledgment by choosing to process a transaction by non-electronic means. The Commission preliminarily believes that requiring SBS Entities to acknowledge trades as promptly as they are able to do so would promote the purposes of Exchange Act Section 15Fi-1.

Request for Comment

The Commission solicits comment on all aspects of the proposed time to provide a trade acknowledgment, and the requirement for SBS Entities to process electronically all transactions for which they have the ability.

16. What is the current industry practice with respect to the time necessary to confirm trades, and does the operational infrastructure of SBS Entities makes

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[28] Transactions in non-standardized SBS that are individually negotiated and contain unique terms, or transactions effected telephonically and processed manually might fall into this category.

providing a trade acknowledgment within 24 hours of execution for manual trades feasible?

17. Should the proposed rule require an SBS Entity to provide a trade acknowledgment more quickly, particularly for transactions that are executed or processed electronically?
18. Would the proposed rule provide sufficient time for SBS Entities to provide trade acknowledgments to their counterparties?
19. Is there currently a backlog in confirming trades, and if so, would the proposed rule encourage confirming trades and reduce the backlog? Are there other procedures that would reduce any backlog of unconfirmed trades?
20. Are there circumstances in which certain terms included on a trade acknowledgment would not be agreed by the parties within 24 hours of execution? If so, please explain why parties may not be able to agree on such terms within 24 hours of the execution of the SBS transaction. How should an inability to obtain agreement on such contract terms within 24 hours of execution, when it happens, be handled?
21. How should the proposed rule address terms required to be on the trade acknowledgment that are not known on the date of execution?
22. How should the proposed rule address transactions between an SBS Entity and a fund manager or other agent, where the allocation of the trade to the fund manager's or agent's accounts is not determined by the fund manager or agent until sometime after execution? Should a delay in providing a trade

acknowledgment be permitted under these circumstances? If so, how long a delay should be permitted?

23. Should the proposed rule require SBS Entities that have the ability to process transactions electronically do so in all situations? Are there circumstances when an SBS Entity would have the ability to process a transaction electronically but should not be required to do so?

24. How often do trade acknowledgments contain inaccurate information and what are the most common errors? What procedures are currently in place to correct those errors?

C. Form and Content of Trade Acknowledgments

Paragraph (d) of proposed rule 15Fi-1 would require the trade acknowledgments to be provided through any electronic means that provide reasonable assurance of delivery and a record of transmittal. The Commission believes that electronic delivery of SBS trade acknowledgments would promote the timely provision of trade acknowledgments, in accordance with Exchange Act Section 15F(i) of the Exchange Act. The proposed rule would provide flexibility for SBS Entities to determine the specific electronic means by which they will comply.

The Commission anticipates that clearing agencies may be instrumental in delivering trade acknowledgments and verifying SBS transactions for their members, but that the roles played by individual clearing agencies may vary. For example, as discussed in Part II.A above, clearing agencies may provide matching services in which they perform independent comparisons of each security-based swap transaction participant's trade data regarding the terms of settlement of the transaction that result in the issuance of legally binding matched terms to the transactions. Paragraph (b)(2) of the proposed rule would permit clearing agencies to provide trade acknowledgments on behalf of SBS Entities; however, SBS Entities would not be limited to using clearing agencies to provide trade acknowledgments electronically. SBS Entities may also provide trade acknowledgments through a mutually agreed upon electronic standard, such as a messaging system that uses Financial products Markup Language (commonly known as FpML). SBS Entities may also continue to rely on facsimile transmission or email to provide trade acknowledgments. The Commission understands these means of providing trade acknowledgments may be particularly necessary when engaging in SBS transactions with counterparties that rarely buy or sell SBS and that consequently do not have the means to receive trade acknowledgments otherwise.

Providing trade acknowledgments exclusively by mail or overnight courier would not satisfy the requirements of the proposed rule. These delayed means of communication do not appear to promote the principles of Exchange Act Section 15F(i). Moreover, as discussed in Part II.E below, an SBS Entity must establish, maintain, and enforce policies and procedures to obtain prompt verification of the terms included in each trade acknowledgment it provides. This requirement does not appear compatible with processes to provide trade acknowledgments that rely on delayed means of communication.

Paragraph (d) of proposed rule 15Fi-1 would require trade acknowledgments to contain a minimum of 22 items of information, all but one of which is identical to the items that SBS Entities would be required to report to an SBS data repository pursuant to the rules the Commission has separately proposed in Regulation SBSR.[29] We proposed to require the information in Regulation SBSR, in part, to facilitate regulatory oversight and monitoring of the SBS market by providing comprehensive information regarding SBS transactions and trading activity.[30] The Commission believes that counterparties to an SBS transaction would benefit from receiving a trade acknowledgment that is similarly comprehensive. In addition, by requiring essentially the same information to be included on a trade acknowledgment as is reported to an SBS data repository, the proposed rule should allow SBS Entities to use systems and databases designed to comply with Regulation SBSR to also comply with rule 15Fi-1 under the Exchange Act, which would reduce the burden of complying with proposed rule 15Fi-1.

The specific items that SBS Entities would provide in a trade acknowledgment under the proposed rule include: (1) the asset class[31] of the security-based swap and, if the security-based swap is an equity derivative, whether it is a total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based; (2) information that identifies the security-based swap instrument and the specific asset(s) or issuer of a security on which the security-based swap is based; (3) the notional amount(s), and the currenc(ies) in which the notional amount(s) is expressed; (4) the date and time, to the second, of execution, expressed using Coordinated Universal Time (UTC); (5) the

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29 See SBSR Proposing Release, note 16 supra.

30 Id.

31 The term "asset class" means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives. See proposed Rule 15Fi-1(a)(1).

effective date; (6) the scheduled termination date; (7) the price;[32] (8) the terms of any fixed or floating rate payments, and the frequency of any payments; (9) whether the security-based swap will be cleared by a clearing agency; (10) if both counterparties to a security-based swap are security-based swap dealers, an indication to that effect; (11) if the transaction involved an existing security-based swap, an indication that the transaction did not involve an opportunity to negotiate a material term of the contract, other than the counterparty; (12) if the security-based swap is customized to the extent that the information provided in items (1) through (11) does not provide all of the material information necessary to identify such customized security-based swap or does not contain the data elements necessary to calculate the price, an indication to that effect; (13) the participant ID of each counterparty; (14) as applicable, the broker ID, desk ID, and trader ID of the reporting party;[33] (15) the amount(s) and currenc(ies) of any up-front

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32 The term "price" means the price of a security-based swap transaction, expressed in terms of the commercial conventions used in that asset class. See proposed Rule 15Fi-1(a)(8).

33 Proposed Rule 15Fi-1(a) includes definitions for "unique identification code," "broker ID," "desk ID," "participant ID," and "trader ID." Proposed Rule 15Fi-1(a)(12) defines "unique identification code" or "UIC" as the unique identification code assigned to a person, unit of a person, or product by or on behalf of an internationally recognized standards-setting body that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory. If no standards-setting body meets these criteria, a registered security-based swap data repository shall assign all necessary UICs using its own methodology. If a standards-setting body meets these criteria but has not assigned a UIC to a particular person, unit of a person, or product, a registered security-based swap data repository shall assign a UIC to that person, unit of a person, or product using its own methodology. "Broker ID" is a UIC assigned to a person acting as a broker for a participant. Proposed Rule 15Fi-(1)(a)(2). "Desk ID" is a UIC assigned to the trading desk of a participant or of a broker of a participant. Proposed Rule 15Fi-1(a)(5). "Participant ID" is a UIC assigned to a participant. Proposed Rule 15Fi-1(a)(7). "Trader ID" is a UIC assigned to a natural person who executes security-based swaps. Proposed Rule 15Fi-1(a)(11). The definitions of UIC, broker ID, desk ID, participant ID, and trader ID are identical

payment(s) and a description of the terms and contingencies of the payment streams of each counterparty to the other; (16) the title of any master agreement, or any other agreement governing the transaction (including the title of any document governing the satisfaction of margin obligations), incorporated by reference and the date of any such agreement; (17) the data elements necessary for a person to determine the market value of the transaction; (18) if the security-based swap will be cleared, the name of the clearing agency; (19) if the security-based swap is not cleared, whether the exception in Section 3C(g) of the Exchange Act was invoked;[34] (20) if the security-based swap is not cleared, a description of the settlement terms, including whether the security-based swap is cash-settled or physically settled, and the method for determining the settlement value; (21) the venue where the security-based swap was executed; and (22) if the transaction is to be cleared, any additional information that is required for the transaction to be cleared by a clearing agency.

The first 21 items are identical to the items that would be reported to an SBS data repository under proposed Regulation SBSR. In addition, if a transaction is to be cleared, proposed rule 15Fi-1(d)(22) would require SBS Entities to include on a trade acknowledgment any additional information that a clearing agency requires to clear the transaction. The Commission has oversight authority over clearing agencies, including

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to the definitions of the same terms the Commission has proposed in Regulation SBSR, and parties would use the same IDs for purposes of both rules. See SBSR Proposing Release, note 16 supra.

34 Section 3C(g) of the Exchange Act provides certain exceptions from the general requirement of Section 3C(a)(1) of the Exchange Act that an SBS be submitted to a registered clearing agency or a clearing agency that is exempt from registration.

the ability to approve or disapprove all proposed rules and rule changes.[35] These proposed rules and rule changes are also published for public notice and comment. The Commission preliminarily believes that additional information that is significant to a clearing agency would also be significant to a counterparty, and thus should be included in the trade acknowledgment. An SBS Entity that is a clearing agency participant would be required to comply with (and therefore to know) the clearing agency's requirements because it is obligated to comply with the clearing agency's rules. If a clearing agency participant acting on behalf of an SBS Entity submits a transaction to a clearing agency, the participant would have to obtain the necessary information from the SBS Entity.

Request for Comment

The Commission requests comment on all aspects of the proposal as to the form and content of the trade acknowledgment.

25. Is it feasible to require trade acknowledgments to be provided electronically?
26. Would the requirement for electronic trade acknowledgment unduly restrict the types of SBS transactions that SBS Entities may enter into or the persons that may be their counterparties?
27. Would permitting non-electronic means of providing trade acknowledgments further the Commission's objective to promote the timely and accurate confirmation, processing, netting, documentation, and valuation of all SBS?
28. What systems are used to provide confirmations today?
29. Should the proposed rule require SBS Entities to use other systems, such as electronic messaging systems that rely on machine readable structured data

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[35] See Exchange Act Section 19(b). Section 3(a)(26) of the Exchange Act defines "self-regulatory organization" to include a registered clearing agency.

(and therefore lend themselves to automated trade processing) or some other process, to provide trade acknowledgments? If so, please describe those systems.

30. Should we consider any enhancements to current market practices?
31. Would permitting trade acknowledgments to be provided by facsimile or email create problems or raise issues, and would the benefits of permitting acknowledgments to be provided by facsimile or email outweigh those problems or issues?
32. Would the requirement for trade acknowledgments to be provided through electronic means that provide reasonable assurance of delivery and a record of transmittal create difficulties for participants, for example, because some counterparties are unable to receive trade acknowledgments electronically, or because electronic trade acknowledgment is not feasible for transactions in certain asset classes?
33. Can the Commission's objective to promote the timely provision of trade acknowledgments be achieved if SBS Entities provide trade acknowledgments by non-electronic means, such as mail or overnight courier, and if so, how?
34. Should the proposed rule allow clearing agencies to use methods other than confirmation by matching or comparison to provide trade acknowledgments on behalf of SBS Entities?
35. Is there additional information that the proposed rule should require to be included on a trade acknowledgment?
36. Does the proposed rule require any information that is unnecessary?

37. The Commission has proposed that the trade acknowledgment contain a minimum of 22 items of information. In light of the purpose of the rule, should the Commission simply require instead that the trade acknowledgment must evidence the entire agreement of the parties? For example, the Commission could require a trade acknowledgment to include: (a) "all of the terms an SBS transaction"; (b) "all of the material terms of an SBS transaction"; (c) "all terms that the parties have agreed to at the time of execution"; (d) "all terms that are necessary for the parties to have a complete and definitive agreement"; or (e) "all the terms necessary to fully and completely describe the transaction." Which of these alternatives is best, and why? Would it be clear how to comply with any or all of these possible alternatives? If not, why not? Would certain terms used in these alternative requirements require further definition, such as "complete and definitive," or "fully and completely"? If so, what terms would require further definition, and how should they be defined? Would the alternative requirements encompass transaction terms that would otherwise not be included on a trade acknowledgment as required by the proposed rule and the enumerated items specified therein? If so, what additional transaction terms would be required? What would be the costs and benefits or disadvantages of such a principles-based requirement?

38. Please propose any alternative standards to those described in question 38 the Commission should consider, discuss what additional information would be

required under your alternatives, and the costs and benefits and the advantages and disadvantages of your proposed standards.

39. Should the Commission require markup/markdown disclosure or expected profitability/loss on a trade acknowledgment? If so, why, and if not, why not? How should SBS Entities calculate markup/markdown or expected profitability/loss? What would be the best evidence of the prevailing market price for a SBS transaction from which a markup or markdown could be calculated? Should the prevailing market price be based on a dealer's contemporaneous cost, its cost to hedge the transaction, or a dealer's sale to another SBS dealer or major SBS participant? Should there be any distinction between inter-dealer transactions and transactions between a dealer and a non-dealer? Are SBS dealers and/or major SBS participants acting as market makers?
40. The Commission understands that some SBS agreements may receive credit support from a guarantor or other credit support provider who agrees to satisfy a party's payment or margin obligations in the event of default. Should the trade acknowledgment include the legal name of or other information about the guarantor or credit support provider?
41. How does price differ, if at all, from market value?
42. Should the Commission require that a trade acknowledgment include in all cases the material information necessary to identify the SBS or the data elements necessary to calculate its price (rather than the proposal in paragraph (d)(12))?

43. Should the Commission require that a trade acknowledgment include in all cases the material information necessary to determine required upfront payments and any future cash flows (rather the proposal in paragraph (d)(12))?

44. Do parties typically provide the material information necessary to identify the SBS or the data elements necessary to calculate its price in a trade acknowledgment or confirmation? Are there any SBS transactions, such as highly customized SBS transactions, for which it would be difficult to provide this information? If so, please describe these transactions and the information that parties would be challenged to provide.

45. Section 3C(g)(1) of the Exchange Act provides an exception for certain counterparties from the mandatory clearing requirement in Exchange Act Section 3C(a)(1). In order to qualify for the exception, counterparties would need to comply with the Commission's rules and regulations, which may require that counterparties provide additional information to the Commission, such as how a counterparty invoking the clearing exception generally expects to meet its financial obligations associated with an SBS or the title of any agreements in place between the SBS Entity and the counterparty that would support such counterparty's financial obligations. Should the trade acknowledgment include such additional information that a counterparty may need to provide to the Commission? Should the trade acknowledgment include such additional information that a counterparty may need to provide to

the Commission to support that it is not a financial entity and is using the SBS to hedge or mitigate commercial risk?

46. The Commission also considered proposing a requirement that parties use master confirmation agreements for complex products when such agreements are in widespread use.[36] If the parties have entered into a master confirmation agreement, the transaction-specific confirmations may be less detailed because the confirmation would not repeat the standard terms included in the master confirmation agreement. The Commission believes that the use of master confirmation agreements reduces transaction costs, improves liquidity, and speeds back-office processing in the markets in which they are adopted, and therefore encourages their use. However, the Commission believes that it would be difficult for SBS Entities to determine whether a master confirmation agreement is "in widespread use" and therefore required to be used. The Commission solicits comment on whether to require the use of master confirmation agreements in markets in which they are widespread, and how the Commission and SBS Entities could determine whether master confirmation agreements are in widespread use.

D. Trade Verification

As part of the trade verification process, paragraph (e)(1) of proposed rule 15Fi-1 would require an SBS Entity to establish, maintain, and enforce reasonable written

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36 Master confirmation agreements are agreements that incorporate by reference standardized agreements (such as the 1992 or 2002 ISDA Master Agreement) that allow parties to agree on most standard terms to be incorporated by reference into a complex trade and then execute individual transactions by agreeing on a small subset of economic terms.

policies and procedures to obtain the prompt verification of trade acknowledgments. The Commission preliminarily believes this requirement will induce SBS Entities to minimize the number of unverified trade acknowledgments, and thereby reduce the operational risk and uncertainty associated with unverified SBS transactions.

Verifying a transaction would require the SBS Entity responsible for providing the trade acknowledgment to obtain manually, electronically, or by some other legally equivalent means, the signature of its counterparty on the trade acknowledgment.[37] Verifying trades may be done through a process in which the counterparty affirms the transaction terms after reviewing a trade acknowledgment sent by the first party. The counterparty may also dispute the terms of the transaction (often referred to as a "DK" of the transaction, short for "don't know"). Verifying or disputing the transaction may be done by fax or electronically, where the first party transmits a trade acknowledgment to its counterparty, after which the counterparty – electronically, manually, or by some other legally equivalent method – either signs and returns the trade acknowledgment to verify the transaction, or notifies the counterparty that it rejects the terms. By promoting prompt verification, the proposed rule is designed to minimize the operational risk and uncertainty associated with SBS transactions for which trade acknowledgments have not been verified.

Pursuant to paragraph (e)(2) of the rule, cleared transactions would be verified in accordance with the process prescribed by the registered clearing agency through which the transaction will be cleared. The Commission expects that clearing agencies will adopt rules to obtain the signature of a counterparty on a trade acknowledgment as part of

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37 See Proposed Rule 15Fi-1(a)(13).

their verification procedures. In electronically processed transactions, the clearing agency could obtain counterparties' signatures electronically or by other means. As noted above, the Commission has authority over registered clearing agencies, including the authority to review and approve or disapprove all proposed rules and rule changes.[38] The Commission would, therefore, be able to review any proposed rules and rule changes concerning verification of trade acknowledgments to determine whether the rules or rule changes are consistent with the purposes of proposed rule 15Fi-1.

For SBS transactions that are not subject to clearing, paragraph (e)(1) of the proposed rule would require SBS Entities to establish their own trade verification processes. For example, an SBS Entity could establish, maintain, and enforce policies and procedures under which it will only deal with a counterparty that agrees to timely review any trade acknowledgment to ensure that it accurately describes their agreed upon transaction, and sign and return the trade acknowledgment as evidence of the verification. SBS Entities' policies and procedures for verification could also include using a third-party matching service.[39]

Paragraph (e)(2) of the proposed rule would provide that, in any SBS transaction to be cleared through a clearing agency, an SBS Entity's compliance with the verification process prescribed by the clearing agency satisfies the verification requirements of subparagraph (e)(1) with respect to the transaction. Therefore, an SBS

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38 See Exchange Act Sec. 19(b).

39 As described in Part A.2. above, each counterparty could submit the SBS terms to an agreed-upon matching service operated by a registered clearing agency. The matching service would then compare the submitted transaction terms. If the submitted SBS terms agreed, the transaction would be verified; otherwise, the matching service would notify the counterparties of the discrepancies, and the counterparties would have the opportunity to resolve them.

Entity would not need to separately verify a transaction with another SBS Entity cleared through a clearing agency. Additionally, an SBS Entity would not be required to have separate written policies and procedures that are reasonably designed to obtain prompt verification of the terms of a trade acknowledgment if the SBS Entity enters a cleared transaction with a non-SBS Entity, and the SBS Entity complies with the clearing agency's verification process.

Paragraph (e)(3) of the proposed rule would require SBS Entities to promptly verify the accuracy of, or dispute with their counterparties, the terms of trade acknowledgments they receive pursuant to the proposed rule. This requirement is intended to reduce the incidence of unverified SBS transactions, thereby reducing the operational risk for SBS Entities.

Request for Comment

The Commission solicits comment on all aspects of the proposed requirement that SBS Entities verify trade acknowledgments they receive, and establish, maintain, and enforce written policies and procedures to obtain the prompt verification of the terms of executed SBS transactions.

47. Should the proposed rule set time limits within which trade acknowledgments must be verified by SBS Entities? For example, should the proposed rule require SBS Entities to verify or dispute a trade acknowledgment within 24 or 48 hours of provision of the trade acknowledgment? Should SBS Entities be required to verify or dispute a trade acknowledgment more quickly for SBS transactions that are executed electronically or processed electronically than for other transactions?

48. What additional steps could the Commission take to promote verification of SBS transactions?

49. Should the Commission give more guidance in the types of policies and procedures it expects SBS Entities to adopt that would be "reasonably designed to obtain prompt verification of the terms of a trade acknowledgment"?

50. Are there other ways in which SBS participants currently evidence their agreement to an SBS transaction besides manual or electronic signature of a trade acknowledgment that we should consider?

51. The proposed rule requires that parties obtain "verification" of the trade acknowledgment, which would be defined to mean manual or electronic signature of the trade acknowledgment by the receiving party. Is this definition sufficient? Does this definition differ from current market practice, and if so, how?

52. Are there other processes currently in place that would not fit within this definition of "verification" that we should consider?

53. Although the Commission believes that matching services are an effective way to verify SBS transactions, and increase the efficiency of the SBS settlement process, the Commission has not proposed requiring SBS Entities to submit their trades to a matching service. The Commission is concerned that the variety of SBS transactions may make it unlikely that matching services would be able to verify all transactions, and the Commission questions whether all SBS Entities' counterparties would be members or

participants (or eligible to be members or participants) in a matching service. Therefore, a requirement to submit all trades to a matching service could limit both the types of transactions and the counterparties in the SBS market. We request comment on the mandatory use of matching services. Would a requirement to use matching services limit the types of SBS transactions or counterparties in the market? How could the Commission mitigate those effects?

E. Exemption from Rule 10b-10

Proposed paragraph (f) of rule 15Fi-1 would provide an exemption from the requirements of rule 10b-10 under the Exchange Act for SBS Entities that confirm their SBS transactions in compliance with proposed rule 15Fi-1.[40] Rule 10b-10 generally requires that broker-dealers effecting securities transactions on behalf of customers, provide to their customers, at or before completion of the securities transaction, a written notification containing certain basic transaction terms.[41]

The Dodd-Frank Act amended the Exchange Act definition of "security" to include any "security-based swap."[42] Consequently, SBS, as securities, are fully subject to the federal securities laws and regulations, including, rule 10b-10.[43] The Commission

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40 17 CFR 240.10b-10.

41 Examples of transaction terms included on a rule 10b-10 confirmation include: the date of the transaction; the identity, price, and number of shares bought or sold; the capacity of the broker-dealer; the dollar or yield at which a transaction in a debt security was effected, and under specified circumstances, the compensation paid to the broker-dealer by the customer or other parties. Id.

42 Dodd-Frank Act Sec. 761(a)(2) (codified at Exchange Act Section 3(a)(10)).

43 The Commission will discuss further the implications of defining "security" to include security-based swaps on the requirement for brokers and dealers to register with its proposed rules for SBS Entity registration.

anticipates that some SBS Entities may also be registered broker-dealers. Therefore, in the absence of an exemption, an SBS Entity that is also a broker or dealer would be required to comply with both rule 10b-10 and proposed rule 15Fi-1. This could be duplicative and overly burdensome.

The proposed exemption in paragraph (f) would apply solely to transactions in SBS in which an SBS Entity is also a broker or a dealer, and would not apply to a transaction by a broker-dealer that is not also an SBS Entity. In other words, a broker-dealer that is not an SBS Entity would continue to comply with rule 10b-10 to the extent that it effects transactions in SBS with customers.

As noted in Part A.1 above, because the proposed rule would apply solely to an SBS Entity that "purchases" or "sells" an SBS, it is effectively limited to principal transactions in which the SBS Entity is a counterparty to the transaction and is acting for its own account. Thus, the proposed exemption in paragraph (f) would also apply solely to principal transactions. The Commission recognizes that some SBS Entities may also engage in SBS brokerage or agency transactions.[44] Any broker acting as an agent in an SBS transaction, regardless of whether it is also registered as an SBS Entity, would continue to be required to comply with Rule 10b-10.[45]

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44 An SBS Entity's agency activities would be done pursuant to its broker-dealer registration under Section 15(b) of the Exchange Act. 15 U.S.C. 78o(b).

45 This would include, at a minimum, disclosure of: the date of the transaction; the identity, price and number of units (or the principal amount) bought or sold, and the time of the transaction or the fact that it will be furnished upon written request (17 CFR 240.10b-10(a)(1)); that they are acting in an agent capacity (17 CFR 240.10b-10(a)(2)); and, under specified circumstances, the amount of remuneration to be received by the broker from the customer, and whether the broker is receiving any other remuneration in connection with the transaction (17 CFR 240.10b-10(a)(2)(i)(B) and (D)).

Request for Comment

The Commission solicits comment on all aspects of the proposed exemption from rule 10b-10 for SBS Entities that provide a trade acknowledgment pursuant to proposed rule 15Fi-1(f).

54. Is the proposed exemption from rule 10b-10 necessary or appropriate?

55. Is additional interpretive guidance regarding rule 10b-10 necessary?

III. Implementation Timeframes

The Commission proposes that the rule be effective 60 days after publication of the final rule in the Federal Register.

Request for Comment

The Commission solicits comment on all aspects of the implementation time frame for proposed rule 15Fi-1.

56. Would the proposed time frame provide sufficient time for SBS Entities to comply with the rule?

57. Should the implementation time be coordinated with the implementation timeframes for proposed Regulation SBSR?

IV. Paperwork Reduction Act

Certain provisions of the proposed rule would result in "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[46] The Commission is therefore submitting proposed rule 15Fi-1 to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. Compliance with the collection of information requirements would be

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[46] 44 U.S.C. 3501 et seq.

mandatory. 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.

A. Summary of Collection of Information

As discussed above, Exchange Act Section 15F(i)(1) provides that SBS Entities "shall conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all security-based swaps."[47] Section 15F(i)(2) of the Exchange Act further provides that the Commission must adopt rules governing documentation standards for SBS Entities. Accordingly, proposed rule 15Fi-1 would adopt documentation standards for the timely and accurate acknowledgment and verification of SBS transactions by SBS Entities. The proposed rule contains six paragraphs: (a) definitions of relevant terms; (b) the trade acknowledgment obligations of specific SBS Entities; (c) the prescribed time frames under which a trade acknowledgment must be sent; (d) the form and content requirements of the trade acknowledgment; (e) an SBS Entities' verification obligations; and (f) a limited exemption for brokers from the requirements of Exchange Act Rule 10b-10.[48]

Under paragraph (b)(1) of proposed rule 15Fi-1, sending an SBS trade acknowledgment would be the obligation of a particular SBS Entity (i.e., an SBS dealer or major-SBS participant) depending on whether the SBS Entity and its counterparty are SBS dealers or major SBS participants and/or any agreements between the counterparties that delineate the trade acknowledgment responsibility. Paragraph (b)(2) of the proposed rule however, would provide that SBS Entities will satisfy this requirement to the extent

[47] 15 U.S.C. 78o-8.

[48] 17 CFR 240.10b-10.

that an SBS transaction is cleared through the facilities of clearing agency that matches or compares the terms of the transaction. Regardless of how the trade acknowledgment obligation is satisfied however, a trade acknowledgment would be required to be provided within 15 minutes, 30 minutes or 24 hours following execution, depending on whether the transaction is executed and/or processed electronically.[49]

Paragraph (d) of proposed rule 15Fi-1 would require that trade acknowledgments be provided through electronic means and lists the 22 data elements that must be included on each confirmation.[50] Paragraph (e)(1) of proposed rule 15Fi-1 would require SBS Entities to establish, maintain, and enforce policies and procedures reasonably designed to obtain prompt verification of SBS trade acknowledgments. If a transaction is cleared through a clearing agency, paragraph (e)(2) of the proposed rule would also require SBS Entities to comply with the clearing agency's verification procedures. Regardless of the method of transmittal, when an SBS Entity receives a trade acknowledgment, pursuant to paragraph (e)(3) of the proposed rule, it must promptly verify the accuracy of the trade acknowledgment or dispute the terms with its counterparty. Paragraph (a) of the proposed rule would define relevant terms and would not be a "collection of information"

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49 Under proposed Rule 15Fi-1(c)(1)(i), any transaction that is executed and processed electronically would have to be acknowledged within 15 minutes of execution. Transactions that are not electronically executed but processed electronically would have to be acknowledged within 30 minutes of execution. See proposed Rule 15Fi-1(c)(1)(ii). Finally, proposed Rule 15Fi-1(c)(1)(ii) would require that all other transactions be acknowledged within 24 hours of execution. Proposed paragraph (c)(2) of the rule however, would require that transactions be processed electronically if the counterparties have the ability to do so. As the market for derivatives develops further however, the Commission believes that most SBS transactions will be processed electronically.

50 See proposed Rule 15Fi-1(d) (1) through (22). See also discussion in Section II.C. supra.

within the meaning of the PRA. Similarly, paragraph (f) is an exemptive provision and would not be a collection of information.

B. Proposed Use of Information

The trade acknowledgment and verification requirements of proposed rule 15Fi-1 would apply to both types of SBS Entities depending on whether the entity and its counterparty are SBS dealers or major SBS participants and on any agreements between counterparties addressing the obligation to send a trade acknowledgment. Generally, the transaction details that would be provided in a proposed rule 15Fi-1 trade acknowledgment would serve as a written record by which the counterparties to a transaction memorialize the economic and related terms of a transaction. In effect, the trade acknowledgment would reflect the contract entered into between the counterparties. In addition, proposed rule 15Fi-1's verification requirements are intended to assure that the written record of the transaction (i.e. the trade acknowledgment) accurately reflects the terms of the transaction as understood by the respective counterparties. In situations where an SBS Entity is provided a trade acknowledgment that is not an accurate reflection of the agreement, proposed rule 15Fi-1 would require the SBS Entity to dispute the terms of the transaction.

C. Respondents

Proposed rule 15Fi-1 would only apply to SBS Entities, that is to SBS dealers and major SBS participants, both of which would be registered with the Commission. Based on the Commission staff's discussions with industry participants and incorporated in our other Dodd-Frank Act related rulemaking, we preliminarily believe that approximately 50 entities may fit within the definition of SBS dealer, and up to five entities may fit within the definition of major SBS participant. Thus, approximately 55 entities may be required to register with the Commission as SBS Entities and thus, would be subject to the trade acknowledgment provision and verification requirements of proposed rule 15Fi-1.[51]

D. Total Initial and Annual Reporting and Recordkeeping

Pursuant to proposed rule 15Fi-1, all SBS transactions would have to be acknowledged and verified through the methods and by the timeframes prescribed in the proposed rule. Collectively, paragraphs (b), (c), (d) and (e) of proposed rule 15Fi-1 identify the information that is to be included in a trade acknowledgment; the party responsible for sending the trade acknowledgment; the permissible methods for sending the trade acknowledgment; and criteria for verifying the terms of a trade acknowledgment. According to the Depository Trust and Clearing Corporation ("DTCC"), there are on average 36,000 single-name credit-default swap ("CDS") transactions per day,[52] resulting in a total number of 13,140,000 CDS transactions per year. The Commission preliminarily believes that CDSs represent 85% of all SBS transactions.[53] Assuming that at least one SBS Entity is a party to every SBS transaction, the Commission preliminarily estimates that the total number of SBS transactions that

51 We note that many clearing agencies already have facilities that would permit SBS Entities to acknowledge and verify SBS transactions in addition to other services provided by the clearing agency.

52 See, e.g., http://www.dtcc.com/products/derivserv/data_table_iii.php (weekly data as updated by DTCC).

53 The Commission's estimate is based on internal analysis of available SBS market data. The Commission is seeking comment about the overall size of the SBS market.

would be subject to proposed 15Fi-1 on an annual basis would be approximately 15,460,000 which is an average of 281,091 transactions per SBS Entity per year.[54]

Based on discussions with industry participants, the Commission estimates that approximately 99 percent, or 15,305,400 transactions,[55] are processed electronically, meaning that these transactions are either cleared through the facilities of a clearing agency,[56] or processed through an SBS Entity's internal electronic systems. The Commission believes that the remaining one percent of SBS transactions, or 154,600 transactions,[57] are currently not processed electronically, but are acknowledged and verified through other means, such as email, facsimile or other similar means.[58]

As discussed above, the Commission believes that most transactions will be electronically executed and cleared through the facilities of a clearing agency. The Commission understands that the clearing of SBS transactions through the facilities of a clearing agency generally includes the matching and verification of such transactions. The Commission has taken this process into account in paragraph (b)(2) of proposed rule 15Fi-1, which provides that SBS Entities will satisfy the requirement to provide a trade

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54 These figures are based on the following: [13,140,000 / 0.85] = 15,458,824, or approximately 15,460,000. (15,460,000 estimated SBS transactions) / (55 SBS Entities) = 281,091 SBS transactions per SBS Entity per year. The Commission understands that many of these transactions may arise from previously executed SBS transactions.

55 15,460,000 SBS transactions x .99 = 15,305,400 transactions.

56 See discussion in Part II.A.2 supra.

57 15,460,000 SBS transactions x .01 = 154,600 transactions.

58 We note that proposed rule 15Fi-1(c)(2) would require that SBS transactions be processed electronically if the acknowledging entity has the ability to do so. As noted above, the Commission believes that as this market develops further, fewer SBS Entities will lack the ability to process SBS transactions electronically. See also note 50 supra.

acknowledgment if a clearing agency produces a confirmation through its facilities. Nevertheless, the Commission believes that it will be necessary for SBS Entities, if they have not already done so, to develop computerized systems for inputting the terms of an SBS transaction and then transmitting that data to the relevant clearing agency for electronic processing.

The Commission also believes that such computerized systems will necessarily have to be programmed so that SBS transactions that are not electronically processed through the facilities of a clearing agency can be processed internally. Indeed, it is the Commission's understanding, through publicly available information and discussions with industry participants, that many SBS Entities may already have these types of systems in place.

Because this information is anecdotal, for the purposes of the PRA, the Commission assumes that most SBS Entities do not currently have the platforms necessary for processing, acknowledging, and verifying SBS transactions electronically, whether internally or by transmitting the necessary data packages to the facilities of a clearing agency for processing. Therefore, the Commission believes that SBS Entities will have to develop internal order and trade management systems ("OMS") that will be connected or linked to the facilities of a clearing agency and that will also be able to process SBS transactions internally if necessary.[59] The Commission believes that those systems will also have front-office and back-office linkages that will permit the front

59 The Commission believes that systems for acknowledging and verifying SBS transactions will likely be an additional functionality of an OMS that SBS Entities would have to use to report SBS transactions to an SBS data repository. See SBSR Proposing Release, note 16 supra.

office to input SBS transaction details[60] and to send these updates in real-time or near real-time to the back-office so that complete packages of information can be sent to the clearing agency for electronic processing and timely acknowledgment, or in the alternative, so that the relevant SBS Entity can itself electronically process the transaction and send the required trade acknowledgment.

Based on our staff's discussions with industry participants and incorporated in our other Commission rulemaking related to the Dodd-Frank Act,[61] the Commission preliminarily estimates that the development of an OMS by SBS Entities for electronic processing of SBS transactions with the capabilities described above would impose a one-time aggregate burden of approximately 19,525 hours, or 355 burden hours per SBS Entity.[62] This estimate assumes that SBS Entities will not have to develop an entirely new OMS but rather, would leverage existing trading and processing platforms and adapt those systems to satisfy the functionalities described above. In addition, the Commission further preliminarily estimates that proposed rule 15Fi-1 would impose an ongoing annual hour burden of approximately 23,980 hours or 436 hours per SBS Entity.[63] This

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60 The Commission understands that in some instances, additional transaction details may have to be entered post-execution but prior to processing. In the industry, this process generally referred to as "enrichment."

61 <u>See</u> SBSR Proposing Release, note 16 <u>supra</u>, at Section XIII.B.4.a.

62 This estimate is based on Commission staff discussions with market participants and is calculated as follows: [((Sr. Programmer at 160 hours) + (Sr. Systems Analyst at 160 hours) + (Compliance Manager at 10 hours) + (Director of Compliance at 5 hours) + (Compliance Attorney at 20 hours)) x 55 (SBS Entities)] = 19,525 burden hours at 355 hours per SBS Entity. The Commission understands that many SBS Entities may already computerized systems in place for electronically processing SBS transactions, whether internally or through a clearing agency. This may result in lesser burdens for those parties

63 This estimate is based on Commission staff discussions with market participants and is calculated as follows: [((Sr. Programmer at 32 hours) + (Sr. Systems

estimate would include day-to-day technical support of the OMS, as well as the amortized annual burden associated with system or platform upgrades and periodic implementation of significant updates based on new technology, products, or both.

In addition, pursuant to paragraph (e)(1) of proposed rule 15Fi-1, SBS Entities must establish, maintain, and enforce written policies and procedures reasonably designed to obtain prompt verification of transaction terms. While the cost of these policies and procedures will vary, the Commission estimates that such policies and procedures would require an average of 80 hours per respondent to initially prepare and implement, with a total initial burden of 4,400 hours for all respondents.[64] Once these policies and procedures are established, the Commission estimates that it will take an average 40 hours annually to maintain these policies and procedures per respondent, with a total estimated average annual burden of 2,200 hours for all respondents.[65]

E. Recordkeeping Requirements

Pursuant to amendments to the Exchange Act from Title VII of the Dodd-Frank Act, the Commission plans to propose separate rules for SBS transactions that include, among other things, recordkeeping and transaction reporting requirements. Because a trade acknowledgment will serve as a written record of the transaction, the information

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Analyst at 32 hours) + (Compliance Manager at 60 hours) + (Compliance Clerk at 240 hours) + (Director of Compliance at 24 hours) + (Compliance Attorney at 48 hours)) x (55 SBS Entities)] = 23.980 burden hours, or 436 hours per SBS Entity.

64 This estimate is based on Commission staff discussions with market participants and is calculated as follows: [(Compliance Attorney at 40 hours) (Director of Compliance at 20 hours) + (Deputy General Counsel at 20 hours) x (55 SBS Entities)] = 4,400 burden hours, or 80 hours per SBS Entity.

65 This estimate is based on Commission staff discussions with market participants and is calculated as follows: [(Compliance Attorney at 20 hours) (Director of Compliance at 10 hours) + (General Counsel at 10 hours) x (55 SBS Entities)] = 2,200 burden hours, or 40 hours per SBS Entity.

required by proposed Rule 15Fi-1would be required to be maintained by an SBS Entity subject to those rules. This requirement will be subject to a separate PRA submission under that rulemaking.

F. Collection of Information is Mandatory

Each collection of information discussed above would be a mandatory collection of information.

G. Will Responses of Collection of Information be Kept Confidential?

By its terms, information collected pursuant to proposed rule 15Fi-1 will not be available to the public. Under other rules proposed by the Commission, however, most, if not all, of the information required to be included in a trade acknowledgment, as described in paragraph (d) of the proposed rule, will be otherwise publicly available. In particular, under proposed Regulation SBSR,[66] SBS Entities would be required to report SBS transaction details to a SBS data repository that will in turn, publicly disseminate SBS transaction data. To the extent however, that the Commission receives confidential information pursuant to this collection of information that is otherwise not publicly available, that information will be kept confidential, subject to the provisions of the Freedom of Information Act.

H. Request for Comment

The Commission requests comment on all aspects of its burden estimates. The Commission also solicits comment as follows:

58. Is the proposed collection of information necessary for the performance of the functions of the agency? Would the information have a practical utility?

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66 See SBSR Proposing Release, note 16 supra.

59. How accurate are the Commission's preliminary estimates of the burdens of the proposed collection of information associated with proposed rule 15Fi-1? How many entities would incur collection of information burdens pursuant to rule 15Fi-1?

60. Would SBS Entities incur any additional burdens associated with designing, creating and implementing a system for the processing, acknowledgment and verification of SBS transactions pursuant to proposed rule 15Fi-1?

61. Would there be different or additional burdens associated with the collection of information under proposed rule 15Fi-1 that an SBS Entity would not undertake in the ordinary course of business?

62. Are there additional burdens that the Commission has not addressed in its preliminary burden estimates?

63. Are there ways to enhance the quality, utility and clarity of the information to be collected?

64. Are there ways to minimize the burden of collection of information on those who would be required to respond, including through the use of automated collection techniques or other forms of information technology?

65. What entities may be subject to proposed rule 15Fi-1? Would specific classes of entities be impacted? How many entities would be impacted? Will any entity or class of entities be impacted differently than others?

V. Cost-Benefit Analysis

The Dodd-Frank Act was enacted, in part, to promote the financial stability of the

United States by improving accountability and transparency in the financial system.[67] Title VII of the Dodd-Frank Act designates the Commission to oversee the SBS markets and develop appropriate regulations. In furtherance of this goal, the Dodd-Frank Act added Section 15F(i) to the Exchange Act, which requires SBS Entities to "conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to timely and accurate confirmation, processing, netting, documentation, and valuation of all security-based swaps," and provides that the Commission must adopt rules governing those documentation standards. Accordingly, proposed rule 15Fi-1 would provide these documentation standards with respect to the timely and accurate provision of trade acknowledgments and verification of SBS transactions by SBS Entities.

The market for OTC derivatives, which has been described as opaque,[68] has grown exponentially in recent years[69] and is capable of affecting significant sectors of the U.S. economy. One of the primary goals of Title VII of the Dodd-Frank Act is to increase the transparency and efficiency of the OTC derivatives market and to reduce the

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67 See Pub. L. No. 111-203 Preamble.

68 With respect to CDSs, for example, the GAO found that "comprehensive and consistent data on the overall market have not been readily available," that "authoritative information about the actual size of the CDS market is generally not available," and that regulators currently are unable "to monitor activities across the market." GAO, "Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps," GAO-09-397T (March 2009), at 2, 5, 27.

69 The Bank for International Settlements semi-annual reports on the swap markets summarizes developments in the OTC derivatives markets. The report breaks down trading volumes and other statistics for various classes of derivatives, including credit default swaps, interest rate and foreign exchange derivatives, and equity and commodity derivatives. The report covers derivatives trading within the G10 countries. The most recent report, available at http://www.bis.org/statistics/derstats.htm, covers the period through the last quarter of 2009.

potential for counterparty and systemic risk.[70] With respect to the confirmation of OTC derivatives transactions, the GAO noted that the trading volume of credit derivatives, such as SBS, had expanded so rapidly that the operational infrastructure and confirmation practices of many SBS Entities had failed to keep pace with the increased volume.[71] In particular, the GAO noted, among other things, that the lack of automated systems for confirming and verifying the terms of SBS transactions contributed to a significant backlog of unconfirmed transactions, which in turn created significant legal and operation risk for market participants.[72] As a result, these risks and other operational issues associated with OTC derivatives have been the focus of reports and recommendations by the President's Working Group,[73] and of ongoing efforts to by the FRBNY[74] to enhance operational systems in the OTC market, including the reduction of confirmation backlogs and the timely provision of confirmations and verification of transactions in OTC derivatives.

Proposed rule 15Fi-1 would prescribe standards for the documentation and timely provision of SBS trade acknowledgments and the verification of such trade acknowledgments. More specifically, proposed Rule 15Fi-1 would require SBS Entities to provide a trade acknowledgment of an SBS transaction within 15 minutes, 30 minutes

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70 See "Financial Regulatory Reform – A New Foundation: Rebuilding Financial Supervision and Regulation," U.S. Department of the Treasury, at 47-48 (June 17, 2009).

71 See GAO Confirmation Report, supra, note 6 and accompanying text.

72 Id. at pages 12-15.

73 See, e.g., Press Release, President's Working Group on Financial Markets, Progress Summary on OTC Derivatives Operational Improvements (November 2008).

74 See, note 10, supra.

or 24 hours following execution of the transactions, depending on whether the transaction is executed and/or processed electronically.[75] In addition, the proposed rule would require SBS Entities to include specified information in the trade acknowledgment,[76] to verify transactions with other SBS Entities, and to establish, maintain, and enforce reasonable written policies and procedures for verifying the transaction terms. The proposed rule would require most SBS transactions to be processed and acknowledged electronically if the SBS Entity has the ability to do so, but also would provide that many of the requirements of the rule can satisfied through the facilities of the clearing agency that clears an SBS transaction.

A. Benefits

The Commission believes that proposed rule 15Fi-1 would yield substantial benefits to the SBS market and address many of the concerns noted by the GAO regarding the timely and accurate acknowledgment of OTC derivatives transactions. In particular, by requiring SBS Entities to timely provide trade acknowledgments and verify SBS transactions and to use electronic means when possible, the Commission is addressing the concern raised by the GAO regarding the legal and operational risks associated with confirmation backlogs in the OTC derivatives markets. In particular, the GAO noted in its report that the lack of automation was a significant contributor to confirmation backlogs.[77] The Commission believes that requiring SBS transactions to be processed electronically would help reduce what the GAO described as the operational and legal risks accompanying unconfirmed derivatives transactions. In addition, the

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75 See note 49 supra.

76 See note 50 supra. See also proposed Rule 15Fi-1(c)(1).

77 See GAO Confirmation Report, supra note 6.

Commission believes that permitting SBS Entities to rely on the facilities of a clearing agency to satisfy their requirements under the proposed rule will encourage these entities to use clearing agency facilities, thereby promoting efficiency and automation in this market.

B. Costs

Proposed rule 15Fi-1 would impose initial and ongoing costs on SBS Entities. The Commission believes that these costs will be a function of number of SBS transactions entered into by SBS Entities, whether SBS Entities have the ability to electronically process SBS transactions, and whether SBS Entities will enter into SBS transactions that can be, and are, cleared by a clearing agency.

The Commission obtained information from publicly available sources and consulted with industry participants in an effort to quantify the number of aggregate SBS transactions on an annual basis. According to the DTCC, there are on average 36,000 single-name CDS transactions per day,[78] resulting in a total number of 13,140,000 CDS transactions per year. The Commission preliminarily believes that CDSs represent 85% of all SBS transactions.[79] Therefore, the Commission preliminarily believes that there will be a total of approximately 15,460,000 SBS transactions entered into each year. Assuming that at least one SBS Entity is a party to every SBS transaction, the Commission preliminarily estimates that the total number of SBS transactions that would be subject to proposed 15Fi-1 on an annual basis would be approximately 15,460,000

78 See, e.g., http://www.dtcc.com/products/derivserv/data_table_iii.php (weekly data as updated by DTCC).

79 The Commission's estimate is based on internal analysis of available SBS market data. The Commission is seeking comment about the overall size of the SBS market.

which is an average of 281,091 transactions per SBS Entity per year.[80]

To fulfill the proposed rule's requirements, the Commission believes that SBS Entities would have to develop an OMS with portals to relevant clearing agencies and real-time or near real-time linkages between an SBS Entities' front and back-office operations. The development of an OMS would have to occur regardless of whether an SBS transaction is, or can be, cleared by a clearing agency.

The Commission preliminarily estimates that an SBS Entity's' development of an OMS that achieves compliance with proposed rule 15Fi-1 would impose a one-time aggregate cost of $3,665,750,[81] or approximately $66,650 per SBS Entity. This estimate includes the development of an OMS that leverages off of an SBS Entities' existing front-office and back-office operational platforms. The Commission further preliminarily estimates that the requirements of proposed rule 15Fi-1 would impose an ongoing annual aggregate cost of $4,022,920, or approximately $73,144 per SBS Entity.[82] This estimate

80 These figures are based on the following: [13,140,000 / 0.85] = 15,458,424, or approximately 15,460,000. (15,460,000 estimated SBS transactions) / (55 SBS Entities) = 309,200 SBS transactions per SBS Entity per year. The Commission understands that many of these transactions may arise from previously executed SBS transactions.

81 This estimate is based on the following: [((Sr. Programmer (160 hours) at $285 per hour) + (Sr. Systems Analyst (160 hours) at $251 per hour) + (Compliance Manager (10 hours) at $294 per hour) + (Director of Compliance (5 hours) at $426 per hour) + (Compliance Attorney (20 hours) at $291 per hour) x (50 SBS Entities)] = $3,665,750 or $66,650 per SBS Entity. The Commission understands that many SBS Entities may already computerized systems in place for electronically processing SBS transactions, whether internally or through a clearing agency.

82 This estimate is based on Commission staff discussions with market participants and is calculated as follows: [((Sr. Programmer (32 hours) at $285 per hour) + (Sr. Systems Analyst (32 hours) at $251 per hour) + (Compliance Manager (60 hours) at $294 per hour) + (Compliance Clerk (240 hours) at $59 per hour)+ (Director of Compliance (24 hours) at $426 per hour + (Compliance Attorney (48

would include day-to-day technical supports of the OMS, as well as an estimate of the amortized annual burden associated with system or platform upgrades and periodic "re-platforming" (i.e., implementing significant updates based on new technology, products or both). In addition, the Commission estimates that the development and implementation of written policies and procedures as required under paragraph (e)(1) of the proposed rule would impose initial costs of $1,754,500, or approximately $31,900 per SBS Entity.[83] Once established, the Commission estimates that it would costs respondents approximately $877,250 per year, or $15,950 per respondent,[84] to update and maintain these policies and procedures.

In sum, the Commission estimates that the initial cost of complying with proposed rule 15Fi-1 will be $5,417,500 for all respondents, or $98,500 per SBS Entity.[85] The Commission estimates that total ongoing costs to respondents would be $4,900,170 for all respondents, or $89,094 per SBS Entity.[86]

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hours) at $291 per hour) x (55 SBS Entities)] = $4,022,920 burden hours, or $73,144 per SBS Entity.

83 This estimate comes from Commission staff experience regarding the development of policies and procedures and is calculated as follows: [(Compliance Attorney (40 hours) at $294 per hour) + (Director of Compliance (20 hours) at $426 per hour) + (Deputy General Counsel (20 hours) at $581 per hour) x (55 SBS Entities)] = $1,754,500 total, or $31,900 per SBS Entity.

84 This estimate comes from Commission staff experience regarding the development of policies and procedures and is calculated as follows: [(Compliance Attorney (20 hours) at $294 per hour) + (Director of Compliance (10 hours) at $426 per hour) + (Deputy General Counsel (10 hours) at $581 per hour) x (55 SBS Entities)] = $877,250 total, or $15,950 per SBS Entity.

85 ($3,665,750 initial cost for developing OMS) + ($1,754,500 for developing policies and procedures) = $5,417,500 for all respondents. ($5,417,500 / 505 Respondents) = $98,500 per SBS Entity.

86 ($4,022,920 ongoing cost for maintaining OMS) + ($877,250 for maintaining policies and procedures) = $4,900,170 for all respondents. ($4,900,170 / 55 Respondents) = $89,094 per SBS Entity.

C. Request for Comment

The Commission requests comment on the costs and benefits of proposed rule 15Fi-1 discussed above, as well as any costs and benefits not already described that could result. In addition, the Commission requests comment on the following:

66. How can the Commission accurately estimate the costs and benefits of the proposed rule?
67. What are the costs currently borne by SBS Entities that would be subject to proposed rule 15Fi-1 with respect to the acknowledgment and verification of SBS transactions?
68. How many entities would be subject to the proposed rule? How transactions would be subject to the proposed rule?
69. Are there additional costs involved in complying with the rule that have not been identified? What are the types, and amounts, of the costs?
70. Would the obligations imposed on SBS Entities by proposed rule 15Fi-1 be a significant enough barrier to cause some firms not to enter the SBS market? If so, how many firms might decline to enter the market? How could the cost of their not entering the market be measured? How should the Commission weigh those costs, if any, against the anticipated benefits from reducing legal and operational risk to SBS Entities from the proposal, as discussed above?
71. Would there be additional benefits from the proposed rule that have not been identified?

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Exchange Act Section 3(f) requires the Commission, when engaging in rulemaking that requires it to consider 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. In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact of those rules on competition. Section 23(a)(2) also 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.

The Commission preliminarily believes that the documentation standards for the provision of trade acknowledgments and verification of SBS transactions, as required by the Dodd-Frank Act and implemented by proposed rule 15Fi-1, would promote efficiency, competition, and capital formation by encouraging SBS Entities to automate their systems for SBS transactions, providing further incentive for SBS Entities to clear SBS transactions through clearing agencies' automated facilities, thus lowering transaction costs, and helping alleviate the legal and operational risks encountered by SBS Entities when SBS transactions are otherwise confirmed through manual methods.

The Commission's experience with the acknowledgment and verification of other types of securities is that the timely resolution of disputes regarding the terms of a transaction are more efficiently handled near in time to when the transaction took place. Timely acknowledgment and verification of SBS transactions will provide counterparties with the appropriate means by which to evaluate their own risk exposures in a timely manner, thereby enabling them to more quickly and efficiently determine whether and how to deploy capital in other asset classes. In addition, the Commission believes that competition will be promoted because market participants would be encouraged to enter into SBS transactions with SBS Entities whose automated operations reduce the amount of time it takes to confirm the terms of a trade. In particular, the Commission believes that the need for speed and efficiency in today's capital markets would encourage market participants in general, and SBS Entities in particular, to provide quicker and more efficient process for confirming SBS transactions because counterparties to an SBS transaction must not only concern themselves with the SBS transaction, but also the underlying reference security that itself is subject to rapid market movements.

VII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), the Commission must advise the OMB whether the proposed regulation constitutes a "major" rule. Under SBREFA, a rule is considered "major" when, if adopted, it results or is likely to result in: (1) an annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation. If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review.

The Commission requests comment on the potential impact of proposed rule 15Fi-1 on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

VIII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA") requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act, as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities." Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less; or (2) a broker-dealer 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 prepared pursuant to Rule 17a-5(d) under the Exchange Act, or, if not required to file such statements, a broker-dealer with 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.

Based on our staff's discussions with SBS market participants, the Commission preliminarily believes that the majority of SBS transactions have at least one counterparty that is either a SBS dealer or major SBS participant, and that these entities – whether registered broker-dealers or not – would exceed the thresholds defining "small entities" set out above. Accordingly, neither of these types of entities would likely qualify as small entities for purposes of the RFA. Moreover, even in situations in which one of the counterparties to a SBS is not covered by these definitions, the Commission preliminarily does not believe that any such entities would be "small entities" as defined in Commission Rule 0-10. Industry participants have indicated to our staff that only persons or entities with assets significantly in excess of $5 million participate in the SBS market. For example, as stated in a current survey conducted by Office of the Comptroller of the Currency, 99.9% of CDS positions by U.S. commercial banks and trusts are held by those with assets over $10 billion.[87] Given the magnitude of this figure, and the fact that it so far exceeds $5 million, the Commission preliminarily believes that the vast majority of, if not all, SBS transactions do not involve small entities for purposes of the RFA.

In addition, the Commission preliminarily believes that the entities likely to register as SBS Entities would not be small entities. Industry participants have indicated to our staff that most if not all of the registered SBS Entities would be part of large business entities, and that all registered SBS Entities would have assets exceeding $5 million and total capital exceeding $500,000. Therefore, the Commission preliminarily believes that none of the SBS Entities would be small entities.

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87 See Office of the Comptroller of the Currency, "Quarterly Report on Bank Trading and Derivatives Activities Second Quarter 2010" (2010).

On this basis, the Commission preliminarily believes that the number of SBS transactions involving a small entity as that term is defined for purposes of the RFA would be de minimis. Moreover, the Commission does not believe that any aspect of proposed rule 15Fi-1 would be likely to alter the type of counterparties presently engaging in SBS transactions. Therefore, the Commission preliminarily does not believe that proposed rule 15Fi-1 would impact any small entities.

For the foregoing reasons, the Commission certifies that proposed Rule 15Fi-1 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, indicate whether they believe that SBS Entities are unlikely to be small entities, and provide empirical data to support their responses.

IX. Statutory Basis and Text of Proposed Amendments

The Commission is proposing to adopt Rule 15Fi-1 pursuant to Section 15F of the Exchange Act, as amended.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities, Security-based swaps, Security-based Swap Dealers, Major Security-based Swap Participants.

In accordance with the foregoing, the Securities and Exchange Commission is proposing to amend Title 17, chapter II of the Code of Federal Regulations as follows:

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

1. The general authority citation for Part 240 is revised to read 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, 78o-4, 78o-8, 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, and 12 U.S.C. 5221(e)(3) unless otherwise noted.

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2. Add an undesignated center heading following § 15Cc1-1 and § 240.15Fi-1 to read as follows:

REGISTRATION AND REGULATION OF SECURITY-BASED SWAP DEALERS AND MAJOR SECURITY-BASED SWAP PARTICIPANTS

§ 240.15Fi-1 Acknowledgment and verification of security-based swap transactions.

(a) Definitions. For the purposes of this section:

(1) The term asset class means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives.

(2) The term broker ID means the UIC assigned to a person acting as a broker for a participant.

(3) The term clearing agency means a clearing agency registered pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1).

(4) The term confirmation means a trade acknowledgment that has been subject to verification.

(5) The term desk ID means the UIC assigned to the trading desk of a participant or of a broker of a participant.

(6) The term execution means the point at which the parties become irrevocably bound to a transaction under applicable law.

(7) The term participant ID means the UIC assigned to a participant.

(8) The term price means the price of a security-based swap transaction, expressed in terms of the commercial conventions used in that asset class.

(9) The term processed electronically means entered into a security-based swap dealer or security-based swap participant's computerized processing systems to facilitate clearance and settlement.

(10) The term trade acknowledgment means a written or electronic record of a security-based swap transaction sent by one party to the other.

(11) The term trader ID means the UIC assigned to a natural person who executes security-based swaps.

(12) The term unique identification code or UIC means the unique identification code assigned to a person, unit of a person, or product by or on behalf of an internationally recognized standards-setting body that imposes fees and usage restrictions that are fair and reasonable and not unreasonably discriminatory. If no standards-setting body meets these criteria, a registered security-based swap data repository shall assign all necessary UICs using its own methodology. If a standards-setting body meets these criteria but has not assigned a UIC to a particular person, unit of a person, or product, a registered security-based swap data repository shall assign a UIC to that person, unit of a person, or product using its own methodology.

(13) The term verification means the process by which a trade acknowledgment has been manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty.

(b) Trade Acknowledgment Requirement.

(1) In any transaction in which a security-based swap dealer or major security-based swap participant purchases from or sells to any counterparty a security-based swap, a trade acknowledgment must be provided by:

(i) The security-based swap dealer, if the transaction is between a security-based swap dealer and a major security-based swap participant;

(ii) The security-based swap dealer or major security-based swap participant, if only one counterparty in the transaction is a security-based swap dealer or major security-based swap participant; or

(iii) The counterparty that the counterparties have agreed will provide the trade acknowledgment in any transaction other than one described in paragraph (i) or (ii) of this section.

(2) A security-based swap dealer or major security-based swap participant will have satisfied the requirements of paragraph (b)(1) of this section if a clearing agency through its facilities produces a confirmation of each security-based swap transaction.

(c) Prescribed Time.

(1) Any trade acknowledgment required by paragraph (b) of this section must be provided promptly, but in any event:

(i) For any transaction that has been executed and processed electronically, within 15 minutes of execution;

(ii) For any transaction that is not executed electronically, but that will be processed electronically, within 30 minutes of execution; or

(iii) For any transaction that cannot be processed electronically by the security-based swap dealer or security-based swap participant, within 24 hours following execution.

(2) A transaction must be processed electronically if the security-based swap dealer or major security-based swap participant has the ability to do so.

(d) Form and Content of Trade Acknowledgment. Any trade acknowledgment required in paragraph (b) of this section must be provided through electronic means that provide reasonable assurance of delivery and a record of transmittal, and must disclose:

(1) The asset class of the security-based swap and, if the security-based swap is an equity derivative, whether it is a total return swap or is otherwise designed to offer risks and returns proportional to a position in the equity security or securities on which the security-based swap is based;

(2) Information that identifies the security-based swap instrument and the specific asset(s) or issuer of a security on which the security-based swap is based;

(3) The notional amount(s), and the currenc(ies) in which the notional amount(s) is expressed;

(4) The date and time, to the second, of execution expressed using Coordinated Universal Time (UTC);

(5) The effective date;

(6) The scheduled termination date;

(7) The price;

(8) The terms of any fixed or floating rate payments, and the frequency of any payments;

(9) Whether or not the security-based swap will be cleared by a clearing agency;

(10) If both counterparties to a security-based swap are security-based swap dealers, an indication to that effect;

(11) If the transaction involved an existing security-based swap, an indication that the transaction did not involve an opportunity to negotiate a material term of the contract, other than the counterparty;

(12) If the security-based swap is customized to the extent that the information provided in paragraphs (d)(1) through (11) of this section does not provide all of the material information necessary to identify such customized security-based swap or does not contain the data elements necessary to calculate the price, an indication to that effect;

(13) The participant ID of each counterparty;

(14) As applicable, the broker ID, desk ID, and trader ID of the reporting party;

(15) The amount(s) and currenc(ies) of any up-front payment(s) and a description of the terms and contingencies of the payment streams of each counterparty to the other;

(16) The title of any master agreement, or any other agreement governing the transaction (including the title of any document governing the satisfaction of margin obligations), incorporated by reference and the date of any such agreement;

(17) The data elements necessary for a person to determine the market value of the transaction;

(18) If the security-based swap will be cleared, the name of the clearing agency;

(19) If the security-based swap is not cleared, whether the exception in Section 3C(g) of the Exchange Act (15 U.S.C. 78c-3(g)) was invoked;

(20) If the security-based swap is not cleared, a description of the settlement terms, including whether the security-based swap is cash-settled or physically settled, and the method for determining the settlement value;

(21) The venue where the security-based swap was executed; and

(22) If the transaction is to be cleared, any additional information that is required for the transaction to be cleared by a clearing agency.

(e) Trade Verification.

(1) A security-based swap dealer or major security-based swap participant must establish, maintain, and enforce written policies and procedures that are reasonably designed to obtain prompt verification of the terms of a trade acknowledgment provided pursuant to paragraph (b) of this section.

(2) In any security-based swap transaction to be cleared through a clearing agency, a security-based swap dealer or major security-based swap participant must comply with the verification process prescribed by the clearing agency. Such compliance shall satisfy the requirements of paragraph (e)(1) of this section with respect to the transaction.

(3) A security-based swap dealer or major security-based swap participant must promptly verify the accuracy of, or dispute with its counterparty, the terms of a trade acknowledgment it receives pursuant to paragraph (b) of this section.

(f) Exemption from § 240.10b-10. A security-based swap dealer or major security-based swap participant who is also a broker or dealer and who complies with paragraph (b) of this section with respect to a security-based swap transaction is exempt from the requirements of § 240.10b-10 of this chapter with respect to the security-based swap transaction.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: January 14, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63738 / January 19, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14200

In the Matter of **Enter Tech Corp.,** **Entertainment Trends Corp. (f/k/a Daljama, Inc.),** **Eonnet Media, Inc.,** **Equorumnet,** **Esesis, Inc.,** **European American Resources, Inc., and** **eVision International, 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 Enter Tech Corp., Entertainment Trends Corp. (f/k/a Daljama, Inc.), Eonnet Media, Inc., Equorumnet, Esesis, Inc., European American Resources, Inc., and eVision International, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Enter Tech Corp. (CIK No. 1021725) is a permanently revoked Nevada corporation located in Loveland, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Enter Tech 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 $89,550 for the prior three months.

2. Entertainment Trends Corp. (f/k/a Daljama, Inc.) (CIK No. 1122152) is a forfeited Texas corporation located in Cedar Hill, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Entertainment Trends is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Registration Statement on Form 10-SB on September 1, 2000. The Form 10-SB did not include financials.

3. Eonnet Media, Inc. (CIK No. 1088095) is a dissolved Florida corporation located in Largo, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Eonnet Media 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 $126,050 for the prior three months.

4. Equorumnet (CIK No. 1091783) is a permanently revoked Nevada corporation located in Kansas City, Missouri with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Equorumnet 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 June 30, 2000, which reported a net loss of $84,106 since the company's July 15, 1999 inception.

5. Esesis, Inc. (CIK No. 1182151) is a Colorado corporation located in Centennial, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Esesis 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, 2006, which reported a net loss of $8,430 for the prior nine months.

6. European American Resources, Inc. (CIK No. 789949) is an inactive Delaware corporation located in Eureka, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). European American 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 June 30, 2002, which reported a net loss of $93,927 for the prior three months. As of January 18, 2011, the company's stock (symbol "EPAR") was traded on the over-the-counter markets.

7. eVision International, Inc. (CIK No. 844780) 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). eVision International 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, 2002, which reported a net loss of $398,266 for the prior nine months. As of January 18, 2011, the company's stock (symbol "EVIS") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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.

9. 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.

10. 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, 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 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

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. 63740 / January 20, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3232 / January 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13997

In the Matter of **DOHAN + COMPANY CPAs,** **STEVEN H. DOHAN, CPA,** **NANCY L. BROWN, CPA, and** **EREZ BAHAR, CA,** **Respondents.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 4C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE AS TO DOHAN + COMPANY CPAS, STEVEN H. DOHAN, CPA, AND NANCY L. BROWN, CPA**

I.

In these proceedings, instituted on August 9, 2010 pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Securities and Exchange Commission's ("Commission") Rules of Practice, Respondents Dohan + Company CPAs ("Dohan + Co."), Steven H. Dohan ("Dohan"), and Nancy L. Brown ("Brown") (collectively "Respondents") have submitted Offers of Settlement ("Offer") which the Commission has determined to accept.

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 4C of the Securities

Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice as to Dohan + Company CPAs, Steven H. Dohan, CPA, and Nancy L. Brown, CPA ("Order"), as set forth below.

III.

On the basis of this Order and the Offers of Respondents Dohan + Co., Dohan, and Brown, the Commission finds[1] that:

A. SUMMARY

1. These proceedings arise out of Respondents' improper professional conduct during their audit of International Commercial Television, Inc.'s ("ICTV") 2007 financial statements. During fiscal year 2007, ICTV improperly recognized revenue and incorrectly recorded product returns, resulting in a material overstatement of revenue and net income. Respondents' audit of ICTV's 2007 financial statements failed to comply with numerous Public Company Accounting Oversight Board ("PCAOB") auditing standards. These included failing to demonstrate the required level of proficiency, failing to exercise due care and professional skepticism, failing to obtain sufficient evidential matter, failing to plan the audit, and failing to supervise the audit staff. As a result, Respondents Dohan and Brown and others caused Respondent Dohan + Co. to issue an unqualified audit report for ICTV's 2007 Form 10-K/SB that incorrectly stated that the audit had been conducted in accordance with the PCAOB's auditing standards and that ICTV's financial statements were fairly reported in conformity with Generally Accepted Accounting Principles ("GAAP"). Respondents' conduct, as further described below, constituted improper professional conduct within the meaning of Rule 102(e)(1)(ii) and (iv) and Section 4C of the Exchange Act.

B. RESPONDENTS

2. **Dohan + Company CPAs** is an accounting and auditing firm based in Miami, Florida. The firm provides services to public companies registered with the Commission and has been registered with the PCAOB since October 2003. The firm conducted audits of ICTV's financial statements for the years ended 2004, 2005, 2006, and 2007. As auditor, Dohan + Co. issued a report stating that ICTV's financial statements were prepared in conformity with GAAP and that Dohan + Co. had conducted audits in accordance with the PCAOB's standards.

3. **Steven H. Dohan**, CPA, age 63, is a resident of Miami, Florida. Dohan is the founder and managing director of Dohan + Co. and was the concurring partner on the ICTV audits and quarterly reviews during the relevant period. Dohan is a Certified Public Accountant licensed in Florida.

4. **Nancy L. Brown**, CPA, age 58, is a resident of Miami, Florida. Until recently, Brown was a director at Dohan + Co. and was the engagement partner on the ICTV audits and quarterly reviews during the relevant period. Brown is a Certified Public Accountant licensed in Florida.

[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.

C. RELATED PARTY

5. **International Commercial Television, Inc.** is a Nevada corporation headquartered in Bainbridge Island, Washington. Founded in 2001, the Company sells health and beauty products internationally via infomercials and through various televised shopping networks. ICTV's common stock is registered under Section 12(g) of the Exchange Act and is quoted on the Pink Sheets under the symbol "ICTL."

D. FACTS

<u>ICTV's Improper Revenue Recognition</u>

6. ICTV is a marketer of consumer retail goods, specializing in "fountain of youth" health and beauty products it owns or holds the right to sell. ICTV's best-selling product is the Derma Wand, a skin care appliance that purportedly "reduces fine lines and wrinkles and improves overall skin appearance."

7. ICTV sells product through two main channels: (1) direct sales to end users via infomercials produced by ICTV ("direct sales"), and (2) distribution through third-party distributors for sell-through to end users. ICTV's distributors include televised shopping networks such as the Home Shopping Network ("HSN").

8. Over a six-quarter period from early 2007 and continuing into 2008, ICTV improperly recognized revenue on sales through HSN. In addition, ICTV failed to properly record revenue, and estimate and account for returns, for product sold through its direct sales channels.

9. ICTV began selling product through HSN in 2007, predominantly through a "drop-ship" contract entered into between ICTV and HSN in or about May 2007. Under the drop-ship contract, HSN did not purchase the product itself, but instead facilitated sales to HSN's customers (*i.e.*, the end users). Generally, HSN sent ICTV written requests to pre-order product that would be sold during future HSN television broadcasts. ICTV retained title to the product until HSN sold the product on-air to its customers and the product was shipped to the end users. HSN did not guarantee the purchase of any product, and any unsold product remained under the ownership of ICTV. The contract also allowed HSN to return any product from its customers up to 60 days after delivery to the customer.[2]

10. Despite these contractual provisions governing sell-through and right of return, ICTV recognized revenue in most cases upon HSN's order of the product, before HSN sold through to its customers and before the right of return expired. In some instances, ICTV also recognized revenue without a corresponding written request from HSN. In those cases, ICTV booked HSN sales upon alleged confirmation from its third-party fulfillment warehouse that product had been physically segregated for HSN's use.

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[2] ICTV also sold product directly to HSN under the terms of a separate, "traditional" contract, in which HSN issued a purchase order, retrieved the product, sold the product to end users, and paid ICTV after the sell-through. However, only the first HSN sale was made per the terms of the traditional contract. All other sales were made per the drop-ship arrangement.

11. ICTV failed to ensure that HSN sold through the units booked by the end of the quarter, resulting in a mounting accounts receivable balance with each successive HSN order. This accounting treatment violated multiple revenue recognition criteria under Generally Accepted Accounting Principles ("GAAP").

12. In addition to prematurely recognizing revenue on sales through HSN, ICTV also booked revenue in 2007 on a product that failed an HSN quality control inspection and was never sold through HSN. The purported sale remained on ICTV's books through the 2007 audit and was not reversed until ICTV issued a restated Form 10-K/SB in March 2009.

13. In total, ICTV booked seven HSN sales in 2007 totaling $2.8 million. This figure was reported in ICTV's trial balance and ultimately reported by ICTV in its 2007 Form 10-K. Respondents' working papers state that the auditors tested the HSN sales and traced certain of the sales to ICTV's sales journal, which in turn showed the amount that ICTV booked as revenue.

14. Each HSN sale recognized for 2007 was improperly recognized, resulting in a material overstatement of revenue for ICTV's fiscal 2007.

15. ICTV also failed to properly record revenue on its direct sales. ICTV provided its direct sales customers a 30-day free trial period whereby the customer could try the ordered product prior to purchase, and billed customers upon expiration of the 30-day period. Despite this provision, ICTV recognized revenue upon shipment of the product, and before expiration of the trial period, in violation of GAAP. ICTV also failed to properly estimate and record product returns on direct sales.

16. Over the course of the six-quarter period, ICTV filed periodic reports with the Commission on Forms 10-Q and 10-K. As a result of the improper accounting discussed above, ICTV reported materially inflated revenue and net income to investors and to the Commission.

ICTV's Restatement

17. In October 2008, ICTV announced that it intended to restate its financial statements for the fiscal year ended 2007 and the first two quarters of 2008 as a result of improper revenue recognition. ICTV filed its restated Form 10-K/A for fiscal year 2007 on March 31, 2009. The restatement resulted in a $1.4 million reduction in 2007 revenue related to the HSN errors, and an $840,000 reduction in 2007 revenue related to the failure to properly record direct sales returns.

18. In March 2010, ICTV's new outside auditors uncovered additional revenue recognition errors and ICTV reported that it intended to restate its previously-restated financial statements for the fiscal year ended 2007 and the first two quarters of 2008. In April 2010, ICTV again restated its financial statements for the fiscal year ended 2007. The restatement included an additional $550,000 revenue reduction related to the premature recognition of direct sales revenue prior to expiration of a free trial period.

19. The chart below shows that the errors were material to ICTV's financial statements:

Period	Previously Reported Net Income	Restated Net Income (Loss)	Reduction to Reported Net Income
FY 2007	$1,475,775	($1,081,988)	($2,557,763)
1Q 2008	$109,980	($164,773)	($274,753)
2Q 2008	$260,298	($862,399)	($1,122,697)

Applicable Revenue Recognition Principles and Guidance

20. The basic principles of revenue recognition under GAAP provide that revenue must be realized or realizable and earned before it can be recognized. Further, "[p]rofit is deemed to be realized when a sale in the ordinary course of business is effected, unless the circumstances are such that the collection of the sales price is not reasonably assured." Accounting Research Bulletin No. 43, *Restatement and Revision of Accounting Research Bulletins*, Chapter 1A. SEC Staff Accounting Bulletin ("SAB") No. 101, *Revenue Recognition in Financial Statements* (as superseded, in part, by SAB No. 104, *Revenue Recognition*), reflects these basic principles of revenue recognition and provides guidance in the application of GAAP with respect to recognizing revenue. SAB 101 sets forth four criteria to be considered when determining whether revenue has been realized or realizable and earned. Specifically, revenue generally may be recognized when persuasive evidence of an arrangement exists, delivery has occurred, the seller's price is fixed or determinable, and collectibility is reasonably assured.

21. GAAP also provides that, when a right of return exists, revenue can be recognized at the time of sale only if all of the following conditions are met: (1) the seller's price is substantially fixed or determinable at the date of sale; (2) the buyer has paid, or the buyer is obligated to pay and the obligation is not contingent on resale of the product; (3) the buyer's obligation would not be changed in the event of theft, physical destruction, or damage of the product; (4) the buyer acquiring the product for resale has economic substance apart from that provided by the seller; (5) the seller does not have significant obligations for future performance to directly bring about resale of the product by the buyer; and (6) the amount of future returns can be reasonably estimated. Statement of Financial Accounting Standards No. 48, *Revenue Recognition When Right of Return Exists*.

Respondents' Deficient 2007 Audit

Background

22. Dohan + Co. issued the audit report filed with ICTV's 2007 financial statements and reviewed ICTV's quarterly statements during 2007 through the second quarter of 2008.

23. Dohan + Co. contracted with another accounting firm to provide an audit manager and senior accountant to perform the field work at ICTV. Dohan + Co. and the other accounting firm had worked together in a similar arrangement on several other engagements. Under PCAOB

auditing standards, the staff sharing arrangement between Dohan + Co. and the other accounting firm was subject to the supervision rules and responsibilities set forth in AICPA Codification of Statements on Auditing Standards (as adopted and amended by the PCAOB) ("AU") § 311, *Planning and Supervision*.

24. Dohan + Co. reviewed the other accounting firm's working papers and satisfied itself with both the quality and the amount of work performed by the other accounting firm. Dohan + Co. also made the decision to adopt the other accounting firm's working papers, with little modification, and performed few additional substantive procedures.

25. The audit team for the 2007 ICTV audit primarily consisted of Brown, the engagement partner; Dohan, the concurring partner; a Canadian Chartered Accountant employed by the other accounting firm who served as the audit manager (the "Audit Manager"); and a senior accountant who conducted all substantive audit procedures and field work (the "Senior Accountant"). The Senior Accountant conducted the onsite work for the audit over a two-to-three day period in March 2008. The Audit Manager's responsibilities included planning the audit, supervising the onsite work and reviewing any work performed by the Senior Accountant. Brown's responsibilities included the overall planning and supervision of the audit. Dohan's responsibilities included providing an objective review of the audit and the financial statements that were the subject of the report.

The Auditors' Working Papers

26. On their face, the year-end 2007 audit working papers reveal that Respondents knew of an agreement between ICTV and HSN that claimed to contribute to a 280% increase in revenue over fiscal year-end 2006. The revenue lead sheet stated:

> The Company is also now using the Home Shopping Network for sales in the US market. HSN buys product from the Company (DermaWand and CellRX so far) and features the product on various shows. The Company records the sales once HSN has placed the order and the order has been shipped. HSN does not pay until they have sold the products. This process sometimes takes a few months as HSN will pre-order for future shows.

27. A similar notation appeared on the accounts receivable lead sheet:

> HSN buys a certain amount of product from the Company prior to showing the infomercials. The Company records the sale at this time. HSN pays the Company once the product has actually been sold.

28. The year-end 2007 audit working papers also documented that the HSN relationship was a new and material development in ICTV's business. An analytical review worksheet highlighted a 280% increase in ICTV's annual sales revenue, from $3 million in 2006 to $11.3 million in 2007 due to "an agreement with the Home Shopping Network during the year to sell the Company's product." The worksheet also reported a 414% increase to accounts receivable, from $555,000 in 2006 to $2.9 million in 2007, as a result of increased sales. The material increase in ICTV's revenue, ICTV's new relationship with HSN, the contingent payment terms associated

with that relationship, and Respondents' knowledge of ICTV's deficient internal controls, among other factors, required Respondents to apply heightened scrutiny to the ICTV audit.

Audit Failures by Dohan, Brown, and Dohan + Co.

29. Brown reviewed and signed off on the working papers. Dohan, before signing off on the audit, reviewed the majority of the working papers, including the revenue, accounts receivable, and analytical review working papers. Thus, Respondents each knew of certain terms of ICTV's arrangement with HSN, including that HSN did not pay ICTV until it sold the product to end users. This should have alerted Respondents that ICTV's revenue recognition practices did not comply with GAAP.

30. Indeed, Dohan understood at the time of the audit that the sell-through of ICTV's product by HSN presented a revenue recognition issue under SAB 101, but failed to research the issue at the time of his review nor direct any other member of the audit team to research the issue.

31. Despite knowledge of the above, Respondents unreasonably failed to properly audit ICTV's revenue recognition practices. For example, Respondents failed to obtain a copy of the applicable agreement between ICTV and HSN. Brown knew that there was an agreement between ICTV and HSN to sell ICTV's product. Dohan knew that ICTV's revenue and accounts receivable had increased "dramatically" in 2007 as a result of an agreement entered into with HSN. Yet, Respondents each failed to inquire as to the existence of any written agreement and failed to obtain a copy of any written agreement. Respondents' failure to inquire about the terms of the applicable ICTV agreement with HSN, to obtain a copy of the agreement, or to adequately understand the nature of ICTV's relationship with HSN was an unreasonable departure from professional standards. Because of these failures, Respondents failed to recognize that under the HSN drop-ship agreement, no sale occurred, and revenue should not have been recognized, until the product was sold to end users.

32. Respondents also failed to issue audit confirmations to confirm ICTV's accounts receivable and inventory, or perform adequate alternative procedures. Respondents knew that their own audit program called for the confirmations of receivables and inventory. Had confirmations been sent and received by the auditors, Respondents could have learned that the sales and inventory levels reported by ICTV were not supported.

33. Brown and Dohan + Co. also neglected to perform other audit procedures dictated by the audit program. For example, the audit program required the auditors to review and attend physical inventory counts. This step was marked "NA" in the working papers, indicating that it was not performed. The audit program also recommended that the auditors consider extended procedures to confirm sales terms and conditions with customers; this step was marked "NA" as well. Dohan knew that these procedures were not performed.

34. The working papers also contain a number of internal inconsistencies that should have been resolved by Respondents. For instance, although the revenue and accounts receivable lead sheets described how HSN did not pay ICTV until sell-through, which sometimes took "a few months," the working papers elsewhere indicated that there were no "unusual or long payment

terms" or "buyer conditions which must be met in order to complete the sale.". In addition, the revenue working papers reported that cash had been received for a $990,000 sale to HSN on December 21, 2007, while the accounts receivable working papers reported the $990,000 balance as still outstanding. Respondents failed to reconcile any of these inconsistencies during their review of the working papers.

35. Brown and Dohan + Co. also failed to properly audit ICTV's stated revenue and returns for direct consumer sales. The working papers do not reflect that the audit team considered ICTV's revenue recognition practices for such sales in light of the 30-day free trial period extended to direct sales customers. The working papers also do not show that the auditors performed any substantive testing of ICTV's stated returns for direct sales, or that the auditors considered the impact of applicable GAAP guidance on estimating future returns for such sales. The auditors also failed to reconcile an inherent inconsistency between ICTV's stated returns and its disclosed historical return rate for direct consumer sales.

The Auditors Issue Unqualified Audit Reports on ICTV's 2007 Financial Statements Despite Numerous Audit Failures

36. Despite these failures, Dohan, Brown, and the other auditors caused Dohan + Co. to issue an unqualified audit report on ICTV's 2007 financial statements, which incorrectly represented that the audit had been conducted in accordance with the PCAOB's auditing standards and that ICTV's financial statements were fairly reported in conformity with GAAP. The audit completion documents, which included a checklist and the auditors' assessment that the audit was complete, reflect that Dohan, Brown, and the other auditors were each satisfied with the work performed and signed off on the release of the audit report.

37. Respondents also conducted the audit and review work on ICTV's restatement for the fiscal year ended 2007 and the first two quarters of 2008. In March 2009, Dohan + Co. issued an unqualified audit report on ICTV's restated 2007 financial statements. The restatement working papers indicate that Dohan, Brown, and the other auditors each reviewed the restated financial statements and signed off on the release of the audit report.

38. In September 2009, ICTV retained new auditors. The new auditors found additional revenue recognition errors and brought them to ICTV's attention. Based upon this information, ICTV concluded that the restated 2007 financial statements needed to be restated. This additional restatement further calls into question Dohan + Co.'s competence under applicable PCAOB standards.

Respondents' Improper Professional Conduct

39. The "applicable professional standards" for accountants practicing before the Commission include the PCAOB auditing standards.

40. PCAOB auditing standards require that the auditor be proficient in accounting matters and that the "auditor with final responsibility for the engagement should know, at a minimum, the relevant professional accounting and auditing standards and should be

knowledgeable about the client." AU § 230.06, *Due Professional Care in the Performance of Work*; *see also* AU § 210, *Training and Proficiency of the Auditor*. AU Section 230 also requires an auditor to exercise due professional care and professional skepticism, which includes demonstrating a questioning mind and a critical assessment of audit evidence.

41. PCAOB auditing standards require that "competent evidential matter . . . be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under audit." AU § 326.01, *Evidential Matter*. This "includes both written and electronic information such as . . . contracts." AU § 326.17. The auditor is also to send out audit confirmations. AU § 330, *The Confirmation Process*.

42. Auditors must adequately plan, staff, and supervise the audit. *See* AU §§ 150.02, *Generally Accepted Auditing Standards*; 210.01; 230.06; 311.01 *et seq.*, *Planning and Supervision*; 311.11 *et seq.* This includes "obtain[ing] a level of knowledge of the entity's business that will enable" the auditor to understand transactions and practices that may have a significant effect on the financial statements. AU § 311.06.

43. Further, AU § 316, *Consideration of Fraud in a Financial Statement Audit*, requires the auditor to assess the risks of material misstatement due to fraud and to presume that revenue recognition is a fraud risk.

44. The Audit Manager was responsible for supervising and reviewing documentation of field work performed. As the engagement partner, Brown had overall responsibility for the engagement to ensure that Dohan + Co.'s audit of ICTV's 2007 financial statements was conducted in accordance with PCAOB auditing standards, including planning and supervising the audit and the review of field work. Dohan, as the concurring partner, knew that his role was to "give a fresh, clean look at a job, to provide a fresh set of eyes on the engagement, and to assist where necessary in making sure the engagement goes out to the best of the firm's ability."

45. Indeed, Dohan and Brown were already on notice that the PCAOB had identified material audit deficiencies with respect to many of the auditing standards discussed above, per an inspection of Dohan + Co. by the PCAOB prior to Respondents' 2007 ICTV audit. As a result of that inspection, Dohan and Brown learned that the PCAOB found a number of deficiencies regarding the firm's audits of other clients, including the failure to adequately test revenue and to obtain sufficient evidential matter, as well as deficiencies in Dohan + Co.'s quality control procedures, including concurring partner reviews.

46. During the 2007 ICTV audit, Respondents unreasonably departed from the PCAOB auditing standards in numerous instances, including in the manner further described below.

47. Respondents failed to demonstrate the required level of proficiency. Brown was not aware of applicable GAAP guidance that prohibits revenue recognition if payment of the related sales receivable was dependent upon sell-through by the customer. Although Dohan was aware of some of the applicable GAAP guidance, and knew that ICTV's revenue recognition practices potentially violated GAAP, he failed to conduct additional research or direct another member of the audit team to follow up.

48. Respondents failed to obtain sufficient evidential matter. Respondents failed to understand, or obtain a copy of, ICTV's written contract with HSN, despite the fact that each knew that ICTV had an "agreement" or "business arrangement" with HSN to sell ICTV's product. In addition, Brown and Dohan each reviewed the working papers that expressly stated that ICTV's revenue had materially increased in 2007 due to an "agreement" with HSN.

49. Respondents failed to exercise due professional care and skepticism in the face of numerous red flags and inconsistencies. Respondents never asked ICTV for a copy of any HSN agreement or documentation of the terms of the agreement. Brown and Dohan + Co. ignored or disregarded specific audit program steps regarding, among others, long payment terms, buyer conditions in the sale of product, the confirmation of significant accounts receivable, and the observation of physical inventory counts. Dohan, during his review, either agreed that such procedures were not necessary or failed to identify his fellow auditors' disregard for these auditing steps. Respondents also failed to reconcile numerous inconsistencies during their review of the working papers.

50. Respondents failed to send out accounts receivable confirmations as required by the audit program or to ensure adequate alternative procedures. Further, Brown and Dohan + Co. knew that the audit program also recommended that the auditors send out sales terms and conditions and inventory confirmations but elected not to do so. Dohan supported these decisions despite his belief that ICTV's revenue recognition practice with respect to HSN presented an issue under SAB 101 and with the knowledge that the audit program recommended these confirmations be sent.

51. Respondents failed to adequately plan, staff and supervise the audit. Brown never visited ICTV or the office of the other accounting firm, and relied upon the Audit Manager to manage all of the field work. Dohan failed to ensure that Brown and the Audit Manager were adequately proficient to conduct the audit.

52. Brown and Dohan + Co. failed to sufficiently understand ICTV's business to enable it to understand transactions that had a significant effect on ICTV's financial statements. Brown and Dohan + Co. failed to identify the impact of ICTV's 30-day free trial period, or applicable GAAP standards prohibiting revenue recognition prior to customer acceptance where a trial or evaluation period exists. The working papers also do not reflect that Brown or Dohan + Co. performed any substantive testing of ICTV's stated returns for direct sales, or that they considered the impact of applicable GAAP guidance on estimating future returns for such sales. The auditors also failed to reconcile an inherent inconsistency between ICTV's stated returns and its disclosed historical return rate for direct consumer sales.

53. Finally, Respondents also failed to consider other Standards of Field Work contained in AU Section 300, including AU Section 316, *Consideration of Fraud in a Financial Statement Audit*; AU Section 329, *Analytical Procedures*; and AU Section 331, *Inventories*.

E. VIOLATIONS

54. Rule 102(e)(1)(ii) of the Commission's Rules of Practice and Section 4C of the Exchange Act authorize the Commission to censure or deny, temporarily or permanently, the privilege of appearing or practicing before the Commission to accountants who are found to have engaged in improper professional conduct. Under 102(e)(1)(iv), the term "improper professional conduct" includes "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission."

55. Dohan's and Brown's actions during the engagements were unreasonable, failed to conform to applicable professional standards and indicate a lack of competence to practice before the Commission. Dohan and Brown failed to (i) obtain sufficient evidential matter regarding ICTV's relationship with HSN; (ii) demonstrate the required level of proficiency, particularly with respect to applicable GAAP guidance that prohibited ICTV's revenue recognition practices; (iii) exercise due professional care and professional skepticism in performing the audit of ICTV; (iv) issue accounts receivable confirmations or to ensure adequate alternative procedures; and (v) adequately plan the audit and properly supervise the audit personnel in connection with the 2007 engagement.

F. FINDINGS

56. As a result of the conduct described above, the Commission finds that Respondents Dohan + Co., Dohan, and Brown engaged in improper professional conduct pursuant to Rules 102(e)(1)(ii) and 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice and Section 4C of the Exchange Act.

G. UNDERTAKINGS

Dohan + Co. undertakes the following:

1. Acceptance of New Public Company Audit Clients. The goal of this undertaking is to provide adequate time for Dohan + Co. to implement the undertakings concerning the auditing and quality control matters described below and implement such other adjustments to its audit practice required by the suspensions of Dohan and Brown from appearing or practicing before the Commission. Dohan + Co. undertakes that, following the issuance of the Order, it will not accept new engagements for public company audits prior to the later of 12 months from the date of entry of the Order, or the date that an independent consultant certifies in writing that the undertakings discussed herein have been completed to the satisfaction of the Independent Consultant, as described in paragraph 4(b), below. A public company audit is defined as an engagement to audit the financial statements of an "issuer" as that term is defined in Section 3(a)(8) of the Exchange Act.

2. Auditing Matters. The goal of this undertaking is to require Dohan + Co. to engage

in an internal review of its existing policies and procedures concerning compliance with the relevant professional, regulatory and firm requirements with respect to public company audit engagements. Within 12 months from the date of entry of the Order, Dohan + Co. shall adopt and implement policies and procedures, including but not limited to Quality Control Policy and Procedures, to provide Dohan + Co. with a reasonable assurance, for its audit and review engagements, that the firm and its personnel comply with professional auditing standards and applicable regulatory and legal requirements, and that the firm or engagement partners issue reports that are appropriate in the circumstances. The elements of quality control are identified in the PCAOB's Interim Standard, *System of Quality Control for a CPA Firm's Accounting and Auditing Practice* ("QC 20"). The Principals/Partners of Dohan + Co. should have a working knowledge of Dohan + Co.'s procedures and how they meet the requirements of QC 20.

3. Professional Development. The goal of this undertaking is to require Dohan + Co. auditing personnel to participate in professional development activities in subjects that are relevant to their responsibilities and will contribute to their technical training and proficiency as an auditor. Dohan + Co. undertakes to require all of its professional accounting and auditing personnel, to undergo training as follows:

(a) A minimum of 40 hours of continuing professional education ("CPE") in the following areas of generally accepted accounting principles set forth in FASB Accounting Standard Codifications: (i) Topic 205: Presentation of Financial Statements; (ii) Topic 330: Inventory; (iii) Topic 450: Contingencies; and (iv) Topic 605: Revenue Recognition (at least 16 hours on this Topic). The CPE must meet the requirements of the Florida State Board of Accountancy.

(b) A minimum of 40 hours of CPE in the following PCAOB topics and auditing standards[3]: (i) Audit Confirmations; (ii) Consideration of Fraud in a Financial Statement Audit; (iii) Audit Planning; (iv) Audit Evidence; (v) Inventories; (vi) Training and Proficiency of the Independent Auditor; (vii) Planning and Supervision; (viii) Due Professional Care in the Performance of Work and (ix) Supervision of an Audit.[4] The CPE must meet the requirements of the Florida State Board of Accountancy.

(c) A minimum of 40 hours of independent self-study (need not be a formal

[3] PCAOB auditing standards consist of recent auditing standards adopted by the PCAOB and approved by the Commission ("AS"), as well as preexisting AICPA auditing standards adopted as interim standards by the PCAOB in April 2003 ("AU").

[4] PCAOB guidance on many of the auditing standards listed herein are in transition. Certain existing standards are expected to be amended or superseded. Specifically, the PCAOB has recently adopted AS No. 8 through AS No. 15 (Eight New Risk Assessment Standards), which have been submitted to the Commission for approval (*see* Securities and Exchange Commission Release No. 34-62919). The standards, if approved, will become effective for audits of fiscal periods beginning on or after December 15, 2010. The CPE completed pursuant to these undertakings should focus on the requirements of the new standards, including changes made to existing standards if approved.

review course) in the following areas of accounting and auditing standards, including interpretative guidance by the Commission staff: (i) Staff Accounting Bulletin No. 99: Materiality; (ii) Staff Accounting Bulletin Nos. 101: Revenue Recognition in Financial Statements, and 104: Revision of Topic 13; (iii) Staff Accounting Bulletin No. 108: Considering the Effects of Prior Year Misstatements When Quantifying Misstatements in Current Year Financial Statements; (iv) FASB Accounting Standard Codification Topic 605-15-25: Sale of Product when Right of Return Exists; (v) AU 150: Generally Accepted Auditing Standards; (vi) AU 550: Other Information in Documents Containing Audited Financial Statements; and (vii) AS No. 7: Engagement Quality Review.

4. Independent Consultant. Dohan + Co. shall rètain an Independent Consultant acceptable to the Commission staff, to work with Dohan + Co. to assure the Commission staff that Dohan + Co. has satisfactorily implemented the undertakings expressed herein and that after such undertakings it is reasonable to expect that the violations found have been remedied and that Dohan + Co.'s future audits should result in compliance with the relevant professional, regulatory and firm requirements with respect to public company audit engagements. The Independent Consultant shall report to the Commission staff as follows:

(a) The Independent Consultant shall report to the Commission staff in writing six months and 12 months from the date work has begun as to the findings of the Independent Consultant's review and Dohan + Co.'s efforts at correcting the violations.

(b) The suspension from accepting new audit engagements for public company clients, as described in paragraph 1, above, shall continue until the Independent Consultant has certified in writing that the undertakings discussed herein have been completed to the satisfaction of the Independent Consultant.

(c) The Independent Consultant will review a sampling of Dohan + Co.'s audits of SEC registrants after the 12-month suspension discussed in paragraph 1, above, has elapsed and after Dohan + Co. has resumed auditing SEC registrants, for a 12-month period. The Independent Consultant and Dohan + Co. shall certify that they each have no reason to believe that Dohan + Co.'s audits do not conform with the relevant professional, regulatory and firm requirements with respect to public company audit engagements in all material matters.

All reports and certifications shall be submitted to Tracy Davis, Assistant Regional Director, San Francisco Regional Office or her successor, with copies to the Office of Chief Counsel of the Enforcement Division and to the PCAOB, Director of Registration and Inspection.

5. Independent Consultant Independence. Dohan + Co. will require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Dohan + Co., or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under the Order shall not, without prior written consent of the San Francisco Regional Office, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Dohan + Co., 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.

6. Joint Audit Arrangements. Dohan + Co. agrees to cease permanently all joint audit arrangements with other auditors in which Dohan + Co. serves as the principal auditor in connection with audits of SEC registrants, other than joint arrangements required by foreign jurisdictions.

7. Certification of Compliance. Dohan + Co. will certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Dohan + Co. agrees to provide such evidence. The certification and supporting material shall be submitted to Tracy Davis, Assistant Regional Director, San Francisco Regional Office or her successor, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

III.

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

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

Dohan + Co.

A. Dohan + Co. is hereby censured pursuant to Rule 102(e)(1)(ii) and 102(e)(1)(iv)(B)(2) of the Commission's Rules of Practice and Section 4C of the Exchange Act.

Dohan

B. Dohan is denied the privilege of appearing or practicing before the Commission as an accountant.

C. After three years from the date of this order, Dohan 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 Dohan'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) Dohan, 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) Dohan, 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) Dohan 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) Dohan acknowledges his responsibility, as long as Dohan appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

D. The Commission will consider an application by Dohan 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 Dohan's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

E. As a condition for reinstatement, Dohan shall have completed the professional training as described in Section III(G)(3), above.

Brown

F. Brown is denied the privilege of appearing or practicing before the Commission as an accountant.

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

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

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

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

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

(c) Brown 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) Brown acknowledges her responsibility, as long as Brown 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.

H. The Commission will consider an application by Brown to resume appearing or practicing before the Commission provided that her state CPA license is current and she has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Brown's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

I. As a condition for reinstatement, Brown shall have completed the professional training as described in Section III(G)(3), above.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 232, 240 and 249

Release Nos. 33-9175; 34-63741; File No. S7-24-10

RIN 3235-AK75

DISCLOSURE FOR ASSET-BACKED SECURITIES REQUIRED BY SECTION 943 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

AGENCY: Securities and Exchange Commission

ACTION: Final rule.

SUMMARY: Pursuant to Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[1] we are adopting new rules related to representations and warranties in asset-backed securities offerings. The final rules require securitizers of asset-backed securities to disclose fulfilled and unfulfilled repurchase requests. Our rules also require nationally recognized statistical rating organizations to include information regarding the representations, warranties and enforcement mechanisms available to investors in an asset-backed securities offering in any report accompanying a credit rating issued in connection with such offering, including a preliminary credit rating.

DATES: Effective Date: [Insert date 60 days after publication in Federal Register].

Compliance Dates:

Rule 15Ga-1: The initial filing required by Rule 15Ga-1(c)(1) for the three years ended December 31, 2011 is required to be filed on February 14, 2012, except that a securitizer that is any State or Territory of the United States, the District of Columbia, any political subdivision of any State, Territory or the District of Columbia, or any public instrumentality

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1 Pub. L. No. 111-203 (July 21, 2010).

of one or more States, Territories or the District of Columbia, shall provide the initial filing required by Rule 15Ga-1(c)(1) for the three years ended December 31, 2014 and file on February 14, 2015.

Regulation AB: Any registered offering of asset-backed securities commencing with an initial bona fide offer on or after February 14, 2012 must comply with the information requirements of new Item 1104(e) of Regulation AB. For any such offering that relies on Securities Act Rule 415(a)(1)(x), a Securities Act registration statement filed after December 31, 2011 relating to such offering must be pre-effectively or post-effectively amended, as applicable, to make the prospectus included in Part I of the registration statement compliant. The information required by Item of 1121 of Regulation AB is required for all Form 10-Ds required to be filed after December 31, 2011.

Rule 17g-7: NRSROs will be required to provide the information required by the rule to be included in a report accompanying a credit rating for an offering of asset-backed securities for any such report issued on or after [insert date 6 months after effective date].

FOR FURTHER INFORMATION CONTACT: Rolaine Bancroft, Attorney-Advisor, in the Office of Rulemaking, at (202) 551-3430, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628 or, with respect to Rule 17g-7, Joseph I. Levinson, Special Counsel, at (202) 551-5598, Division of Trading and Markets, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Items 1104 and 1121[2] of Regulation AB[3] (a subpart of Regulation S-K) under the Securities Act of 1933

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2 17 CFR 229.1104 and 17 CFR 229.1121.

("Securities Act")[4] and Rules 101 and 314[5] of Regulation S-T.[6] We also are adding Rules 15Ga-1[7] and 17g-7[8] and Form ABS-15G[9] under the Securities Exchange Act of 1934 ("Exchange Act")[10] and the Act.

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3 17 CFR 229.1100 through 17 CFR 229.1123.

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

5 17 CFR 232.101 and 17 CFR 232.314.

6 17 CFR 232.10 et seq.

7 17 CFR 240.15Ga-1.

8 17 CFR 240.17g-7.

9 17 CFR 249.1400.

10 15 U.S.C. 78a et seq.

I. Background

On October 4, 2010, we proposed rules to implement Section 943 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") related to asset-backed securities ("ABS").[11] Section 943 of the Act requires the Commission to prescribe regulations on the use of representations and warranties in the market for asset-backed securities:

(1) to require any securitizer to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by securitizer, so that investors may identify asset originators with clear underwriting deficiencies; and

(2) to require each nationally recognized statistical rating organization ("NRSRO") to include, in any report accompanying a credit rating for an asset-backed securities offering, a description of (A) the representations, warranties and enforcement mechanisms available to investors; and (B) how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.[12]

In addition to the rules required by the Act, we also re-proposed disclosure requirements in Regulation AB in order to conform disclosures about repurchase request activity to those required by Section 943 of the Act.[13]

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[11] See Release No. 33-9148 (Oct. 4, 2010) [75 FR 6278] (the "Proposing Release").

[12] See Section 943 of the Act.

[13] In April of 2010, we proposed rules that would revise the disclosure, reporting and offering process for asset-backed securities. See Asset Backed Securities, SEC Release No. 33-9117 (April 7, 2010) [75 FR 23328] (the "2010 ABS Proposing Release"). Among other things, the 2010 ABS Proposing Release proposed new disclosure requirements with respect to repurchase requests. Specifically, we proposed that issuers disclose in prospectuses the repurchase demand and repurchase and replacement activity for the last three years of sponsors of asset-backed transactions or originators of underlying pool assets if they are obligated to repurchase assets

As we discussed in the Proposing Release, in the underlying transaction agreements for an asset securitization, sponsors or originators typically make representations and warranties relating to the pool assets and their origination, including about the quality of the pool assets. For instance, in the case of residential mortgage-backed securities, one typical representation and warranty is that each of the loans has complied with applicable federal, state and local laws, including truth-in-lending, consumer credit protection, predatory and abusive laws and disclosure laws. Another representation that may be included is that no fraud has taken place in connection with the origination of the assets on the part of the originator or any party involved in the origination of the assets. Upon discovery that a pool asset does not comply with the representation or warranty, under transaction covenants, an obligated party, typically the sponsor, must repurchase the asset or substitute a different asset that complies with the representations and warranties for the non-compliant asset. The effectiveness of the contractual provisions related to representations and warranties has been questioned and lack of responsiveness by sponsors to potential breaches of the representations and warranties relating to the pool assets has been the subject of investor complaint.[14]

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pursuant to the transaction agreements. We also proposed that issuers disclose the repurchase demand and repurchase and replacement activity concerning the asset pool on an ongoing basis in periodic reports.

[14] As we noted in the Proposing Release and the 2010 ABS Proposing Release, transaction agreements typically have not included specific mechanisms to identify breaches of representations and warranties or to resolve a question as to whether a breach of the representations and warranties has occurred. Thus, these contractual agreements have frequently been ineffective because, without access to documents relating to each pool asset, it can be difficult for the trustee, which typically notifies the sponsor of an alleged breach, to determine whether or not a representation or warranty relating to a pool asset has been breached. In the 2010 ABS Proposing Release, the Commission proposed a condition to shelf eligibility that would require a provision in the pooling and servicing agreement that would require the party obligated to repurchase the assets for breach of representations and warranties to periodically furnish an opinion of an independent third party regarding whether the obligated party acted consistently with the terms of the pooling and servicing agreement with

As discussed in more detail below, we have taken into consideration the comments received on the proposed rules and are adopting new Rules 15Ga-1 and 17g-7, new Form ABS-15G and amendments to Regulation AB. The rules and form that we are adopting today implement the requirements of Section 943 of the Act, and also conform disclosure requirements for prospectuses and ongoing reports for ABS sold in registered transactions. We received over forty comment letters in response to the proposed rules. These letters came from investors, securitizers, corporations, credit rating agencies, professional and trade associations, law firms, municipal entities, and other interested parties.[15] In general, commentators supported the manner in which we proposed to implement Section 943 of the Act. Some commentators opposed some aspects of the proposed rules and suggested modifications to the proposals.

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respect to any loans that the trustee put back to the obligated party for violation of representations and warranties and which were not repurchased. See Section II.A.3.b. of the 2010 ABS Proposing Release. See also the Committee on Capital Markets Regulation, The Global Financial Crisis: A Plan for Regulatory Reform, May 2009, at 135 (noting that contractual provisions have proven to be of little practical value to investors during the crisis); see also Investors Proceeding with Countrywide Lawsuit, Mortgage Servicing News, Feb. 1, 2009 (describing class action investor suit against Countrywide in which investors claim that language in the pooling and servicing agreements requires the seller/servicer to repurchase loans that were originated with "predatory" or abusive lending practices) and American Securitization Forum, ASF Releases Model Representations and Warranties to Bolster Risk Retention and Transparency in Mortgage Securitizations, (Dec. 15, 2009), available at http://www.americansecuritization.com. It has been reported that only large ABS investors, such as Fannie Mae and Freddie Mac, have been able to effectively exercise repurchase demands. See Aparajita Saha-Bubna, "Repurchased Loans Putting Banks in Hole," Wall Street Journal (Mar. 8, 2010)(noting that most mortgages put back to lenders are coming from Fannie Mae and Freddie Mac). See also Joe Adler, "Regulators See Growing Threat from Put-Backs," American Banker (Dec. 6, 2010) (noting that investor put-back cases face procedural hurdles and that investors are trying to unionize around repurchasing). However, recent articles report that banks have begun settlement efforts. See e.g., Dawn Kopecki and Hugh Son, "Bank of America Deal on Loan-Repurchase Demands Sets 'Template' for Banks," Bloomberg (Jan. 4, 2011) available at http://www.bloomberg.com/news/2011-01-03/banks-stocks-rise-after-bank-of-america-settles-mortgage-putback-claims.html (noting recent settlements of repurchase claims).

15 The public comments we received are available on our website at http://sec.gov/comments/s7-24-10/s72410.shtml.

The adopted rules reflect changes made in response to many of these comments. We discuss our revisions with respect to each proposed rule in more detail throughout this release. The rules we are adopting require:

- ABS securitizers to disclose demand, repurchase and replacement history in a tabular format for an initial three-year look back period ending December 31, 2011;
- ABS securitizers to disclose, subsequent to that date, demand, repurchase and replacement activity in a tabular format on a quarterly basis;
- ABS issuers to disclose demand, repurchase and replacement history for a three-year look back period, in the same tabular format as new Rule 15Ga-1, in the body of the prospectus;
- ABS issuers to disclose demand, repurchase and replacement activity for a specific ABS, in the same tabular format, in periodic reports filed on Form 10-D; and
- NRSROs to disclose, in any report accompanying a credit rating for an ABS transaction, the representations, warranties and enforcement mechanisms available to investors and how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.

II. Discussion of Amendments

A. Disclosure Requirements for Securitizers

We proposed and are adopting new Rule 15Ga-1 to implement Section 943(2) of the Act. This new rule would require any securitizer of asset-backed securities to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by securitizer, so that investors may identify asset originators with clear underwriting deficiencies. Under the new rule, a securitizer would provide the disclosure by filing new Form ABS-15G.[16]

1. Definition of Exchange Act-ABS for Purposes of Rule 15Ga-1

As we discussed in the Proposing Release, the Act amended the Exchange Act to include a definition of an "asset-backed security" and Section 943 of the Act references that definition.[17] The statutory definition of an asset-backed security ("Exchange Act-ABS") is much broader than the definition of an asset-backed security in Regulation AB ("Reg AB-ABS").[18] The definition of an Exchange Act-ABS includes securities that are typically sold in transactions that are exempt from registration under the Securities Act, such as collateralized debt obligations ("CDOs"), as well as securities issued or guaranteed by a government sponsored entity ("GSE"), such as Fannie Mae and Freddie Mac and municipal securities that otherwise come within the definition.[19] Since Section 943 uses the broader

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16 See also Section II.B. for discussion of disclosures in prospectuses and periodic reports.

17 Section 3(a)(77) of the Exchange Act, as amended by the Act, provides that the term "asset-backed security" means a fixed-income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage, or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the asset, including: a collateralized mortgage obligation; a collateralized debt obligation; a collateralized bond obligation; a collateralized debt obligation of asset-backed securities; a collateralized debt obligation of collateralized debt obligations; and a security that the Commission, by rule, determines to be an asset-backed security for purposes of this section; and does not include a security issued by a finance subsidiary held by the parent company or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

18 In 2004, we adopted the definition of "asset-backed security" in Regulation AB. The definition and our interpretations of it are intended to establish parameters for the types of securities that are appropriate for the alternate disclosure and regulatory regime provided in Regulation AB and the related rules for Form S-3 registration of ABS. The definition does not mean that public offerings of securities outside of these parameters, such as synthetic securitizations, may not be registered with the Commission, but only that the alternate regulatory regime is not designed for those securities. The definition does mean that such securities must rely on non-ABS form eligibility for registration, including shelf registration. See Section III.A.2 of Asset-Backed Securities, SEC Release no. 33-8518 (January 7, 2005) [70 FR 1506] (the "2004 ABS Adopting Release") and Item 1101(c) of Regulation AB [17 CFR 1101(c)].

19 Government sponsored enterprises (GSEs) such as Fannie Mae and Freddie Mac purchase mortgage loans and issue or guarantee mortgage-backed securities (MBS). MBS issued or guaranteed by these GSEs have been and continue to be exempt from registration under the Securities Act and reporting under the

Exchange Act-ABS definition, our new Rule 15Ga-1 would require a securitizer to provide disclosures relating to all asset-backed securities that fall within the statutory definition, whether or not sold in Securities Act registered transactions. However, as we discuss further below, even if a security meets the definition of an Exchange Act-ABS, the new disclosure requirement would only be triggered if the underlying transaction agreements contain a covenant to repurchase or replace an asset.

2. Definition of Securitizer for Purposes of Rule 15Ga-1

Section 943 and new Rule 15Ga-1 impose the disclosure obligation on a "securitizer" as defined in the Exchange Act. The Act amended the Exchange Act to include the definition of a "securitizer". Under the Exchange Act, a securitizer is either:

(A) an issuer of an asset-backed security; or

(B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer.[20]

The definition of securitizer is not specifically limited to entities that undertake transactions that are registered under the Securities Act or conducted in reliance upon any particular exemption.[21] Consequently, it applies to any entity or person that issues or

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Exchange Act. For more information regarding GSEs, see Task Force on Mortgage-Backed Securities Disclosure, "Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets" (Jan. 2003) available at http://www.sec.gov/news/studies/mortgagebacked.htm.

[20] See Section 15G(a)(3) of the Exchange Act, as amended by the Act.

[21] We received comment letters on the application of proposed Rule 15Ga-1 to ABS offered outside the United States and to ABS sold in the United States by foreign securitizers. See e.g., letters from American Bar Association (ABA), Association for Financial Markets in Europe (AFME), Center for Responsible Lending (CFRL), U.S. Senator Carl Levin (Levin), Metropolitan Life Insurance Company (Metlife) and Securities Industry and Financial Markets Association (SIFMA). Section 943 of the Act does not expressly provide for Commission exemption for particular classes of securitizers from the requirements. If securitizers of Exchange Act-ABS are subject to our jurisdiction, then securitizers are required to provide the disclosures required by Rule 15Ga-1.

organizes an Exchange Act-ABS as specified in Section 15G(a)(3) of the Exchange Act. Further, as noted above, Section 943 and Section 15G(a)(3) do not distinguish between securitizers of Exchange Act-ABS in registered or unregistered transactions, and our new Rule 15Ga-1 would apply equally to securitizers offering ABS in registered and unregistered transactions.

With respect to registered transactions and the definitions of transaction parties in Regulation AB, sponsors and depositors[22] both fall within the statutory definition of securitizer. A sponsor typically initiates a securitization transaction by selling or pledging to a specially created issuing entity a group of financial assets that the sponsor either has originated itself or has purchased in the secondary market.[23] In some instances, the transfer of assets is a two-step process: the financial assets are transferred by the sponsor first to an intermediate entity, often a limited purpose entity created by the sponsor for a securitization program and commonly called a depositor, and then the depositor will transfer the assets to the issuing entity for the particular asset-backed transaction.[24] Because both sponsors and depositors fit within the statutory definition of securitizers, both entities would have the disclosure responsibilities under new Rule 15Ga-1. However, if a sponsor filed all

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22 We interpret the term "issuer" in Section 15G(a)(3)(A) to refer to the depositor of an asset-backed security. This treatment is consistent with our historical regulatory approach to that term, including the Securities Act and the rules promulgated under the Securities Act and the Exchange Act. See, e.g., Securities Act Rule 191 (17 CFR 230.191) and Exchange Act Rule 3b-19 (17 CFR 240.3b-19).

23 A sponsor, as defined in Regulation AB, is the person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity. See Item 1101(l) of Regulation AB [17 CFR 229.1101(l)]. Sponsors of asset-backed securities often include banks, mortgage companies, finance companies, investment banks and other entities that originate or acquire and package financial assets for resale as ABS. See Section II. of the 2004 ABS Adopting Release.

24 A depositor receives or purchases and transfers or sells the pool assets to the issuing entity. See Item 1101(e) of Regulation AB [17 CFR 229.1101(e)]. For asset-backed securities transactions where there is not an intermediate transfer of assets from the sponsor to the issuing entity, the term depositor refers to the sponsor. For asset-backed securities transactions where the person transferring or selling the pool assets is itself a trust, the depositor of the issuing entity is the depositor of that trust.

disclosures required under new Rule 15Ga-1, which would include disclosures of the activity of affiliated depositors, as described below, consistent with the proposal final Rule 15Ga-1 provides that those depositors affiliated with the sponsors would not have to separately provide and file the same disclosures. We believe this is appropriate for affiliated securitizers because otherwise such disclosure would be duplicative and would not provide any additional useful information, since as noted above, the depositor usually serves as an intermediate entity of a transaction initiated by a sponsor.[25] In addition, investors would be able to find information "aggregated by securitizer" as required by Section 943 in this case because the table would be aggregated either by affiliated depositors or the sponsor the ABS.

We received two comment letters that urged us to consider two other situations related to a securitizer's filing requirement. One requested that either the Exchange Act reporting party or the party that contractually assumes a reporting duty would have the obligation to disclose repurchase request information and file Form ABS-15G, but not both.[26] The other requested we allow securitizers to reference and rely on originator disclosures to satisfy a securitizer's requirements if they have made contractual arrangements to do so.[27] Both of these commentators requested filing accommodations that related to unaffiliated parties, and we are concerned that the requested approach could make it more difficult for

[25] There may be other situations where multiple affiliated securitizers would have individual reporting obligations under Rule 15Ga-1 with respect to a particular transaction. Under our final rule, if one securitizer has filed all the disclosures required in order to meet the obligations under Rule 15Ga-1, which would include disclosures of the activity of affiliated securitizers, those securitizers would not be required to separately provide and file the same disclosures. Several commentators also requested that a securitizer be permitted to file separate reports for different asset classes, instead of including the activity for all asset classes in which the securitizer has issued ABS in a single report. See discussion below in Section II.A.4.b. and fn. 82.

[26] See letter from SIFMA (noting, "for example, in a 'rent-a-shelf' transaction, both the renter and the registrant could be deemed securitizers").

[27] See letter from ABA (noting that the Commission has previously allowed ABS issuers to incorporate by reference information filed by third parties, such as credit enhancement providers or significant obligors).

investors to locate the information "aggregated by securitizer" as is required by Section 943 because the relationship between unaffiliated transaction parties may not be readily understood. Therefore, we are requiring that all securitizers in a transaction file Form ABS-15G, unless they are affiliated securitizers as discussed above.

One commentator explained that requiring disclosure of assets "originated and sold," as proposed, could be construed to require the securitizer to report demand and repurchase activity on loans originated and sold by it but securitized by other securitizers which might lead to inconsistent and duplicative reporting.[28] In the case of Exchange Act-ABS issued by the GSE's, we received several comment letters noting that the term securitizer, for purposes of Rule 15Ga-1 should be applied solely to Fannie Mae or Freddie Mac and not the financial institution transferring loans for securitization by Fannie Mae or Freddie Mac.[29] We agree with commentators observations that "originated and sold" may be read to require disclosure about transfers of assets that were not securitized, and thus as discussed further below, we have revised the rule to require disclosure concerning assets "securitized" by securitizers.

3. Application to Municipal Securitizers

As stated earlier, Section 943 and the new rule apply to Exchange Act-ABS whether or not offered and sold in Securities Act registered transactions. In addition, Section 943 and the new rule impose the disclosure obligation on any securitizer, as defined in the Exchange Act. Thus, the new rule will apply to a municipal entity that is a securitizer of Exchange Act-ABS ("municipal securitizer"). We sought comment in the Proposing Release on whether we should provide further guidance regarding the application of proposed Rule 15Ga-1 to

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28 See letter from American Securitization Forum (ASF).

29 See e.g., letters from ASF, Bank of America (BOA), Fannie Mae and Freddie Mac (GSEs), Mortgage Bankers Association (MBA), and SIFMA.

securities issued by municipal entities that would fall within the definition of Exchange-Act ABS. We also asked whether the types of municipal securities about which proposed Rule 15Ga-1 would require a municipal securitizer to provide representation and warranty repurchase disclosure was clear. Several commentators provided examples of municipal securities that could fall within the definition of Exchange-Act ABS such as student loan bonds, housing and mortgage bonds, bond-bank issuances, and revolving fund bonds.[30]

With respect to proposed Rule 15Ga-1, a few commentators noted that it would not likely apply to most municipal securities because the underlying transaction documents typically would not contain a covenant to repurchase or replace an asset if it does not comply with representation and warranty provisions, if any.[31] Commentators also noted various reasons why proposed Rule 15Ga-1 should not apply to municipal securitizers, such as a belief that they have an express statutory exemption or[32] or that there is a requirement under the Act to first make a rule determination about the status of the securities.[33] In addition, several commentators argued that the Commission has authority to exempt municipal

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30 See e.g., letters from Federated Investors, Inc., Investment Company Institute (ICI), National Association of Bond Lawyers (NABL), Kutak Rock (Kutak) and Moody's Investors Service (Moody's). We also received some comment letters that questioned whether municipal securities fall within the definition of Exchange Act-ABS. In particular, a few letters questioned whether a municipal security would meet the Exchange-Act ABS criteria of payments depending "primarily on the cash flow from the asset" if the security also is secured by a general obligation of the municipal issuer. See e.g., letters from Kutak, Education Finance Council (EFC) and Minnesota Housing Finance Agency (MHFA).

31 See e.g., letters from NABL and Connecticut Housing Finance Authority (CHFA).

32 Several commentators noted that the Tower Amendment (Section 15B(d)(1) of the Exchange Act [15 USC 78o-4] expressly prohibits the Securities and Exchange Commission and the Municipal Securities Rulemaking Board ("MSRB") from requiring an issuer of municipal bonds (including housing bonds) to make any specific disclosure filing with the SEC or MSRB prior to the sale of these securities to investors. See e.g., letters from Kutak, Group of 14 Municipal Organizations (Muni Group), NABL, National Association of Local Housing Finance Agencies (NALHFA), Treasurer of the State of Connecticut (Nappier), National Council of State Housing Agencies (NCHSA) and Robert W. Scott (Scott).

33 Commentators cited to the phrase "a security that the Commission, by rule, determines to be an asset-backed security" that appears after the description of examples of Exchange Act-ABS. See Section 3(a)(77) of the Exchange Act, as amended by the Act. See e.g., letters received from NABL, Muni Group, and Scott. .

securitizers from Rule15Ga-1, citing the overall structure of the Act's amendments and legislative history. These commentators questioned whether Congress intended to require Section 943 disclosures with respect to municipal securities at all.[34]

Other commentators suggested that the Commission wait for the results of the municipal disclosure study required by Subtitle H of the Act[35] before requiring compliance with the proposals[36] as well as for the results of the Commission's municipal field hearings, discussed below.[37] One investor group was concerned that a piecemeal approach to municipal securities disclosure would have the unintended effect of creating confusion for investors and issuers alike because different asset classes of municipal securities would be subject to different disclosure requirements.[38]

Moreover, many commentators argued that certain municipal ABS, such as housing bonds, only include assets originated under strict underwriting standards and are subject to legal and program requirements in order to obtain and maintain guarantees and tax-exempt

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34 In particular, one commentator noted that despite the broad definition of "asset-backed security," it believes the SEC has the authority to exempt municipal securities from this rule, and doing so is necessary and appropriate in light of Section 3(a)(2) of the Securities Act and Section 3(a)(12) of the Exchange Act, which both treat municipal securities as exempted securities. See letter from NCHSA. Other commentators argued that the Commission has the authority to exempt municipal securities from risk retention in Section 941of the Act (Credit Risk Retention), and those same exemptions should apply to Section 943. See e.g., letters from ICI, NABL, NALHFA, NCSHA, Muni Group, and Scott. Specifically, four commentators cited to language in the Joint Explanatory Statement of the Conference Committee suggesting the Commission has authority to grant total or partial exemptions from risk-retention and disclosure requirements for municipal securities. See e.g., letters from ICI, NCSHA, Muni Group, and Scott. But see letter from Nappier (noting concerns from Senate staff that future transactions might be created and structured through municipal issuers specifically to avoid the asset-backed securities provisions).

35 Section 976 of the Act requires the Comptroller General of the United States to submit a report to Congress on the results of a study and review of the disclosure required to be made by issuers of municipal securities, including recommendations for how to improve disclosure by issuers of municipal securities no later than 24 months after the date of enactment of the Act. In addition, pursuant to Section 977 of the Act, the Comptroller General of the United States is also required to conduct a study of the municipal securities markets and report no later than 18 months after the date of enactment of the Act.

36 See e.g., letters from CHFA, ICI, Muni Group, NABL, NALHFA, Nappier, and NCHSA.

37 See e.g., letters from ICI, Muni Group and Scott.

38 See letter from ICI.

status[39] and noted that issues regarding underwriting deficiencies and unfulfilled repurchase requests that the Act intends to address have not been an issue in the municipal securities market.[40] Furthermore, according to a few commentators, any repurchase obligations that do exist for municipal ABS have been enforced by the relevant municipal issuer in order to ensure the continual tax-exempt status of the municipal ABS.[41]

Commentators also noted that a significant difference between municipal ABS and more typical Exchange Act-ABS is that the Municipal Securities Rulemaking Board (MSRB) [42] collects and publicly disseminates market information and information about municipal securities issuers and offerings on its centralized public database, EMMA.[43] Thus, even though most municipal securities are sold in unregistered transactions in reliance on exemptions from registration, as commentators noted,[44] as a result of the applicability of Exchange Act Rule 15c2-12 to municipal securities offerings by underwriters, municipal issuers issuing municipal securities subject to that rule already provide disclosures in offering documents and disclosures to the secondary market pursuant to continuing disclosure

39 See e.g., letters from Connecticut Higher Education Supplemental Loan Authority (CHESLA), CHFA, Hawkins, Delafield and Wood (Hawkins), Kutak, MHFA, NABL, and NCSHA.

40 See generally letters from CHESLA CHFA, EFC, Hawkins, Kutak, MHFA, Muni Group, NABL, NCSHA, and City of New York (NYC)(noting generally that the policy concerns that led to adoption of the Act are not present in the case of municipal securities and the municipal securities markets did not experience the failures or defaults that led to the Act). See also Moody's Investors Service, Inc., Special Report: U.S. Municipal Bond Defaults and Recoveries, 1970-2009, February, 2010 (noting that municipal issuers have a very limited default experience with only 54 defaults over the period 1970-2009). See also letter from NYC (noting that tax lien securitizations arise out of operation of law and are not originated pursuant to underwriting standards).

41 See e.g., letters from CHESLA, CHFA and NABL.

42 The MSRB, a self-regulatory organization subject to oversight by the Commission, regulates securities firms and banks that underwrite, trade and sell municipal securities. The Act broadened the mission of the MSRB to include the protection of state and local governments and other municipal entities, in addition to investors and the public interest. The MSRB also regulates municipal advisors. See Section 975 of the Act.

43 See e.g., letters from EFC, Kutak, MHFA, NABL and NCSHA. The website address for EMMA is www.emma.msrb.org.

44 See e.g., letters from EFC, Kutak, MHFA, NABL and NCSHA.

agreements entered into for the benefit of bondholders. Under Rule 15c2-12, specified annual and event notices are required to be submitted to the MSRB's EMMA system.[45] However, Rule 15c2-12 does not specifically require representation and warranty repurchase disclosure.

Commentators noted other factors that distinguish securitizers of municipal ABS from other Exchange Act-ABS securitizers. For instance, commentators noted that municipal securitizers generally are state or local government entities and exist to serve a public purpose.[46] In addition, commentators also noted that municipal ABS in some cases are secured by a pledge of assets or are secured by a general obligation of the municipal issuer.[47] Finally, commentators stated that market participants do not identify or consider municipal securities as substantially similar to ABS.[48]

Despite the distinguishing factors discussed above, we have determined that the final rules should apply to municipal securitizers. Section 943(2) of the Act requires the Commission to adopt rules mandating that "any securitizer" of an Exchange Act-ABS,

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45 Pursuant to Exchange Act Rule 15c2-12 [17 CFR 240.15c2-12], municipal underwriters must submit final official statements, for municipal securities offerings subject to the rule, on EMMA, which must include, at a minimum, information on the terms of the securities, financial information or operating data concerning the issuer and other entities, enterprises, funds, accounts or other persons material to an evaluation of the offering, and a description of the continuing disclosure undertaking made in connection with the offering (including any indication of any failures to comply with such undertaking during the past five years). Official statements typically also include information regarding the purposes of the issuance, how the securities will be repaid, and the financial and economic characteristics of the obligor with respect to the offered securities. Several commentators stated that, if the final rules applied the Section 943 disclosure requirements to municipal securitizers, then these disclosures should be made on EMMA rather than on EDGAR because they argued that filing such disclosures on EDGAR would be confusing to issuers and to investors who have become accustomed to using EMMA as the repository of municipal-related disclosures. See e.g., letters from EFC, Kutak, NABL and NCSHA.

46 See e.g., letters from CHESLA and CHFA (public purpose is to alleviate the shortage of quality affordable housing) and NALHFA (public purpose is to provide mortgage assistance to first-time home buyers, and multi-family below-market financing for the acquisition, construction and preservation of rental housing for lower-income households).

47 See e.g., letters from EFC, Kutak, MHFA, and NABL.

48 See e.g., letters from Muni Group and Scott.

including municipal ABS, provide the disclosures specified therein. The statute does not expressly provide the Commission the authority to provide exemptions for particular classes of securitizers, including municipal securitizers. We note that Section 943 is a stand-alone provision and is not included as an amendment to the Exchange Act or the Securities Act. As a result, our final rule applies to municipal ABS if they otherwise come within the definition of Exchange Act-ABS. Nonetheless, we recognize that municipal securitizers may have had less experience with developing and providing the types of information required by Section 943(2) and the new rule, and thus may have less developed infrastructures for providing the required disclosures.[49] We believe that a delayed compliance date for municipal securitizers should allow those securitizers to observe how the rule operates for other securitizers and to better prepare for implementation of the rules. We also believe that delayed compliance for municipal securitizers will allow us to evaluate the implementation of Rule 15Ga-1 by other securitizers and provide us with the opportunity to consider whether adjustments to the rule would be appropriate for municipal securitizers before the rule becomes applicable to them. As commentators also noted, we are currently undergoing a review of the municipal securities market, and as part of that review, we recently began a series of field hearings to examine the municipal securities markets, including disclosure and transparency within the municipal securities markets.[50] At the conclusion of this process, the staff of the Commission expects to prepare a report containing information learned and any

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49 See e.g., letters from CHESLA (noting that it operates with a staff of two and a part-time Executive Director); Kutak (noting that many municipal issuers rely on paper files and do not have the technology or staff to produce historical information); and NABL (noting that certain state agencies will need to obtain the necessary funds to meet the filing requirements, and certain state agencies determine their budgets on a biannual cycle).

50 See SEC Press Release 2010-64, SEC Sets Field Hearings on State of Municipal Markets, Sept. 7, 2010 available on the "Spotlight on the State of the Municipal Securities Market" page of our Web site at http://www.sec.gov/spotlight/municipalsecurities.shtml.

recommendations for regulatory changes, industry "best practices," or legislative changes.[51] The results of our review and the studies required by the Act[52] could lead us to conclude that changes to the requirements of Rule 15Ga-1 would be appropriate for municipal securitizers.

Therefore, we are delaying compliance for new Rule 15Ga-1 for municipal securitizers for a period of three years after the date applicable to securitizers other than municipal securitizers.[53] For purposes of the delayed compliance only, a municipal securitizer would be any securitizer that is a State or Territory of the United States, the District of Columbia, any political subdivision of any State, Territory or the District of Columbia, or any public instrumentality of one or more States, Territories or the District of Columbia.

In addition, as discussed below, in an effort to limit the cost and burden on municipal securitizers subject to the new rule, as well as provide the disclosures for investors in the same location as other disclosures regarding municipal securities, we will permit municipal securitizers to satisfy the rule's filing obligation by filing the information on EMMA.[54]

4. Disclosures Required by Rule 15Ga-1

In accordance with Section 943 of the Act, we are adopting new Rule 15Ga-1[55] to require any securitizer of an Exchange Act-ABS to provide tabular disclosure of fulfilled and unfulfilled repurchase requests, so that investors may identify asset originators with clear underwriting deficiencies.

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51 Id.

52 See fn. 35.

53 See discussion below regarding transition period in Section III.

54 Id.

55 We are adopting this rule as an Exchange Act rule because of the relationship with other requirements under the Exchange Act and other statutory requirements we are implementing.

a) Proposed New Rule 15Ga-1

We proposed that if the underlying transaction agreements include a covenant to repurchase or replace an underlying asset for breach of a representation or warranty, then a securitizer would be required to provide the information described below for all assets originated or sold by the securitizer that were the subject of a demand for repurchase or replacement with respect to all outstanding Exchange Act-ABS of the securitizer held by non-affiliates of the securitizer. As discussed further below, we proposed that a securitizer provide the repurchase history for the last five years by filing Form ABS-15G at the time a securitizer first offers an Exchange Act-ABS or organizes and initiates an offering of Exchange Act-ABS, registered or unregistered, after the effective date of the new rules, as adopted. In addition, we proposed that going forward, a securitizer would provide the disclosures for all outstanding Exchange Act-ABS on a monthly basis by filing Form ABS-15G.

Section 943(2) requires disclosure of fulfilled and unfulfilled repurchase requests. Therefore, we proposed to require tabular disclosure of assets subject to any and all demands for repurchase or replacement of the underlying pool assets as long as the transaction agreements provide a covenant to repurchase or replace an underlying asset, which would include demands that did not result in a repurchase under the transaction agreements and demands that were made by the investors upon the trustee. We also proposed that securitizers be permitted to footnote the table to provide additional explanatory disclosures to describe the data disclosed.

In the Proposing Release, we expressed concern that initially a securitizer may not be able to obtain complete information from a trustee about demands made by investors because it may not have tracked these demands. Because securitizers may not have access to historical information about investor demands made upon the trustee, (as opposed to trustee demands upon the securitizer, which presumably, would be known to the securitizer) prior to the effective date of the new rules, we proposed an instruction that a securitizer may disclose in a footnote, if true, that a securitizer requested and was able to obtain only partial information or was unable to obtain any information with respect to investor demands to a trustee that occurred prior to the effective date of the proposed rules and state that the disclosures do not contain all investor demands made to the trustee prior to the effective date.

In the Proposing Release, we acknowledged that a single securitizer (i.e., sponsor) may have several securitization programs to securitize different types of asset classes. Because the Act requires information "aggregated by securitizer", we proposed that a securitizer list the names of all the issuing entities[56] of Exchange Act-ABS outstanding, in order of the date of formation of the issuing entity, so that investors may identify the securities that contain the assets subject to the demands for repurchase and when the issuing entity was formed. We also proposed to require disclosure of the asset class and grouping of the information in the table by asset class. Additionally, if any of the Exchange Act-ABS of the issuing entity were registered under the Securities Act, we proposed that the Central Index Key ("CIK") number of the issuing entity be disclosed and that the securitizer indicate by check mark whether any Exchange Act-ABS were registered. We noted that these items would provide important information that would enable an investor to locate additional publicly available disclosure for registered transactions, if applicable. Because the Act

[56] Issuing entity is defined in Item 1101(f) of Regulation AB [17 CFR 229.1101(f)] as the trust or other entity created at the direction of the sponsor or depositor that owns or holds the pool assets and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

provided that disclosure is required "so that investors may identify asset originators with clear underwriting deficiencies",[57] we proposed that securitizers further break out the information by originator of the underlying assets.

We also proposed that the table provide information about the assets that were subject of a demand; the assets that were repurchased or replaced; the assets that were not repurchased or replaced; and the assets that are pending repurchase or replacement.[58] Additionally, we proposed an instruction to include footnote disclosure about the reasons why repurchase or replacement is pending.[59] Lastly, we proposed that the table include totals by asset class for columns that require numbers of assets and principal amounts.[60]

b) Comments on the Proposed Rule

Comments on this aspect of the proposal were mixed. We received several comments on the form and the content of the table. Four commentators expressed general support that the proposed rule would implement the statutory requirements.[61] Some commentators suggested that we only require reporting where the repurchase obligation is tied to

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57 See Section 943(2) of the Act.

58 We noted that if the ABS were offered in a registered transaction, an investor may be able to locate additional detailed information. For instance, in the 2010 ABS Proposing Release, we proposed that issuers be required to provide loan-level disclosure of repurchase requests on an ongoing basis. If the proposal is adopted, then an issuer would be required to indicate whether a particular asset has been repurchased from the pool with each periodic report on a Form 10-D. If the asset has been repurchased, then the registrant would have to indicate whether a notice of repurchase has been received, the date the asset was repurchased, the name of the repurchaser and the reason for the repurchase. That proposal remains outstanding. See previously proposed Item 1(i) of Schedule L-D [Item 1121A of Regulation AB] in the 2010 ABS Proposing Release.

59 For example, the securitizer would indicate by footnote if pursuant to the terms of a transaction agreement, assets have not been repurchased or replaced pending the expiration of a cure period.

60 See letter from Association of Mortgage Investors on the 2010 ABS Proposing Release (requesting that disclosure of information regarding claims made and satisfied under representation and warranties provisions of the transaction documents be broken down by securitization and then aggregated).

61 See letters from ICI, Levin, Metlife, and SIFMA (investor members).

representations and warranties regarding the underwriting criteria.[62] Another commentator remarked that while repurchase requests occur for many reasons, they serve as a useful benchmark to identify loans with potential problems, such as early payment defaults, incorrect loan information, fraud problems, impermissible adverse selection procedures, or paperwork deficiencies.[63]

Several commentators also requested that demands be limited to those that comport with the procedures specified in the transaction documents.[64] One commentator noted that its investor members believe that existing transaction agreements include overly restrictive thresholds for recognizing bona fide repurchase demands, and noted that even where the data may be incomplete, demands that were not made in accordance with the relevant transaction documents would provide directional information as to the responsiveness of securitizers and originators of assets as well as identify originators with a history of underwriting deficiencies.[65]

Comments regarding the proposal to provide repurchase history for an initial five-year look back period were mixed. Several commentators were generally supportive of an initial look back period.[66] Two commentators noted that the requirement should apply regardless of whether the ABS is outstanding at the end of the reporting period.[67] Several

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62 See e.g., letters from ASF, BOA, GSEs, Kutak, NABL, MHFA, and NCHSA.

63 See letter from Levin.

64 See e.g., letters from ABA, American Bankers Association and ABA Securities Association (ABASA), American Financial Services Association (AFSA), ASF, BOA, Commercial Real Estate Finance Council (CREFC), Financial Services Roundtable (Roundtable), SIFMA and Wells Fargo Bank (Wells) (effectively excluding investor demands upon a trustee if not provided for in the transaction agreements). See also fn. 14.

65 See letter from SIFMA.

66 See e.g., letters from Association of Financial Guaranty Insurers (AFGI), CFRL, Metlife, MBIA Inc. (MBIA), and SIFMA.

67 See letters from Metlife and SIFMA.

others did not support an initial look back period and requested prospective application only.[68] Several commentators noted issues with historical information, such as lack of systems to capture the data, the change in underwriting standards since the housing crisis, misperceptions that may arise from analyzing fragmented data, and the ability to obtain the data from other transaction parties including that certain transaction parties may no longer exist.[69] We also received comment letters suggesting that a three- or five-year look back period would be appropriate for ongoing periodic disclosures.[70]

Several commentators requested that a securitizer should report activity for different asset classes in separate reports, instead of including the activity for all asset classes in which the securitizer has issued ABS in a single report, as proposed.[71] One commentator acknowledged that the result of this suggested change would be that some securitizers may be required to file more than one report, but its members believed reports by asset class would produce more consistent reports that are more useful to investors in evaluating particular offerings.[72]

Most commentators generally supported disclosure of the name of the asset originator.[73] A few commentators suggested that disclosure should only be required if the number of assets or amounts related to a particular originator exceeds a certain de minimis

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68 See e.g., letters from ABA, ABASA, AFSA, ASF, BOA, Community Mortgage Banking Project (CMBP), CREFC, GSEs, Kutak, MBA, NABL, Roundtable, and Wells. In addition, three commentators suggested that the statute did not clearly require historical information. See letters from ABA, ABASA and GSEs.

69 See e.g., letters from ABA, ABASA, BOA, CREFC, GSEs, Kutak, MBA, Roundtable and Wells.

70 See e.g., letters from AFSA, ASF, Metlife and SIFMA.

71 See e.g., letters from ABA, ABASA, AFSA, ASF, BOA, CREFC, Roundtable, and SIFMA.

72 See letter from SIFMA.

73 See e.g., letters from AFGI, CFRL, CMBP, MBIA and Metlife.

amount of the asset pool.[74] Another commentator requested that instead of listing all issuing entities, it be allowed to aggregate the data by seller of the loan and noted that the GSEs have hundreds of thousands of individual GSE securities outstanding; therefore, a listing by individual issuing entity would likely result in extremely unwieldy and disjointed disclosures.[75]

We also received several comments regarding revisions to the columns in the table in order to provide more standardized disclosures. Generally, commentators requested more standardization regarding demands that were pending and not repurchased or replaced.[76] One commentator also strongly recommended that whether, and to what extent detail is provided, should be left to the judgment of each individual securitizer, rather than mandated.[77] Other commentators requested we specifically require more narrative disclosure about the information presented in the table.[78]

c) Final Rule

After considering the comments, we are adopting the table substantially as proposed, with some modifications to the format of the table. We are also adopting modifications to the filing requirement for the initial disclosures and to the filing requirements for periodic disclosures. We continue to believe that Section 943(2) requires historical disclosures about

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74 See e.g., letters from GSEs, Kutak, and SIFMA. In addition, SIFMA noted that to the extent that an originator is no longer in existence, the securitizer should have the option of not providing the information related to such originator.

75 See letter from GSEs.

76 See e.g., letters from ASF, CMBP, Metlife and SIFMA (suggesting that additional columns should be added to the table to make clear which demand requests have not been resolved and are subject of arbitration, litigation or negotiation). See also letters from ABA, BOA and Roundtable (suggesting that standardized categories of information would better reflect the repurchase request and resolution process so that investors may more easily compare information presented in the table than if it were presented in footnotes only).

77 See letter from CREFC.

78 See e.g., letters from CFRL and Metlife.

a securitizer's repurchase history, in order to give investors a clearer sense of potential problems with originators' underwriting practices, but as we recognized in the Proposing Release, and as commentators stated, securitizers may not have all of the information readily available. Therefore, we have tailored the final amendments to address many of the concerns expressed by the commentators that we believe are consistent with the purposes of Section 943.

As proposed, we are requiring disclosure in the table with respect to any Exchange Act-ABS where the underlying transaction agreements contain a covenant to repurchase or replace an underlying asset for breach of a representation or warranty. We are not limiting the disclosure requirement to representations and warranties concerning underwriting standards, as suggested by some commentators[79] because as discussed above, covenants may require repurchase if the underlying asset does not meet other types of representations and warranties, such as applicable laws or fraud, which could also be indicative of underwriting deficiencies.[80] We are also revising the text of the regulation to refer to assets "securitized" by a securitizer instead of "originated and transferred" as proposed to address commentators concerns as described above.[81]

After considering the comments received, we are adopting additions to the table in order to provide better disclosures about the demand, repurchase and replacement history so that investors may identify asset originators with clear underwriting deficiencies.

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[79] See e.g., letters from ABA, ABASA, AFSA, ASF, BOA, CREFC, Roundtable, SIFMA and Wells.

[80] See Section I. See also letter from Levin (noting repurchase requests may occur for early payment defaults, incorrect loan information, fraud, impermissible adverse selection procedures and paperwork deficiencies).

[81] See e.g., letters from ASF, BOA, GSEs, MBA and SIFMA (generally noting that the requirement should apply solely to Fannie Mae or Freddie Mac and not the institution transferring loans for securitization by Fannie Mae or Freddie Mac. See also Section II.A.2. regarding the definition of securitizer for purposes of Rule 15Ga-1.

Name of Issuing Entity	Check if Regis-tered	Name of Originator	Total Assets in ABS by Originator			Assets That Were Subject of Demand			Assets That Were Repurchased or Replaced			Assets Pending Repurchase or Replacement (within cure period)			Demand in Dispute			Demand Withdrawn			Demand Rejected		
			(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	(n)	(o)	(p)	(q)	(r)	(s)	(t)	(u)	(v)	(w)	(x)
Asset Class X																							
Issuing Entity A CIK #	X	Originator 1																					
		Originator 2																					
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	
Asset Class Y																							
Issuing Entity B		Originator 3																					
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	

First, the final rule requires, as proposed, that a securitizer disclose the asset class and group the information in the table by asset class (column (a)).[82]

Second, the final rule requires, as proposed, that the securitizer disclose the names of the issuing entities[83] of the ABS and list the issuing entities in order of the date of formation (column (a)).[84] In addition, we are adding an instruction to clarify that the activity should include all issuing entities that had securities outstanding during the reporting period in order to provide investors with complete and comparable disclosure for the entire reporting period.[85]

Third, the final rule requires, as proposed, that the securitizer indicate by check mark whether the transaction was registered under the Securities Act of 1933 (column (b)) and provide the CIK number of the issuing entity (column (a)).[86]

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82 Rule 15Ga-1(a)(1)(i). As noted earlier, some commentators requested that a securitizer should report activity for different asset classes in separate reports, instead of including the activity for all asset classes in a single report. See e.g., letters from ABA, ASF, BOA, CMBP, Metlife, Roundtable and SIFMA. As discussed in Section II.A.2., both sponsor and depositors fall within the definition of securitizer and thus are obligated under Section 943 and the new rule to provide the disclosures. The final rule addresses commentators' requests because sponsors typically securitize assets of different classes through separate affiliated depositors for each asset class. For example, if a sponsor has two different affiliated depositors, one that securitizes auto loans and the other credit cards, the sponsor's reporting obligation would be satisfied if each of the depositors filed the required disclosures with respect to all of their respective trusts. Thus, a sponsor would not have to separately provide and file the same disclosures, if they were filed by an affiliated depositor of the same transaction. We expect users will find reports disclosing the information by asset class useful in making comparisons regarding originators of the same asset class.

83 17 CFR 229.1101(f).

84 Rule 15Ga-1(a)(1)(ii). In a stand-alone trust structure, usually backed by a pool of amortizing loans, a separate issuing entity is created for each issuance of ABS backed by a specific pool of assets. The date of formation of the issuing entity would most likely be at the same time of the issuance of the ABS. In a securitization using a master trust structure, the ABS transaction contemplates future issuances of ABS by the same issuing entity, backed by the same, but expanded, asset pool. Master trusts would organize the data using the date the issuing entity was formed, which would most likely be earlier than the date of the most recent issuance of securities.

85 See e.g., letters from Metlife and SIFMA (suggesting that disclosure should include any deals that were outstanding at any point in time during a reporting period).

86 Rule 15Ga-1(a)(1)(iii).

Fourth, the final rule requires, as proposed, that securitizers disclose the name of the originator of the underlying assets. In addition, we are adopting an instruction to clarify that all originators must be disclosed.[87] As noted earlier, some commentators requested that we require only disclosure of originators that originated more than a de minimis amount of the assets within an issuing entity, or that were responsible for more than a de minimis number of repurchase requests.[88] We, however, believe that in order for the disclosures to meet the purpose of the statute to "identify asset originators with clear underwriting deficiencies," it must be comparable, and even de minimis amounts may in the aggregate over time create information gaps about an originators' repurchase history. In addition, originators with no repurchase request activity should be listed in the table also to provide comparable disclosures.

Fifth, the final rule requires new columns to disclose the number, outstanding principal balance and percentage by principal balance of the assets originated by each originator in the pool at the time of securitization for each issuing entity (columns (d) through (f)).[89] We were persuaded by one commentator's suggestion that the columns should be added in order to assist investors in placing the information on repurchase demands in the proper context.[90] This way, investors may be able to determine the concentration of each originators' assets in each securitized asset pool.

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87 Rule 15Ga-1(a)(1)(iv). We are adding the instruction to clarify that all originators are required to be included. See generally, letters from AFGI, CFRL, CMBP, MBIA and Metlife (noting that without the disclosure requirement of the originator, it may be more difficult for investors to make fair comparisons regarding the repurchase history, including which originators are most likely to be subject to repurchase or replacement requests and which are most likely to honor such requests when made).

88 See e.g., letters from Kutak, GSEs and SIFMA.

89 Rule 15Ga-1(a)(1)(v).

90 See letter from CMBP.

Sixth, we are adopting, as proposed, a requirement to disclose the number, outstanding principal balance and percentage by principal balance of assets that were subject of a demand to repurchase or replace for breach of representations and warranties (columns (g) through (i)), including investor demands upon a trustee.[91] As stated earlier, Section 943(2) requires disclosure of fulfilled and unfulfilled repurchase requests. We continue to believe that disclosure should not be limited to only those demands, repurchases and replacements made pursuant to the transaction agreement alone. Investors have demanded that trustees enforce repurchase covenants because transaction agreements do not typically contain a provision for an investor to directly make a repurchase demand.[92] Since Section 943(2) does not limit the required disclosures to those demands successfully made by the trustee, under our final rule, investor demands upon a trustee are required to be included in the table, irrespective of the trustee's determination to make a repurchase demand on a securitizer based on the investor request. As we discussed above, we recognize that initially a securitizer may not be able to obtain complete information from a trustee because it may not have established systems to track investor demands. To address this concern, we are adopting, substantially as proposed, a provision in Rule 15Ga-1 that a securitizer may include a footnote if the securitizer was unable to obtain all information with respect to investor demands upon a trustee that occurred prior to July 22, 2010 (the effective date of the Act)

91 Rule 15Ga-1(a)(1)(vi)

92 See Jody Shenn, "BNY Won't Investigate Countrywide Mortgage Securities," Bloomberg Business Week (Sep. 13, 2010) available at http://www.businessweek.com/news/2010-09-13/bny-won-t-investigate-countrywide-mortgage-securities.html (noting the difficulties that investors are facing to enforce contracts with respect to repurchase demands) and Al Yoon, "NY Fed joins other investors on loan repurchase bid," Reuters (Aug. 4, 2010) available at http://www.reuters.com/article/idUSTRE6736DZ20100804 (noting that investors have been frustrated with trustees and servicers and are banding together to force trustees to act on repurchase requests). See also Kevin J. Buckley, "Securitization Trustee Issues," The Journal of Structured Finance (Summer 2010) (discussing investors demands upon trustees to enforce sellers' repurchase obligations).

and state that the disclosure does not contain investor demands upon a trustee made prior to July 22, 2010.[93]

The Act does not specify when the disclosure should first be provided, or the frequency with which it should be updated. We are adopting a three-year look back period for the initial disclosures, instead of a five-year look back period, as proposed. We believe a three-year look back period for the initial disclosures strikes the right balance between the disclosure benefits to investors, availability of historical information and compliance costs to securitizers.[94] Commentators suggested that periods from three to five years would provide a sufficient period of data for investors to make comparisons in order to identify underwriting deficiencies.[95] However, we also recognize other commentators' suggestions that the rule apply only prospectively because of concerns regarding the availability and comparability of historical information relating to repurchase demands (including investor demands upon a trustee).[96] In particular, older data may be very hard or impossible for securitizers to obtain if they have not had systems in place to track the data required for the required disclosures, which may lead to less comparable data. In order to balance the goals of the Act with commentators' concerns that all securitizers may not be able to provide complete information, we are also adopting a provision in Rule 15Ga-1[97] to permit a securitizer to omit information that is unknown or not reasonably available to the securitizer without

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93 Rule 15Ga-1(a)(2). See also Section 4 of the Act.

94 See also discussion in Section II.A.5.c.

95 See e.g., letters from AFSA, ASF, Metlife and SIFMA.

96 See e.g., letters from ABA, ABASA, AFSA, ASF, BOA, CMBP, CREFC, GSEs, Kutak, MBA, NABL, Roundtable, and Wells.

97 Rule 15Ga-1(a)(2). See e.g., letters from AFSA, ASF, BOA, CREFC, Roundtable and SIFMA.

unreasonable effort or expense similar to Exchange Act Rule 12b-21.[98] Under the final rule, a securitizer must provide the information it possesses or it can acquire without unreasonable effort or expense, and the securitizer must include a statement describing why unreasonable effort or expense would be involved in obtaining the omitted information.

Seventh, we are adopting, as proposed, a requirement to disclose the number, outstanding principal balance and percentage by principal balance of assets that were repurchased or replaced for breach of representation and warranties (columns (j) through (l)).[99]

Eighth, we are persuaded by commentators' suggestions that we should clarify our proposal for disclosures related to pending purchase requests in order to better reflect the repurchase request and resolution process in a comparable format, as opposed to if the information were presented in footnotes.[100] As a result, we are adopting requirements to present more specific information about the pending nature of the demand. We are requiring disclosure of the number, outstanding principal balance and percentage by principal balance of assets that are pending repurchase or replacement specifically due to the expiration of a cure period (columns (m) through (o))[101] and where the demand is currently in dispute (columns (p) through (r)).[102] If the cure period has expired, and the demand is not in dispute, the asset should be reflected in the "demand rejected" columns described below.[103]

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98 17 CFR 240.12b-21.

99 Rule 15Ga-1(a)(1)(vii).

100 See e.g., letters from ABA, ASF, BOA, CMBP, Metlife, Roundtable and SIFMA.

101 Rule 15Ga-1(a)(1)(viii). See e.g., letters from BOA, Roundtable and SIFMA.

102 Rule 15Ga-1(a)(1)(ix). See e.g., letters from ASF, CMBP, Metlife and SIFMA.

103 See e.g., letter from SIFMA.

Ninth, we are also persuaded by commentator's suggestions that we should clarify our proposal for disclosures related to unfulfilled repurchase requests.[104] As a result, we are adopting requirements to present the number, outstanding principal balance and percentage by principal balance of assets that were not repurchased or replaced because the demand was withdrawn (columns (s) through (u))[105] and because the demand was rejected (columns (v) through(x)).[106]

Tenth, we are addressing commentators' requests[107] that we clarify the disclosures required for the amount of outstanding principal balance and percentage by principal balance by adopting an instruction to specify that outstanding principal balance shall be the principal balance as of the reporting period end date and the percentage by principal balance shall be the outstanding principal balance of the asset(s) subject to the repurchase request(s) divided by the outstanding principal balance of the asset pool as of the reporting period end date.

Eleventh, we are adopting, with slight modification from our proposal, a requirement that the securitizer provide totals by each issuing entity reported, and for all issuing entities for columns that require number of assets and principal balance amounts.[108]

Finally, the rule requires securitizers to include narrative disclosure in order to further explain the information presented in the table, if applicable. We are revising the proposed instruction to clarify that securitizers should indicate by footnote and provide narrative disclosure in order to further explain information presented in all columns of the table, as

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104 See fn. 100.

105 Rule 15Ga-1(a)(1)(x). See e.g., letters from CMBP, Roundtable and SIFMA.

106 Rule 15Ga-1(a)(1)(xi). See e.g., letters from BOA, Roundtable and SIFMA.

107 See e.g., letters from AFSA (suggesting that a method of calculation should be prescribed or disclosed in order to provide comparable data) and Roundtable (noting that the percentage by principal balance is not straightforward, given that the pool size will vary over time).

108 Rule 15Ga-1(a)(1)(xii). We had proposed to require totals by asset class only.

appropriate.[109] As noted above, we received several comments requesting that we expressly require certain disclosures to be provided by footnote or accompanying narrative disclosure.[110] Some commentators also requested confirmation that providing narrative information would not jeopardize an issuer's reliance upon a private offering exemptions or safe harbors.[111] As we noted in the Proposing Release, filing proposed Form ABS-15G would not foreclose the reliance of an issuer on the private offering exemption in the Securities Act of 1933 and the safe harbor for offshore transactions from the registration provisions in Section 5.[112]

5. Form ABS-15G

a) Proposed Form ABS-15G

As we discussed in the Proposing Release, the disclosures required by Rule 15Ga-1 do not fit neatly within the framework of existing Securities Act and Exchange Act Forms because those forms relate to registered ABS transactions, and unregistered ABS transactions are not required to file those forms.[113] Therefore, we proposed new Form ABS-15G to be filed on EDGAR so that parties obligated to make disclosures related to Exchange Act-ABS under Rule 15Ga-1 could file the disclosures on EDGAR. We proposed that a securitizer provide the repurchase history for the last five years by filing Form ABS-15G at the time a

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109 We had urged footnote disclosure for the entire table; however, we had specifically proposed an instruction with respect to repurchase requests that were pending.

110 See e.g., letters from SIFMA (requesting disclosure of the party responsible for the breach, exclusion of originator no longer in existence, and notation of assets subject to multiple repurchase requests); Metlife (requesting disclosure of specific violations of representations and warranties, status of the claims and the reason for denial); and ABA (requesting disclosure of whether a demand was resolved through an indemnity payment or purchase price adjustment but not a repurchase).

111 See e.g., letters from ABA, ASF, BOA and SIFMA.

112 15 U.S.C. 77e.

113 However, a portion of the information required by Rule 15Ga-1 would be required in a registration statement and in periodic reports as we discuss further below.

securitizer first offers an Exchange Act-ABS or organizes and initiates an offering of Exchange Act-ABS, registered or unregistered, after the effective date of the new rules, as adopted. In addition, we proposed that going forward, a securitizer would provide the disclosures for all outstanding Exchange Act-ABS on a monthly basis by filing Form ABS-15G within 15 calendar days after the end of each calendar month. We proposed continued periodic reporting through and until the last payment on the last Exchange Act-ABS outstanding held by a non-affiliate that was issued by the securitizer or an affiliate. We also proposed that securitizers file Form ABS-15G to provide a notice to terminate the reporting obligation and disclose the date the last payment was made. Consistent with current filing practices for other ABS forms,[114] for purposes of making the disclosures required by Rule 15Ga-1, we proposed that Form ABS-15G be signed by the senior officer of the securitizer in charge of the securitization.

b) Comments on the Proposed Rule

Comments received on new Form ABS-15G were mixed. Two commentators requested that disclosures be provided on currently available forms because Section 943 does not expressly require, nor create an obligation to file on a new form.[115] One commentator suggested that the disclosure requirements apply only to an initial offering of an Exchange

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[114] The Form 10-K report for ABS issuers must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor, or on behalf of the issuing entity by the senior officer in charge of the servicing. See General Instruction J.3. of Form 10-K [17 CFR 249.310] In addition, the certifications for ABS issuers that are required under Section 302 of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7241] must be signed either on behalf of the depositor by the senior officer in charge of securitization of the depositor if the depositor is signing the Form 10–K report, or on behalf of the issuing entity by the senior officer in charge of the servicing function of the servicer if the servicer is signing the Form 10-K report. In our 2010 ABS Proposing Release, we also proposed to require that the senior officer in charge of securitization of the depositor sign the registration statement (either on Form SF-1 or Form SF-3) for ABS issuers. See Section II.F. of the 2010 ABS Proposing Release.

[115] See letters from AFSA (suggesting that securitizers be given a choice of providing the information either on new Form ABS-15G or by presenting the disclosure in related offering documents) and ASF (noting that disclosure would be more useful to investors in an offering document).

Act-ABS, and not to ongoing reporting because they believe that ongoing information regarding repurchase activity will provide little benefit to investors who have already made the decision to purchase a particular ABS.[116] However, another commentator stated that filing Form ABS-15G on EDGAR would make the disclosures readily available to all investors and the public and would ensure that the data is maintained, easy to find, and cost free for investors as well as regulators and policymakers.[117]

Several commentators suggested that the trigger for the initial filing not be tied to when a securitizer completes its first offering after the effective date of the new rule.[118] Of those, two commentators suggested that the Form ABS-15G filings be required on a certain date after the effective date of the new rules.[119] In support of the proposed trigger, one commentator noted that the prospect of a new issuance by many securitizers may be delayed for a long period following the effective date of the final rules. As a result, investors and insurers of outstanding ABS would be deprived of the information at a time when representation and warranty repurchase claims and disputes related to residential mortgages, in particular, are increasing.[120] Several commentators requested a long implementation period in order to set up systems and gather historical data.[121] Three commentators proposed alternative filing rules suggesting we require securitizers to file a single Form ABS-15G if no

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116 See letter from AFSA (but also noting that frequent securitizers who sponsor multiple asset classes would find it easier to make a single filing on Form ABS-15G rather than in a series of prospectuses).

117 See letter from Levin.

118 See e.g., letters from AFGI, AFSA, ASF, MBIA, Metlife and SIFMA.

119 See Metlife (suggesting 90 days after effective date), and ASF (suggesting no earlier than one year after effective date).

120 See letter from AFGI. Metlife also requested that sponsors with significant outstanding securitizations should file Form ABS-15G in order to enable fair comparisons for investors.

121 See e.g., letters from ASF, BOA, GSEs, MBA and SIFMA. See further discussion about the transition period below in Section III.

demands are received.[122] Three suggested that, thereafter, an annual confirmation could be filed to confirm that no demands have occurred since the filing of the previous Form ABS-15G.[123]

Comments received on reporting frequency of ongoing reporting were mixed, with some supporting monthly,[124] quarterly,[125] and annual[126] ongoing reporting. Several commentators suggested that reporting should only be required if any repurchase activity has occurred.[127] The preferred due date of the filing ranged from 30 days to 90 days after the end of the period.[128] In addition, some commentators requested that the table be presented in periodic intervals rather than on a cumulative basis.[129]

c) Final Form ABS-15G

We are adopting new Form ABS-15G so that securitizers may provide the disclosures required by new Rule 15Ga-1. As noted above, the Act does not specify when the disclosure

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122 See letters from ABA, ASF and SIFMA. In addition, two other commentators suggested that only a statement or checkbox be provided to confirm no activity to report if periodic reporting would still be required. See letters from AFSA and NABL.

123 See letters from ABA, ASF and SIFMA.

124 See letters from AFGI and ICI (generally supporting monthly reporting), and Metlife (noting that monthly reporting would be adequate and that a frequency longer than quarterly would fail to provide investors with information about underwriting deterioration).

125 Some commentators noted that the repurchase process may move slowly, and monthly reporting may not be a useful interval for investors. In particular, residential mortgage ABS typically provide for cure periods of 60-90 days. Further, commentators argued that monthly reporting of no change in activity would be burdensome. See e.g., letters from ABA, ABASA, ASF, CREFC, Roundtable and SIFMA. Other commentators generally supported a quarterly reporting interval. See letters from BOA, CMBP, GSEs, MBA and NYC.

126 See letters from AFSA, GSEs, Kutak, NABL and NYC (generally supporting an annual reporting interval).

127 See e.g., letters from ABA, AFSA, BOA, NABL, Roundtable and SIFMA.

128 See letters from ABA and NABL (suggesting the Form ABS-15G be required 45 days after period end). See also letters from AFSA, CREFC, NYC and SIFMA.

129 See letter from Metlife (noting that repurchase activity in more recent windows of time would provide useful information on trends in asset quality). See also letter from ABA (noting that cumulative reporting may make the information unwieldy and that information about earlier periods would be available on the SEC website).

should first be provided, or the frequency with which it should be updated. As discussed above in Section III.A.4.c., we are adopting a requirement to file initial disclosures required by new Rule 15Ga-1 for the last three years. However, we were persuaded by commentators' concerns that our proposal to trigger the filing requirement of Form ABS-15G at the time a securitizer first offers an Exchange Act-ABS or organizes and initiates an offering of Exchange Act-ABS, registered or unregistered, after the effective date of the new rules could deny market participants of information about demand, repurchase and replacement activity.[130] Further, delaying the required disclosure of information about originators could impair investors' ability to compare issuing entities and the originators of the underlying pools. Therefore, we are adopting a requirement that any securitizer that issued an Exchange Act-ABS during the three-year period ended December 31, 2011, that includes a covenant to repurchase or replace an underlying asset for breach of a representation or warranty, would be required to file on new Form ABS-15G the disclosures required by new Rule 15Ga-1, if the securitizer has Exchange Act-ABS that had such a covenant to repurchase or replace outstanding held by non-affiliates as of December 31, 2011.[131] If a securitizer has no activity to report for the three-year period, then it may indicate that by checking the appropriate box on Form ABS-15G. The initial Form ABS-15G will be required to be filed no later than 45 days after the end of the three-year period, or on February 14, 2012.

As we discussed in the Proposing Release, while we believe that Congress intended to provide investors with historical information about repurchase activity so that investors may

130 See e.g., letters from AFGI, MBIA, Metlife and SIFMA.

131 Rule 15Ga-1(c).

identify asset originators with clear underwriting deficiencies, we also recognized that securitizers may not have historically collected the information required under the new rules. We are requiring that the initial disclosures be limited to the last three years of activity, rather than five years as proposed, in order to balance the requirements of Section 943 and the burden on securitizers to provide the historical disclosures. As we note above, we are also adopting certain provisions in new Rule 15Ga-1 in order to address commentators' concerns regarding the production of historical information.[132] On balance, we believe that the new rule addresses the Act's requirement and investors' need for historical disclosures in order to identify asset originators with clear underwriting deficiencies, while also addressing securitizers' concerns with the challenges of producing historical information and related liability.

We are also persuaded by commentators' views regarding the frequency of reporting and, therefore, we are adopting a requirement for securitizers to provide periodic disclosures of demand, repurchase and replacement history on a quarterly basis[133] by filing Form ABS-15G on EDGAR within 45 days of the end of the calendar quarter.[134] In the Proposing Release, we noted that most transaction agreements provide for monthly distributions, and also provide for reporting on a monthly basis. We were persuaded, however, by commentators' suggestions that demand, repurchase and replacement history could be presented in less frequent intervals while still providing meaningful disclosure. For instance, as commentators noted, the repurchase process may move slowly, and monthly reporting

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132 See Section II.A.4.c., Rule 15Ga-1(c)(1) and Item 1.01 of Form ABS-15G.

133 See e.g., letters from ABA, ABASA, ASF, BOA, CMBP, CREFC, GSEs, MBA, Metlife, NYC, Roundtable and SIFMA.

134 See Rule 15Ga-1(c)(2) and Item 1.02 of Form ABS-15G. See e.g., letters from ABA and NABL.

may not be a useful interval for investors if no activity typically occurs during such periods.[135] We also had proposed that ongoing disclosures be presented on a cumulative basis, for each issuing entity. Instead, we are adopting, as suggested by commentators, a requirement for securitizers to present only the information for the quarter in their quarterly filing because cumulative data may be cumbersome to manipulate and not be as useful to identify recent trends as information presented on a quarter by quarter basis.[136] In addition, as noted in the Proposing Release, we recognize that demands may have been made prior to the beginning of the initial look back period and that resolution may have occurred after that date. We are also adopting two instructions to clarify that a securitizer would need to disclose activity during the reporting period, even if it relates to assets that were subject to demands made prior to the beginning of the reporting period,[137] including if they were made prior to the beginning of the three-year look back period. Securitizers should include footnote disclosure to clarify, if applicable.

Further, to address commentators' concerns that certain issuers who include a covenant to repurchase or replace pool assets in their transaction agreements, but who are never presented with a repurchase demand would be required to make disclosure, we are

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135 See fn. 125. Also, as we discuss further below, we are adopting amendments to Regulation AB that would require disclosure of demand, repurchase and replacement history with respect to a particular issuing entity to be provided in distribution reports, which may occur more frequently than quarterly. For example, if a Form 10-D is due to be filed monthly for a particular issuing entity, then demand, repurchase and replacement history of that particular ABS would have to be reported monthly. See e.g., letter from SIFMA.

136 Rule 15Ga-1(c)(2). See letters from ABA (suggesting that only updated information be provided) and Metlife (noting that repurchase activity in more recent windows of time would provide useful information on trends in asset quality). In addition, investors may locate information about prior periods on our website and as we discuss below in Section II.B.3., we are amending Regulation AB to require cumulative repurchase history for a three-year look back period in prospectuses. We also highlight the instruction to Rule 15Ga-1(a)(1)(ii) which specifies that the table should include all issuing entities with activity during the quarterly reporting period, including those that are no longer outstanding at the end of the calendar quarter.

137 See instructions to paragraph (a)(1) and (c)(1) of Rule 15Ga-1.

adopting a provision, suggested by commentators,[138] that in lieu of providing the table, a securitizer may check a box indicating that it had no demands during the quarter.[139] Thereafter, a securitizer would have suspended its obligation to report on a quarterly basis, until the time when a demand occurs during the quarterly reporting period.[140] However, the securitizer would be required to file an annual Form ABS-15G to confirm that no demands were made during the entire year.[141] If demands were made during a calendar quarter, the securitizer would have to report that activity for the calendar quarter by filing Form ABS-15G within 45 days of the end of the calendar quarter. The new rule would also apply to new securitizers where the new securitizer would have to file Form ABS-15G for the calendar quarter in which it issued Exchange Act-ABS.[142] If no demand activity occurred, it could check the box indicating that no activity occurred and thereafter, would not have to file Form ABS-15G on a quarterly basis until it had demand history to report. A new securitizer would still be required to file an annual Form ABS-15G to indicate it had no demand activity if true.

We are also adopting, as proposed, the ability to terminate the reporting obligation. The new rule allows a securitizer to terminate its reporting obligation when the last payment is made on the last Exchange Act-ABS outstanding held by a non-affiliate that was issued by the securitizer or an affiliate.

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138 See e.g., letters from ABA and ASF.

139 Rule 15Ga-1(c)(2)(i).

140 If a securitizer had no activity during the initial three-year period, and indicated that by checking the box on the initial filing, then its obligation to file periodic filings would be suspended. See Rule 15Ga-1(c)(2)(i).

141 Rule 15Ga-1(c)(2)(ii).

142 Rule 15Ga-1(c)(2)(i). We had proposed that the disclosure requirements would be triggered with an offering of Exchange Act-ABS. Under the final rule, a new securitizer would not be required to make the initial three-year look back filing because it would not have any Exchange Act-ABS outstanding as of December 31, 2011 and thus, would not have any historical repurchase activity to report. Thus, a new securitizer is only required to provide information on a prospective basis.

Lastly, as discussed above, in an effort to limit the cost and burden on municipal securitizers subject to the new rule as well as allow issuers to provide the Rule 15Ga-1 disclosures for investors in the same location as other disclosures regarding municipal securities, we will permit municipal securitizers to satisfy the filing obligation by filing the information required by new Rule 15Ga-1 on EMMA.[143]

B. Disclosure Requirements in Regulation AB Transactions

1. Proposed Amendments to Regulation AB

We re-proposed some of our 2010 ABS proposals for Regulation AB with respect to disclosures regarding sponsors in prospectuses and with respect to disclosures about the asset pool in periodic reports, so that issuers would be required to include the disclosures in the same format as required by proposed Rule 15Ga-1(a).[144] We proposed that issuers of Reg AB-ABS provide disclosures in the same format as proposed Rule 15Ga-1(a) within a prospectus and within ongoing reports on Form 10-D. For prospectuses, we proposed that if the underlying transaction agreements provide a covenant to repurchase or replace an underlying asset for breach of a representation or warranty, then issuers would be required to provide in the body of the prospectus disclosure of a sponsor's repurchase demand and repurchase and replacement history for the last three years, pursuant to the format proscribed in Rule 15Ga-1(a). In addition, we proposed to limit the disclosure required in the prospectus to repurchase history for the same asset class as the securities being registered.

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143 Rule 314 of Regulation S-T.

144 In the 2010 ABS Proposing Release, we also proposed to amend Item 1110(c) of Regulation AB to require originators (of greater than 20% of the assets underlying the pool) to disclose the amount, if material, of publicly securitized assets originated or sold by the sponsor that were the subject of a demand to repurchase or replace for breach of the representations and warranties concerning the pool assets that has been made in the prior three years pursuant to the transaction agreements on a pool by pool basis as well as the percentage of that amount that were not then repurchased or replaced by the sponsor. That proposal remains outstanding.

Our proposal did not include a materiality threshold, as Section 943 includes no such standard. We proposed that a reference be included in the prospectus to the Form ABS-15G filings made by the securitizer (i.e., sponsor) of the transaction and disclose the CIK number of the securitizer so that investors may easily locate Form ABS-15G filings on EDGAR.

We also proposed to amend Item 1121 of Regulation AB so that issuers would be required to disclose the demand, repurchase and replacement history regarding the assets in the pool in the format prescribed by new Rule 15Ga-1(a) in Form 10-D. In order to conform the requirements to proposed Rule 15Ga-1, we also did not include a materiality threshold. We proposed that the Form 10-D include a reference to the Form ABS-15G filings made by the securitizer of the transaction and disclose the CIK number of the securitizer so that investors may easily locate Form ABS-15G filings on EDGAR. As we noted in the Proposing Release, providing repurchase history disclosure in prospectuses and in Form 10-D would be independent from and would not alleviate a securitizer's obligation to disclose ongoing information for all of their transactions as required by new Rule 15Ga-1.

2. Comments Received on the Proposal

Commentators generally supported our proposal to have Regulation AB disclosures in the same format as required under proposed Rule 15Ga-1 to lessen the burden on securitizers and permit investors to more readily review and compare the data.[145] However, we also received three comment letters suggesting that Regulation AB should be subject to a materiality threshold [146]

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145 See letters from Metlife and SIFMA.

146 See letters from ASF, BOA and SIFMA.

One commentator suggested that the information presented in the prospectus should be presented as of a date not later than 135 days prior to the date of first use of the prospectus.[147] We received one comment letter which stated that monthly reporting is appropriate at the issuing entity level where most ABS are making distributions to investors on a monthly basis and monthly reporting is tied directly to that schedule.[148]

Five commentators supported a different liability standard for historical data[149] and some suggested that we adopt implementation in a fashion similar as we had provided for static pool implementation.[150]

3. Final Rule

We are adopting the amendment to Item 1104 substantially as proposed with a few modifications in response to comments received.[151] We are revising the text of the regulation to refer to assets "securitized" by a securitizer instead of "originated and transferred", as proposed, to address commentators concerns and to conform to Rule 15Ga-1 as described above in Section II.A.2. Also, as proposed, tabular disclosure is required in prospectuses in the format required by new Rule 15Ga-1 for the last three years.[152] We are also adopting, as proposed, a requirement that issuers include a reference to the CIK number of the securitizer.

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147 See letter from BOA.

148 See letter from SIFMA.

149 See letters from AFSA, ASF, BOA, Roundtable and SIFMA.

150 See letters from AFSA, ABA, BOA and SIFMA (suggesting that information related to periods prior to the effective date or ABS issued prior to the effective date not be considered part of the prospectus or registration statement). See also Section III.B.4. of the 2004 ABS Adopting Release.

151 Item 1104(e) of Regulation AB.

152 Item 1104(e)(1) of Regulation AB. As we noted in the Proposing Release, we proposed that prospectuses include disclosure about the same asset class for a three-year look back period because information about other asset classes and information older than three years may make the size of the prospectus unwieldy and investors should have ready access to more current information. See fn. 57 of the Proposing Release.

In addition, and as suggested by a commentator,[153] we are adopting a requirement that the information presented in the prospectus shall not be more than 135 days old.[154] This provision should reduce the burdens on securitizers because it is consistent with the disclosure conventions for static pool and interim financial information as well as the quarterly filing deadlines we are adopting today for Form ABS-15G.[155] It also should not diminish the quality of the information provided to investors because, as we discuss above, commentators stated that the repurchase process is typically slow and quarterly reporting is an appropriate interval to provide useful information about demand and repurchase activity.[156] In addition, information subsequent to the last quarterly reporting period may be available for a particular Exchange Act-ABS if it is required to report on Form 10-D on a more frequent basis than quarterly, such as monthly.

Finally, as we discuss above, commentators expressed significant concern about the ability to produce historical data to meet the requirements of Item 1104 and requested specific relief from liability for historical information.[157] We recognize that issuers may not have been collecting the necessary data for periods before the compliance date of the new rules and even if they had been collecting the necessary information, the information may not have been collected under processes and controls with a view toward disclosure in a prospectus. However, we believe that concerns regarding the availability of data on a going

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153 See letter from BOA.

154 Item 1104(e)(3). For example, a prospectus dated May 12, 2012 could include information as of December 31, 2011 (the information would be 133 days old); however, because a quarterly report on Form ABS-15G for the period ending March 31, 2012, would be due on May 15, 2012 (45 days after quarter end), then a prospectus dated May 17, 2012 would need to provide disclosures as of March 31, 2012.

155 See, e.g., Item 1105 of Regulation AB (17 CFR 229.1105), Rule 3-01 of Regulation S-X (17 CFR 210.3-01) and Rule 3-12 of Regulation S-X (17 CFR 210.3-12).

156 See fn. 125 and 135.

157 See e.g. letters from AFSA, ASF, BOA, Roundtable and SIFMA.

forward basis will not be applicable. Therefore, we are addressing commentators' concerns by phasing in the disclosure requirement. A prospectus filed in the first year after the compliance date, will be permitted to include a one-year look back period, and in the second year after the compliance date, a two-year look back period.[158] Prospectuses filed in the third year after the compliance date and thereafter must include the full three-year look back period.

We are also adopting the amendment to Item 1121, as proposed, so that investors will receive disclosures with their reports on Form 10-D about the demand, repurchase and replacement history with respect to a particular issuing entity.

C. Disclosure Requirements for NRSROs

1. Proposed New Rule 17g-7

We proposed to add new Exchange Act Rule 17g-7, which would implement Section 943(1) of the Act by requiring an NRSRO to make certain disclosures in any report accompanying a credit rating relating to an asset-backed security.[159] Specifically, in accordance with Section 943(1), Rule 17g-7 as proposed would require an NRSRO[160] to

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[158] Therefore, prospectuses filed between February 14, 2012 and February 13, 2013 would be permitted to include only one year of repurchase activity; prospectuses filed between February 14, 2013 and February 13, 2014 would be permitted to include only two years of repurchase activity. All prospectuses filed on or after February 14, 2014 would be required to include three years of repurchase activity. Investors may locate information for prior periods on Form ABS-15G.

[159] In June 2008, we proposed a new Rule 17g-7 that would have required an NRSRO to publish a report containing certain information each time the NRSRO published a credit rating for a structured finance product or, as an alternative, use ratings symbols for structured finance products that differentiated them from the credit ratings for other types of debt securities. See Exchange Act Release No. 57967 (June 16, 2008), [73 FR 36212]. In November 2009, we announced that we were deferring consideration of action on that proposal and separately proposed a new Rule 17g-7 to require annual disclosure by NRSROs of certain information. See Proposed Rules for Nationally Recognized Statistical Rating Organizations, SEC Release 34–61051 (November 23, 2009), [74 FR 63866]. Although we are adopting a new rule with the same rule number, that proposal remains outstanding.

[160] Current Item 1111(e) of Regulation AB [17 CFR 1111(e)] already requires issuers to disclose the representations and warranties related to the transaction in prospectuses. Additionally, in the 2010 ABS Proposing Release, the Commission proposed changes to this item to require a description of any representation

include, in such reports, a description of the representations, warranties and enforcement mechanisms available to investors and a description of how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.[161] As discussed above, the Act also amended the Exchange Act to include the definition of an "asset-backed security" and Section 943 of the Act references that definition.[162] Therefore, we proposed that under Rule 17g-7 an NRSRO must provide the disclosures with respect to any Exchange Act-ABS, whether or not the security is offered in a transaction registered with the Commission.

In the Proposing Release we noted that Section 943, by its terms, applies to any report accompanying a credit rating for an ABS transaction, regardless of when or in what context such reports and credit ratings are issued. Proposed Rule 17g-7 was intended to reflect the broad scope of this congressional mandate. In addition, we proposed a note to the new rule which would clarify that for the purposes of the proposed rule, a "credit rating" would include any expected or preliminary credit rating issued by an NRSRO.[163] We noted in the Proposing Release that in ABS transactions, pre-sale reports are typically issued by an NRSRO at the time the issuer commences the offering and typically include an expected or preliminary credit rating and a summary of the important features of a transaction. We also

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and warranty relating to fraud in the origination of the assets, and a statement if there is no such representation or warranty.

161 As discussed in the Proposing Release, we anticipate that one way an NRSRO could fulfill the requirement to describe how representations, warranties and enforcement mechanisms differ from those provided in similar securities would be to review previous issuances both on an initial and an ongoing basis in order to establish "benchmarks" for various types of securities and revise them as appropriate.

162 See Section 3(a)(77) of the Exchange Act, as amended by the Act.

163 As explained in the Proposing Release, we intend the term "preliminary credit rating" to include any rating, any range of ratings, or any other indications of a rating used prior to the assignment of an initial credit rating for a new issuance. See generally Credit Ratings Disclosure, SEC Release No. 33–9070 (October 7, 2009) [74 FR 53086].

noted that disclosure at the time pre-sale reports are issued is particularly important to investors, since such reports provide them with important information prior to the point at which they make an investment decision.[164]

2. Comments received on Proposed Rule

We received two comment letters expressing general support for the enhanced disclosure that the proposed Rule 17g-7 would require.[165] One commentator noted that it should facilitate an investor's understanding of available remedies for a breach and that the additional requirement for NRSROs to produce information regarding the representations, warranties and enforcement mechanisms available to investors in issuances of similar securities would further enhance the value of this information for investors by allowing them to readily compare various transactions involving the same asset class or similar asset class.[166]

Two commentators requested that the rule text be revised to refer exclusively to representations and warranties regarding the pool assets.[167] One commentator expressed its belief that Congress intended Section 943(1) to include those representations and warranties that an issuer makes about the underlying assets, not those concerning other aspects of the transaction, e.g., corporate or governance representations.[168]

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164 We further noted that Section 932 of the Act amends Section 15E of the Exchange Act to require the Commission to adopt rules requiring NRSROs to prescribe and use a form to accompany the publication of each credit rating that discloses certain information. See Section 932 of the Act. For the purposes of Section 943 and new Rule 17g-7, such a form would clearly be a "report" and, as such, if published in connection with a rating relating to an asset-backed security, would therefore require the necessary disclosures regarding the representations, warranties and enforcement mechanisms available to investors and how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.

165 See letters from ICI and Levin.

166 See letter from ICI.

167 See letters from ABA and Moody's.

168 See letter from Moody's.

We received several comments regarding the term "similar securities." Several commentators requested that we clarify or expressly define the term,[169] while one commentator suggested that we require all NRSROs (in collaboration with investors and other market participants) to agree on concepts of "similar securities."[170] On the other hand, one commentator argued that deciding whether one security is similar to another, and therefore deciding whether their terms are comparable, is ultimately a question of analytic judgment that should be left in the hands of the NRSRO.[171]

Some commentators urged us to allow NRSROs to provide the required disclosures by reference to a transaction's offering documents or other materials disclosed by the issuer or underwriter, primarily due to the anticipated length of the disclosures.[172] One commentator suggested as an alternative limiting the disclosure requirement to a summary of the provisions.[173] However, another commentator opposed allowing NRSROs to satisfy the proposed disclosure requirement by referring to prospectus disclosure, noting the enhanced utility to investors that would arise from placing the relevant disclosure in a ratings report alongside information about the representations, warranties and enforcement mechanisms available to investors in issuances of similar securities.[174]

Commentators were also divided on the issue of utilizing, for the purpose of the required disclosure, industry standards for the representations, warranties and enforcement mechanisms available to investors. Several commentators voiced support for allowing

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169 See e.g., letters from ASF, CREFC, Fitch, Levin, MBA, Realpoint and SIFMA.

170 See letter from Metlife.

171 See letter from S&P.

172 See letters from ASF, Moody's, Realpoint and S&P.

173 See letter from ASF.

174 See letter from ICI.

comparisons to industry standards for the representations, warranties and enforcement mechanisms available to investors as an alternative to comparisons to the representations, warranties and enforcement mechanisms available to investors in issuances of similar securities,[175] while others suggested that the rule should eliminate the comparison to standard securities altogether and replace it with a requirement to provide comparisons to industry standards.[176] One commentator suggested instead that the rule itself establish or reference mechanisms "to encourage the development and standardization of effective ABS representations and warranties to increase the ability to make meaningful comparisons among ABS securities and to strengthen investor confidence that promises made to investors can be enforced."[177] Other commentators, however, opposed the use of industry standards for comparative purposes.[178] Finally, some commentators suggested that the rule should expressly state that comparisons to either an NRSRO's internal benchmarks for representations, warranties and enforcement mechanisms or to any applicable industry standards would meet the requirement.[179]

We received two comment letters expressing conditional support for the note to the proposed rule clarifying that for the purposes of the proposed rule, a "credit rating" would

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175 See letters from ASF, CREFC, Moody's and S&P.

176 See letters from Realpoint and Metlife. The latter commentator suggested comparisons to industry standards as an alternative to its preferred basis of comparison, a uniform set of representations, warranties and enforcement mechanisms within each underlying asset class agreed upon by all NRSROs in collaboration with investors and other market participants.

177 See letter from Levin.

178 See letters from MBA and SIFMA.

179 See letters from ASF and S&P. The ASF noted that its NRSRO members have broad-based internal measures for representations and warranties in ABS transactions, and believe that these measures could act as benchmarks, or as a starting point for developing benchmarks, to meet the required comparison.

include any expected or preliminary credit rating issued by an NRSRO.[180] One of these commentators expressed its belief that the required disclosure should be limited *only* to pre-sale reports,[181] while the second stated that its support was contingent on our allowing all required disclosure under the rule to be done by reference to issuer or underwriter materials.[182] Another commentator, noting that under existing market practice, the timing of pre-sale reports is often unpredictable and there may have been instances where rating agencies have not provided pre-sale reports for rated transactions, expressed its belief that the required disclosure should be part of the offering memorandum.[183]

Two commentators expressed their belief that the rule's requirements should apply to issuer paid ratings only.[184] Another commentator, however, argued against exempting non-issuer paid ratings from the scope of the rule, noting that Section 943(1) does not discriminate between NRSRO business models.[185] Finally, one commentator argued that the rule should not apply to ratings of ABS issuances by foreign issuers that are not issuing securities into the US market.[186]

3. Final Rule

We are adopting new Rule 17g-7 as proposed, including the proposed note to the rule indicating that for the purposes of the rule's requirement, a "credit rating" includes any expected or preliminary credit rating issued by an NRSRO. As explained in the Proposing

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180 See letters from Realpoint and S&P.

181 See letter from Realpoint (also arguing for the exclusion of surveillance reports from the rule's scope).

182 See letter from S&P.

183 See letter from Metlife.

184 See letters from ABA and Realpoint.

185 See letter from S&P.

186 See letter from Moody's.

Release, we intend the term "preliminary credit rating" to include any rating, any range of ratings, or any other indications of a rating used prior to the assignment of an initial credit rating for a new issuance.

We acknowledge commentators' concerns about the interpretation of the term "similar securities," as well as some commentators' requests that NRSROs be allowed to utilize comparisons to industry standards as an alternative to, or instead of, comparisons to the representations, warranties and enforcement mechanisms available to investors in issuances of similar securities. While we recognize these views, we are concerned that defining similar securities or allowing reliance exclusively on industry standards for the purpose of the required comparisons could create unintentional gaps in disclosure. We expect, however, that in making its own determinations as to what constitutes a "similar security" for the purposes of the required comparisons, an NRSRO would draw upon its knowledge of industry standards, along with its own experience with previously rated deals and its knowledge of the market in general. As discussed in the Proposing Release, we anticipate that one way an NRSRO could fulfill the requirement to describe how representations, warranties and enforcement mechanisms differ from those provided in similar securities would be to review previous issuances both on an initial and an ongoing basis in order to establish, and periodically revise as appropriate, "benchmarks" for various types of securities.

As noted above, several commentators suggested we allow NRSROs to satisfy the requirements of new Rule 17g-7 by incorporating the required disclosures by reference to the transaction's offering documents. We were not persuaded, however, by these comments and believe that Congress intended, by including clear and specific language in Section 943(1), that investors receive the disclosures within the ratings report itself. Similarly, in response to commentators' suggestions that the rule should apply only to representations and warranties regarding the pool assets, as well as to the suggestion that the rule should not apply to foreign issuers that are not issuing securities into the US market, we note that nothing in the text of Section 943(1) would support drawing any such distinctions in connection with reports issued by NRSROs subject to Commission oversight.

We also acknowledge commentators' concerns regarding the application of the rule to unsolicited ratings. We note that this concern can be addressed directly by NRSROs themselves through disclosure in their reports accompanying credit ratings. For example, an NRSRO could disclose whether it was hired by the arranger and therefore received information on the representations, warranties and enforcement mechanisms directly; was issuing an unsolicited rating using access to arranger information provided under Rule 17g-5(a)(3),[187] in which case it obtained that information indirectly; or was issuing an unsolicited rating without relying on Rule 17g-5(a)(3), in which case it may not have had access to the information at all. The rule as adopted does not include any limitation on the application of the disclosure requirement to "any report accompanying a credit rating." As such, the requirements of the rule will apply to reports issued in conjunction with both solicited and unsolicited ratings.

III. Transition Period

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[187] 17 CFR 240.17g-5(a)(3). This provision requires an NRSRO that is hired by an arranger to determine an initial credit rating for a structured finance product to take certain steps designed to allow an NRSRO that is not hired by the arranger to nonetheless determine an initial credit rating – and subsequently monitor that credit rating – for the structured finance product. See Amendments to Rules for Nationally Recognized Statistical Rating Organizations, SEC Release No. 34-61050 (November 23, 2009) [74 FR 63832].

The new rules will be effective 60 days after publication in the Federal Register; however, securitizers, issuers and NRSROs will be required to comply with the new rules as described below.

With regard to Rule 15Ga-1, we received several comments suggesting a compliance date of six months,[188] one year,[189] 18 months[190] and two years[191] from the effective date of the new rule. Some commentators noted that securitizers need a longer time to implement the systems for tracking and recording repurchase requests necessary to comply with the rule.[192] However, other commentators believed that many securitization sponsors and servicers have systems in place and have collected the information.[193]

We have considered the comments and as noted earlier, for those securitizers other than municipal securitizers, who have issued ABS during the three-year period ended December 31, 2011, the rule will require that the initial filing pursuant to new Rule 15Ga-1 be filed on EDGAR by February 14, 2012. We are providing this transition period so that securitizers and other transaction participants may set up systems and gather historical data and to track the data.

In addition, as discussed above, we are delaying compliance for a period of three years for municipal securitizers. Therefore, municipal securitizers will be required to make

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188 See letter from Roundtable (but noting a six month period would only be appropriate if the final rule would only require prospective information).

189 See letter from ASF (suggesting a compliance date of no earlier than one year from the date of publication of the final rule if the rule would only require prospective information).

190 See letters from BOA and SIFMA.

191 See letter from GSEs. See also letter from Roundtable suggesting an alternative of 24 months if securitizers are required to re-create data that was not maintained.

192 See letters from BOA, MBA and SIFMA.

193 See letters from AFGI and Metlife.

the initial filing required by Rule 15Ga-1(c)(1) for the three years ended December 31, 2014 and file on February 14, 2015. Also, as discussed above, we will permit municipal securitizers to satisfy the rule's filing obligation by filing the information on EMMA.

We are also providing the same transition period with respect to demand, repurchase and replacement history disclosure in registration statements and prospectuses in accordance with Regulation AB; therefore, Item 1104 disclosures would be required with the first bona fide offering of registered ABS on or after February, 14, 2012. The information in prospectuses should be as of date no older than 135 days. However, as we describe above, we are phasing in the look back period in the first two years of compliance.[194]

With respect to Form 10-Ds, the information should be provided with respect to the particular ABS that is required to report on Form 10-D after December 31, 2011. Securitizers will already be obligated to report information with respect to transactions issued prior to December 31, 2011 on Form ABS-15G on a quarterly basis; therefore, the information required by new Item 1121(c) of Regulation AB should be readily available to report on Form 10-D for a particular Reg AB-ABS (including for Reg AB-ABS issued prior to December 31, 2011).

With respect to Rule 17g-7, we received two comments about the transition period, one requesting six months[195] and the other one year,[196] in each case primarily to be able to comply with the requirement to perform a comparison to similar securities. We are providing a period of six months from the effective date of the new rule for NRSROs to

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194 In the first year after the compliance date issuers may limit the disclosures to the prior year of activity and in the second year after the compliance date, disclosures may be limited to the prior two years of activity.

195 See letter from Moody's.

196 See letter from Fitch.

comply with new Rule 17g-7. We believe this is sufficient time to allow NRSROs to set up the systems to collect, maintain and analyze previous issuances to establish benchmarks.

IV. Paperwork Reduction Act

A. Background

Certain provisions of the rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[197] We published notice requesting comment on the collection of information requirements in the Proposing Release, and we submitted these requirements to the Office of Management and Budget (OMB) for review in accordance with the PRA.[198]

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. The titles for the collections of information are:

(1) "Form ABS-15G" (a new collection of information);

(2) "Regulation S-K" (OMB Control No. 3235-0071); [199] and

(3) "Rule 17g-7" (a new collection of information).

The regulation listed in No. 2 was adopted under the Securities Act and the Exchange Act and sets forth the disclosure requirements for registration statements and periodic and

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197 44 U.S.C. 3501 et seq.

198 44 U.S.C. 3507(d) and 5 CFR 1320.11.

199 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.

current reports filed with respect to asset-backed securities and other types of securities to inform investors.

The regulations and form listed in Nos. 1 and 3 are new collections of information under the Act. Rule 15Ga-1 would require securitizers to provide disclosure regarding fulfilled and unfulfilled repurchase requests with respect to Exchange Act-ABS pursuant to the Act. Form ABS-15G is a new form type that will contain Rule 15Ga-1 disclosures and be filed with the Commission. Rule 17g-7 will require NRSROs to provide disclosure regarding representations, warranties, and enforcement mechanisms available to investors in any report accompanying a credit rating issued by an NRSRO in connection with an Exchange Act-ABS transaction.

Compliance with the amendments is mandatory. Responses to the information collections will not be kept confidential and there is no mandatory retention period for the collections of information.

B. Summary of the Final Rules

As discussed in more detail above, the new rules and amendments we are adopting will require:

- ABS securitizers to disclose demand, repurchase and replacement history in a tabular format for an initial three-year look back period ending December 31, 2011;
- ABS securitizers to disclose, subsequent to that date, demand, repurchase and replacement activity in a tabular format on a quarterly basis;
- ABS issuers to disclose demand, repurchase and replacement history for a three-year look back period, in the same tabular format as new Rule 15Ga-1, in the body of the prospectus;

- ABS issuers to disclose demand, repurchase and replacement activity for a specific ABS, in the same tabular format, in periodic reports filed on Form 10-D; and
- NRSROs to disclose, in any report accompanying a credit rating for an ABS transaction, the representations, warranties and enforcement mechanisms available to investors and how they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.

The new rules implement Section 943 of the Act as well as conform disclosure in prospectuses and ongoing reports for ABS sold in registered transactions.

C. Summary of Comment Letters on the PRA Analysis and Revisions to Proposals

In the Proposing Release, we requested comment on the PRA analysis. We have made several changes in response to comments on the substance of the proposals that are designed to avoid potential unintended consequences and reduce possible additional costs or burdens pointed out by commentators. For example, in response to comment letters regarding the burdens of monthly reporting pursuant to Rule 15Ga-1, we have made responsive revisions to change to a quarterly periodic reporting requirement. We are also permitting a securitizer to suspend its reporting obligation as long as it has no repurchase activity for the reporting period; however, a securitizer would still have to provide an annual confirmation that no disclosure is required under Rule 15Ga-1 by checking a box on new Form ABS-15G.

We received one comment letter addressing our PRA burden estimates for Rule 17g-7, as proposed. The commentator argued that our PRA estimate of 10 hours underestimated the time that NRSROs would need to gather all of the information to conduct the comparisons required by the rule and requested an adequate transition period in order to prepare to comply with the rule.[200] The comment letter, however, did not acknowledge the additional burden estimates that we provided for in the Proposing Release. In addition to the estimated 10 hours per transaction to compare the terms of the current transaction to the benchmarks, cited by the commentator, we also estimated an initial burden of 3,000 hours to set up systems to establish benchmarks and an additional 3,000 hours per year to revise the various benchmarks. Because we believe these estimates adequately estimate the burden imposed by Rule 17g-7, we are not revising our estimates with respect to Rule 17g-7.

D. PRA Reporting and Cost Burden Estimates

Our PRA burden estimates for the rule amendments are based on information that we receive on entities assigned to Standard Industrial Classification Code 6189, the code used with respect to asset-backed securities, as well as information from outside data sources.[201] When possible, we base our estimates on an average of the data that we have available for years 2004, 2005, 2006, 2007, 2008, and 2009.

In adopting rules under the Credit Rating Agency Reform Act of 2006 ("the Rating Agency Act"),[202] as well as proposing additional rules in November 2009, we previously estimated that approximately 30 credit rating agencies would be registered as NRSROs.[203]

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200 See letter from Fitch.

201 We rely on two outside sources of ABS issuance data. We use the ABS issuance data from Asset-Backed Alert on the initial terms of offerings, and we supplement that data with information from Securities Data Corporation (SDC).

202 Pub. L. No. 109-291 (2006).

203 See e.g., Section VIII of Proposed Rules for Nationally Recognized Statistical Rating Organizations, SEC Release No. 34-61051 (Dec. 4, 2009) [74 FR 63866].

1. Form ABS-15G

This new collection of information relates to new disclosure requirements for securitizers that offer Exchange Act-ABS. Under the new rules, such securitizers are required to disclose demand, repurchase and replacement history with respect to pool assets across all trusts aggregated by securitizer. We had proposed that the new information be required at the time a securitizer offers Exchange Act-ABS after the implementation of the new rule, and then monthly, on an ongoing basis as long as the securitizer has Exchange Act-ABS outstanding held by non-affiliates. Instead, we are adopting that the new information be required for all securitizers that offered Exchange Act-ABS during the three-year period ending December 31, 2011, and that have Exchange Act-ABS outstanding that are held by non-affiliates. Going forward, periodic disclosures will be required on a quarterly basis. We are also permitting securitizers to suspend quarterly reporting so long as they have no activity for the quarterly period; however a securitizer is required, annually, to confirm that they had no activity for the year. The disclosures are required to be filed on EDGAR on new Form ABS-15G, except that municipal securitizers may satisfy their reporting obligations by filing their disclosures on EMMA. As discussed in the Proposing Release, we believe that the costs of implementation would include costs of collecting the historical information, software costs, costs of maintaining the required information, and costs of preparing and filing the form. Although the new requirements apply to securitizers, which by definition include both sponsors and issuers, we base our estimates on the number of unique ABS sponsors because we are also providing under the final rule, that issuers affiliated with a sponsor would not have to file a separate Form ABS-15G to provide the same Rule 15Ga-1 disclosures.

Our estimates in the Proposing Release were based on the number of unique ABS securitizers (i.e., sponsors) over 2004-2009, which was 540, for an average of 90 unique securitizers per year.[204] We base our burden estimates for this collection of information on the assumption that most of the costs of implementation would be incurred before the securitizer files its first Form ABS-15G. Because ABS issuers currently have access to systems that track the performance of the assets in a pool we believe that securitizers should also have access to information regarding whether an asset had been repurchased or replaced. However, securitizers may not have historically collected the information and systems may not currently be in place to track when a demand has been made, and in particular, systems may not be in place to track those demands made by investors upon trustees. Therefore, securitizers would incur a one-time cost to compile historical information in systems. Furthermore, the burden to collect and compile the historical information may vary significantly between securitizers, due to the number of asset classes and number of ABS issued by a securitizer.

For the initial filing, we estimate that 270 unique securitizers would be required to file Form ABS-15G.[205] We estimate that a securitizer would incur a one-time setup cost for the initial filing of 852 hours to collect and compile historical information and adjust its existing systems to collect and provide the required information going forward.[206] Therefore,

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[204] We base the number of unique sponsors on data from SDC.

[205] We estimate 270 securitizers for the three-year period from January 1, 2009- December 31, 2011, the look back period for the initial disclosures, (90 unique securitizers X 3 years). Also, as noted above, municipal securitizers will not be subject to Rule 15Ga-1 until three years after the implementation date for other securitizers. For purposes of the PRA, however, we have calculated the burden estimates as if the rule was fully phased in for all companies.

[206] The value of 852 hours for setup costs is based on staff experience. In the Proposing Release, we estimated that 672 of those hours will be to set up systems to track the information and is calculated using an

we estimate that it would take a total of 230,040 hours for a securitizer to set up the mechanisms to file the initial Rule 15Ga-1 disclosures.[207] We allocate 75% of these hours (172,530 hours) to internal burden for all securitizers. For the remaining 25% of these hours (57,510 hours), we use an estimate of $400 per hour for external costs for retaining outside professionals totaling $23,004,000.

After a securitizer has made the necessary adjustments to its systems in connection with the new rule and, after an initial filing of Form ABS-15G disclosures has been made, securitizers will have to file Form ABS-15G on a quarterly basis, unless it suspends its reporting obligation. We estimate that each subsequent quarterly filing of Form ABS-15G to disclose ongoing information by a securitizer will take approximately 30 hours to prepare, review and file. We estimate, for PRA purposes, that the average number of quarterly Form ABS-15G filings per year will be 720.[208]

Therefore, after the initial filing is made, we estimate the total annual burden hours for preparing and filing the disclosure will be 21,600 hours.[209] We allocate 75% of those hours (16,200 hours) to internal burden hours for all securitizers and 25% of those hours

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estimate of two computer programmers for two months, which equals 21 days per month times two employees times two months times eight hours per day.

207 852 hours to adjust existing systems per securitizer X 270 average number of unique securitizers.

208 The Form ABS-15G is required to be filed on a quarterly basis; however, based on comments received that securitizers of certain asset classes would be able to immediately suspend the quarterly reporting requirement because they have not received demands for repurchase (See letters from ABA and ASF) and data available, we are estimating that 90 securitizers would be able to suspend their quarterly reporting requirement after filing the initial filing. Therefore, we estimate that 180 securitizers would be subject to the quarterly reporting requirement (270 – 90). As a result, we expect 720 quarterly filings of Form ABS-15G per year (180 X 4 quarterly filings per year). We assume that the number of quarterly filings will remain the same in the second and third years after implementation because we estimate that the average number of new securitizers that will trigger the reporting obligation each year will be 90, but we also use the same estimate of 90 securitizers that would be able to suspend its quarterly reporting requirement, resulting in no increase in the number of securitizers or quarterly filings.

209 30 hours X 720 filings.

(5,400 hours) for professional costs totaling $400 per hour of external costs of retaining outside professionals totaling $ 2,160,000.

In addition, securitizers that have suspended their quarterly reporting obligation are required to file one annual confirmation that no repurchase activity has occurred for the calendar year. We estimate an average of 90 confirmation filings per year.[210] We estimate that each annual filing to confirm that no activity occurred on Form ABS-15G will take approximately 5 hours to prepare, review and file, therefore we estimate the total annual burden hours to be 450.[211] We allocate 75% of those hours (338 hours) to internal burden hours for all securitizers and 25% of those hours (113 hours) for professional costs totaling $400 per hour of external costs of retaining outside professionals totaling $ 45,000.

Therefore, the total internal burden hours are 189,068[212] and the total external costs are $25,209,000.[213] The increase from our original burden estimate in the Proposing Release is primarily due to the change in the trigger for the initial filing requirement. However, we have significantly reduced the burden estimate on a going forward basis by requiring quarterly, instead of monthly filings, as proposed, as well as permitting securitizers to suspend the quarterly reporting obligation.

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210 Because the first annual confirmation filing would not be due until February 2013, we estimate no annual filings in the first year of implementation. In the second year of implementation we estimate 90 securitizers will file the annual confirmation. In the third year, we estimate that 180 securitizers will file the annual confirmation. The total number of annual confirmations filed would be 270 over three years, therefore we estimate for PRA purposes, an annual average of 90 filings.

211 5 hours X 90 filings.

212 172,530 hours + 16,200 hours + 338 hours.

213 $23,004,000 + $2,160,000 + $45,000.

2. Forms S-1, S-3 and 10-D

We are requiring that asset-backed securities offered on Forms S-1 and S-3 include the required Rule 15Ga-1 disclosures for the same asset class in registration statements. We are also requiring that issuers of registered ABS include the new Rule 15Ga-1 disclosures for only the pool assets on Form 10-D, which contains periodic distribution and pool performance information. The burden for the collection of information is reflected in the burden hours for Form ABS-15G filed by a securitizer; however, Forms S-1, S-3 and 10-D are filed by asset-backed issuers, and issuers may include a portion of the information in the prospectus and in periodic reports. Therefore, we have not included additional burdens for Forms S-1, S-3 and 10-D.

3. Regulation S-K

Regulation S-K, which includes the item requirements in Regulation AB, contains the requirements for disclosure that an issuer must provide in filings under both the Securities Act and the Exchange Act. In 2004, we noted that the collection of information requirements associated with Regulation S-K as it applies to ABS issuers are included in Form S-1, Form S-3, Form 10-K and Form 8-K.[214]

The amendments would make revisions to Regulation S-K. The collection of information requirements, however, are reflected in the burden hours estimated for the various Securities Act and Exchange Act forms related to ABS issuers. The rules in Regulation S-K do not impose any separate burden. Consistent with historical practice, we have retained an estimate of one burden hour to Regulation S-K for administrative convenience.

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[214] See the 2004 ABS Adopting Release.

4. Rule 17g-7

This new collection of information relates to new disclosure requirements for NRSROs. Under new Rule 17g-7, an NRSRO is required to disclose in any report accompanying a credit rating in an asset-backed securities offering the representations, warranties and enforcement mechanisms available to investors and describe how they differ from those in issuances of similar securities. The following summarizes the burden estimates for Rule 17g-7 that we provided in the Proposing Release. We estimated it would take 1 hour per ABS transaction to review the relevant disclosures prepared by an issuer, which an NRSRO would presumably have reviewed as part of the rating process, and convert those disclosures into a format suitable for inclusion in any report to be issued by an NRSRO. We noted our expectation that an NRSRO would incur an initial setup cost to collect, maintain and analyze previous issuances to establish benchmarks as well as an ongoing cost to review the benchmarks to ensure that they remain appropriate. We estimated that the initial review and set up system cost will take 100 hours and that NRSROs will spend an additional 100 hours per year revising the various benchmarks. Therefore, we estimated it would take a total of 3,000 hours[215] for NRSROs to set up systems and an additional 3,000 hours per year revising various benchmarks.[216]

On a deal-by-deal basis, we estimated it would take NRSRO 10 hours per ABS transaction to compare the terms of the current deal to those of similar securities. Because NRSROs would need to provide the disclosures in connection with the issuance of a credit rating on a particular offering of ABS, we based our estimates on an annual average of 2,067

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215 100 hours X 30 NRSROs.

216 100 hours X 30 NRSROs.

ABS offerings.[217] We also assigned four to the number of credit ratings per issuance of ABS, based on an average of two NRSROs preparing two reports (pre-sale and final) for each transaction. Therefore, we estimated that it would take a total of 90,948 hours, annually, for NRSROs to provide the new Rule 17g-7 disclosures.[218] As noted above, we received one comment letter regarding our PRA estimate for Rule 17g-7,[219] and as we discuss above, we are not adjusting our PRA estimates with respect to Rule 17g-7.

5. Summary of Changes to Annual Burden Compliance in Collection of Information

Table 1 illustrates the annual compliance burden of the collection of information in hours and costs for the new disclosure requirements for securitizers and NRSROs. Below, the new Rule 15Ga-1 requirement for securitizers is noted as "Form ABS-15G" and the new requirement for NRSROs is noted as "17g-7."

Form	Current Annual Responses	Proposed Annual Responses	Current Burden Hours	Decrease or Increase in Burden Hours	Proposed Burden Hours	Current Professional Costs	Decrease or Increase in Professional Costs	Proposed Professional Costs
Form ABS-15G	-	810	-	189,068	189,068	-	25,209,000	25,209,000
17g-7	-	8,268	-	96,948	96,948		-	-

VI. Benefit-Cost Analysis

Section 943 of the Act requires the Commission to prescribe rules relating to disclosure of demand, repurchase and replacement history by securitizers and disclosure of

217 The annual average number of registered offerings was 958 and the annual average number of Rule 144A ABS offerings was 716 for an estimated annual average of 1,674 over the period 2004-2009. See Section X. of the 2010 ABS Proposing Release. We also add 393 to estimate for offerings under other exemptions that were not within the scope of the 2010 ABS Proposing Release. Thus, in total we use an estimated annual average number of 2,067 ABS offerings for the basis of our PRA burden estimates.

218 4 reports X 2,067 ABS offerings X 11 hours (1 hour to review disclosures + 10 hours to compare and prepare).

219 See letter from Fitch.

representations, warranties, and enforcement mechanisms by NRSROs. In response to the requirements of Section 943, the Commission is adopting new rules and form amendments that would require securitizers and NRSROs to make the required disclosures.

First, Section 943(2) requires any securitizer to disclose fulfilled and unfulfilled repurchase requests across all trusts aggregated by the securitizer, so that investors may identify asset originators with clear underwriting deficiencies. As the Act requires, our rules will apply to "any securitizer" of Exchange Act-ABS, including unregistered Exchange Act-ABS. The Act requires disclosure of "fulfilled and unfulfilled repurchase requests" and our new rules require disclosure of all repurchase requests, not just those limited to the transaction agreements. Further, the Act requires disclosure "across all trusts aggregated by the securitizer." The new rule seeks to account for the potential limited availability and usefulness of older information by requiring securitizers to provide demand and repurchase history, initially for a three-year look back period and then quarterly on an ongoing basis for all outstanding Exchange Act-ABS held by non-affiliates during the reporting period. In order to implement the disclosure requirement, we are requiring that securitizers provide the disclosures in a tabular format and file them on EDGAR on new Form ABS-15G. As we discuss above, the new rules provide that if an affiliate securitizer has filed the same disclosures, then other affiliated securitizers would not have to also file the disclosures in order to avoid duplicate disclosures. In addition, a securitizer may suspend its quarterly reporting obligation if it has no reportable activity and makes an annual filing to confirm that it has had no activity for the prior year. We are also providing approximately a one-year transition period so that securitizers may set up systems and gather the data to make the required disclosures. For municipal securitizers, we are providing approximately a four-year transition period and permitting municipal securitizers to satisfy the filing obligation by filing on EMMA.

Second, we are also adopting disclosure requirements with respect to repurchase requests in Regulation AB in order to conform disclosures in prospectuses and in periodic reports to those required by Section 943 of the Act.

Third, Section 943(1) of the Act requires that each NRSRO include in any report accompanying a credit rating, a description of the representations, warranties and enforcement mechanisms available to investors. Our new Rule 17g-7 includes an instruction to clarify that for purposes of the requirement, a "credit rating" includes any expected or preliminary credit rating issued by an NRSRO.

We are sensitive to benefits and costs imposed by the new rules, form and amendments. The discussion below focuses on the benefits and costs of the amendments made by the Commission to implement the Act within its permitted discretion, rather than the overall benefits and costs of the changes mandated by the Act.

A. Benefits

In new Rule 15Ga-1 we choose to require that the disclosure mandated by the Act be presented in a tabular format with standardized headings. We believe that this data formatting requirement will benefit investors by providing them with demand, repurchase and replacement information that is easy to use and easy to compare across securitizers.

We are limiting the scope of the disclosures to outstanding Exchange Act-ABS, and in the initial filing to the last three years of demand, repurchase and replacement history. We believe that a three-year look back period strikes the right balance between compliance costs to securitizers and disclosure benefits to investors, since three years of data should be sufficient for investors to identify originators with underwriting deficiencies.

After the initial filing, securitizers are required to file Form ABS-15G, periodically, on a quarterly basis with information about activity that occurred during the quarter, so that consistent with the purpose of Section 943 of the Act, an investor may monitor the demand, repurchase and replacement activity across all Exchange Act-ABS issued by a securitizer. We have chosen to require that the quarterly report include information for the current quarter, instead of cumulative data. This will benefit investors by allowing them the flexibility to track activity over periods of their choosing because it is more user-friendly and less unwieldy than cumulative data. Depending on their needs, they can analyze the current-quarter data alone or aggregate it with data from prior filings in order to identify trends. In addition, aggregated data for the same asset class would be provided in prospectuses.

Several provisions in the adopted rules are designed to limit filing costs to securitizers without diminishing the usefulness of the disclosure available to investors. We are permitting a securitizer to suspend its quarterly obligation if it has no reportable activity, though such a securitizer would still be required to file an annual confirmation that it had no reportable demand or repurchase activity by checking a box on Form ABS-15G. In addition, if an affiliate securitizer has filed the same disclosures with respect to a particular ABS transaction, then other affiliated securitizers would not have to also file the disclosures. We are also requiring that the disclosures be filed on EDGAR on new Form ABS-15G and permitting municipal securitizers to satisfy the reporting obligation by filing on EMMA. By requiring the new Form ABS-15G to be filed on EDGAR, the required information for most securitizers would be housed in a central repository that would preserve continuous access to the information to the benefit of investors. Municipal securitizers can file the information in a central repository for municipal market information, EMMA. Although it is likely that most, if not all municipal securitizers will file on EMMA, they are not required to. However, we believe that filing on EMMA will facilitate use by investors, since the demand, repurchase and replacement disclosures will generally be available in the same repository where investors are most likely to look for other municipal ABS disclosures. .

The one-year transition period will provide securitizers time to set up systems and gather the data to make the required disclosures. For municipal securitizers, we are providing an additional three-year transition period so that they may develop the infrastructures and observe how the rule operates for other securitizers, so that they may better prepare to comply with the new rules.

To facilitate investors' use of demand, repurchase and replacement information, we are amending Regulation AB to require disclosures in the prospectus and periodic reports in a format similar to that required by Rule 15Ga-1. The information in the prospectus must be presented for a three-year look-back period, so that an investor in a particular offering receives and may review cumulative information in one place. Furthermore, an investor would receive disclosure about a demand, repurchase and replacement activity related to a particular ABS in periodic reports, which may be required to be filed at a more frequent interval than Form ABS-15G, such as monthly.

If an Exchange Act-ABS is rated, new Rule 17g-7 would require disclosures by NRSROs about the representations, warranties and enforcement mechanisms available to investors, and how they differ from those of other similar securities in a report accompanying a credit rating. We interpret a "credit rating" to include any expected or preliminary credit rating issued by an NRSRO because pre-sale reports typically accompany an expected or preliminary rating. We believe that this interpretation will benefit investors by allowing them access to information on representations, warranties and enforcement mechanisms prior to the point at which they make an investment decision. As a result, these disclosures will possibly expand the information available to investors and improve transparency regarding the use of representations and warranties in ABS transactions.

B. Costs

With respect to Rule 15Ga-1, the requirement to file on EDGAR initially and then on a quarterly basis will result in costs related to preparation of such filings. Filing on EDGAR would require a securitizer to obtain authorization codes and to adhere to formatting instructions. While our revision from monthly to a quarterly reporting requirement will reduce the filing burden on securitizers, an annual filing would still be required to confirm by check box that no demand, repurchase or replacement activity has occurred.[220]

In addition, we are providing approximately a one-year transition period (and an additional three years for municipal securitizers), which will delay the availability of current information on representations and warranties repurchase activity to investors; however, we believe that a transition period of this length is necessary for securitizers to set up systems and gather historical data needed to comply with the new rules. Further, investors would not receive information about repurchase activity for periods prior to the initial three-year period; however, it is not clear that older data would provide useful information about underwriting deficiencies, because many loan origination and underwriting standards have changed post-

220 See discussion in Section II.A.5.

crisis. In addition, older data may be very hard or impossible for securitizers to obtain if they have not had systems in place to track the data required for the required disclosures.

The new rules implement the Act's requirement on securitizers to disclose the repurchase and replacement demands resulting from breaches of representations and warranties in past ABS transactions initially, for the last three years and then updated disclosures going forward on a quarterly basis. We understand that some of the data collection may be costly. In some cases, it may be very difficult to obtain repurchase or replacement records from the distant past.[221] The final rule, however, permits a securitizer under certain conditions to omit information unknown and not available to the securitizer without unreasonable effort or expense.

As noted above, we have chosen to require that ongoing quarterly reports include information for the current quarter, instead of cumulative data. Therefore, users who would find cumulative data more helpful will need to make additional efforts to compile the information for periods; although cumulative information related to the same asset class would be available in a prospectus for a three-year look back period.

In order to minimize duplicate disclosures, the new rules would not require a securitizer to report if an affiliated securitizer in the same transaction files the required disclosures. As discussed above, we believe this accommodation is appropriate because otherwise such disclosure would be duplicative and would not provide any additional useful information, since as noted above, the depositor usually serves as an intermediate entity of a transaction initiated by a sponsor. However, in some cases, users who would find

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221 See discussion in Section II.A.3.

information about affiliated transactions useful will need to compile information about affiliated transactions themselves.[222]

The new rules, pursuant to the Act, would also require NRSROs to disclose in any report accompanying a credit rating for an ABS transaction the representations, warranties and enforcement mechanisms available to investors and how they differ from those of other similar securities. A note to new Rule 17g-7 clarifies the statutory requirements by explaining that for the purposes of the rule's requirements, a "credit rating" includes any expected or preliminary credit rating issued by an NRSRO. This clarification is designed to ensure that the disclosure requirements of the rule will apply to pre-sale reports issued by NRSROs in ABS transactions. We recognize that this could result in some additional incremental costs to NRSROs; however, we believe that any such additional costs would be more than offset by the benefits to investors that will arise from the inclusion of the required disclosures in NRSRO pre-sale reports, thus providing them with additional information prior to the point at which they make an investment decision.

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a) of the Exchange Act[223] 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

222 Rule 15Ga-1 requires a securitizer to indicate if the ABS transaction was registered and disclose the CIK number of the issuing entity of the ABS transaction, so that users may locate other information available on EDGAR.

223 15 U.S.C. 78w(a).

of the Exchange Act. Section 2(b) of the Securities Act[224] and Section 3(f) of the Exchange Act[225] require the Commission, when engaging in rulemaking that requires it to consider 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 new rules implement Section 943 of the Act and amend Regulation AB in order to conform disclosures in prospectuses and periodic reports to those required by Section 943. New Rule 15Ga-1 implements Section 943(2) by requiring disclosures of the repurchase history of securitized assets be filed on EDGAR (or in the case of municipal securitizers, may be filed in the alternative on EMMA). Filing on these centralized databases preserves access to information, thereby enhancing transparency regarding the use of representations and warranties in asset-backed securities transactions, and an investor's ability to consider historical information when making an investment decision. Requiring that information be presented in a standardized tabular format will further enable investors to more easily understand the disclosed information, compare originators, and identify those with better underwriting criteria or practices. Our amendments to Regulation AB, which require conforming disclosures in the prospectus and periodic reports to the disclosures required by Rule 15Ga-1, should promote comparison of repurchase history information. Furthermore, if investors pull funds away from ABS with consistent underwriting deficiencies or purchase such ABS at a significant discount, securitizers would find it in their interest to avoid acquiring pool assets from originators with a record of poor loan underwriting. As a result,

224 15 U.S.C. 77b(b).

225 15 U.S.C. 78c(f).

such originators would have an additional incentive to improve their loan origination and underwriting processes. The ultimate effect would be that of better allocative efficiency and improved capital formation.

New Rule 15Ga-1 also includes provisions designed to limit the filing costs to securitizers without compromising the disclosure available to investors, thereby improving efficiency in the ABS market. First, if an affiliate securitizer has filed the same disclosures required by new Rule 15Ga-1, then other affiliated securitizers in the same ABS transaction would not have to also file the same disclosures. Second, a securitizer may suspend its ongoing quarterly reporting obligation if it has no reportable activity, although it would still be required to file an annual confirmation that it had no reportable activity.

Because the rules generally apply equally to all securitizers, and ABS transactions, we do not believe the rules will have an impact on competition. However, we are providing a delayed compliance date for securitizers of ABS that are municipal entities in order to provide those securitizers with more time to better prepare for implementation of the Rule 15Ga-1. Therefore, the costs of compliance may also be delayed for municipal securitizers, which could provide municipal securitizers with a competitive cost advantage over other securitizers for a period of time. Based on our research, however, the dollar volume of ABS issued by municipal securitizers has typically been significantly less than other securitizers.

New Rule 17g-7 implements Section 943(1) of the Act by requiring NRSROs to describe in any report accompanying a credit rating, in an asset-backed securities offering, how the representations, warranties and enforcement mechanisms of the rated ABS differ from the representations, warranties and enforcement mechanisms in issuances of similar securities. The rule applies to any expected or preliminary credit rating issued by an NRSRO and will therefore require that this information be presented in pre-sale reports issued by NRSROs in connection with asset-backed securities offerings. As such, the rule will provide information to investors at an earlier point in time, which may promote allocative efficiency and capital formation.

We requested comment on whether the proposed rule, if adopted, would promote efficiency, competition, and capital formation. We did not receive any comments directly responding to this request.[226]

VIII. Regulatory Flexibility Act Certification

In Part IX of the Proposing Release, the Commission certified pursuant to 5 U.S.C. 605(b) that the new rules contained in this release would not have a significant economic impact on a substantial number of small entities. While the Commission encouraged written comments regarding this certification, no commentators responded to this request or indicated that the rules, as adopted would have a significant economic impact on a substantial number of small entities.

226 One commentator did note, however, that if the proposed rules did not provide an adequate transition period, some securitizers would have to remain out of the securitization markets until they can complete the transition, with potential adverse effects on capital formation. It also expressed concern that requiring that reports be compiled for all asset classes in a single filing may amplify the issue. See letter from Roundtable. As we note above, we have considered the comments received and we note that we have provided a long transition period and the initial filing requirement is not triggered by the timing of new offerings.

IX. Statutory Authority and Text of Rule and Form Amendments

We are adopting the new rules, forms and amendments contained in this document under the authority set forth in Section 943 of the Act, Sections 5, 6, 7, 10, 19(a), and 28 of the Securities Act and Sections 3(b), 12, 13, 15, 15E, 17, 23(a), 35A and 36 of the Exchange Act.

List of Subjects

17 CFR Parts 229, 232, 240 and 249

Reporting and recordkeeping requirements, Securities.

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

PART 229 -- STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 -- REGULATION S-K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 229.1104 by adding paragraph (e) to read as follows:

§ 229.1104 (Item 1104) Sponsors.

* * * * *

(e) Repurchases and replacements.

(1) If the underlying transaction agreements provide a covenant to repurchase or replace an underlying asset for breach of a representation or warranty, provide in the body of the prospectus for the prior three years, the information required by Rule 15Ga-1(a) (17 CFR 240.15Ga-1(a)) concerning all assets securitized by the sponsor that were the subject of a demand to repurchase or replace for breach of the representations and warranties concerning the pool assets for all asset-backed securities (as that term is defined in Section 3(a)(77) of the Securities Exchange Act of 1934) where the underlying transaction agreements included a covenant to repurchase or replace an underlying asset of the same asset class held by non-affiliates of the sponsor, except that:

(i) For prospectuses to be filed pursuant to § 230.424 of this chapter prior to February 14, 2013, information may be limited to the prior year; and

(ii) For prospectuses to be filed pursuant to § 230.424 of this chapter on or after February 14, 2013 but prior to February 14, 2014, information may be limited to the prior two years.

(2) Include a reference to the most recent Form ABS-15G filed by the securitizer (as that term is defined in Section 15G(a) of the Securities Exchange Act of 1934) and disclose the CIK number of the securitizer.

(3) For prospectuses to be filed pursuant to § 230.424 of this chapter, the information presented shall not be more than 135 days old.

3. Amend § 229.1121 by adding paragraph (c) to read as follows:

§ 229.1121 (Item 1121) Distribution and pool performance information.

* * * * *

(c) Repurchases and replacements. (1) Provide the information required by Rule 15Ga-1(a) (17 CFR 240.15Ga-1(a)) concerning all assets of the pool that were subject of a demand to repurchase or replace for breach of the representations and warranties.

(2) Include a reference to the most recent Form ABS-15G (17.CFR 249.1400) filed by the securitizer (as that term is defined in Section 15G(a) of the Securities Exchange Act of 1934) and disclose the CIK number of the securitizer.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

4. The authority citation for Part 232 is revised to read 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.

* * * * *

5. Amend § 232.101 by adding paragraphs (a)(1)(xiv) – (xvi) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(xiv) [Reserved]

(xv) [Reserved]

(xvi) Form ABS-15G (as defined in §249.1400 of this chapter).

6. Adding §232.314 to read as follows:

§ 232.314 Accommodation for certain securitizers of asset-backed securities.

The information required in response to Rule 15Ga-1 (§ 240.15Ga-1 of this chapter) by a municipal securitizer will be deemed to satisfy the electronic submission requirements of Rule 101 (§ 232.101 of this chapter) under the following conditions:

(a) For purposes of this section, a municipal securitizer is a securitizer (as that term is defined in Section 15G(a) of the Securities Exchange Act of 1934) that is any State or Territory of the United States, the District of Columbia, any political subdivision of any State, Territory or the District of Columbia, or any public instrumentality of one or more States, Territories or the District of Columbia; and

(b) The information required by Rule 15Ga-1 is provided to the Municipal Securities Rulemaking Board in an electronic format available to the public on the Municipal Securities Rulemaking Board's Internet Web site.

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

7. The authority citation for part 240 is amended by adding authorities for § 240.15Ga-1 and § 240.17g-7 to read 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, 78 l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78 ll, 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 and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.15Ga-1 is also issued under sec. 943, Pub. L. No. 111-203, 124 Stat. 1376.

* * * * *

Section 240.17g-7 is also issued under sec. 943, Pub. L. No. 111-203, 124 Stat. 1376.

* * * * *

8. Add § 240.15Ga-1 to read as follows:

§ 240.15Ga-1 Repurchases and replacements relating to asset-backed securities.

(a) General. With respect to any asset-backed security (as that term is defined in Section 3(a)(77) of the Securities Exchange Act of 1934) for which the underlying transaction agreements contain a covenant to repurchase or replace an underlying asset for breach of a representation or warranty, a securitizer (as that term is defined in Section 15G(a) of the Securities Exchange Act of 1934) shall disclose fulfilled and unfulfilled repurchase requests across all trusts by providing the information required in paragraph (1) concerning all assets securitized by the securitizer that were the subject of a demand to repurchase or replace for breach of the representations and warranties concerning the pool assets for all asset-backed securities held by non-affiliates of the securitizer during the reporting period.

Name of Issuing Entity	Check if Regis-tered	Name of Originator	Total Assets in ABS by Originator			Assets That Were Subject of Demand			Assets That Were Repurchased or Replaced			Assets Pending Repurchase or Replacement (within cure period)			Demand in Dispute			Demand Withdrawn			Demand Rejected		
			(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)	(#)	($)	(% of principal balance)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	(n)	(o)	(p)	(q)	(r)	(s)	(t)	(u)	(v)	(w)	(x)
Asset Class X																							
Issuing Entity A CIK #	X	Originator 1																					
		Originator 2																					
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	
Asset Class Y																							
Issuing Entity B		Originator 3																					
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	
Total			#	$		#	$		#	$		#	$		#	$		#	$		#	$	

(1) The table shall:

(i) Disclose the asset class and group the issuing entities by asset class (column (a)).

(ii) Disclose the name of the issuing entity (as that term is defined in Item 1101(f) of Regulation AB (17 CFR 229.1101(f)) of the asset-backed securities. List the issuing entities in order of the date of formation (column (a)).

Instruction to paragraph (a)(1)(ii): Include all issuing entities with outstanding asset-backed securities during the reporting period.

(iii) For each named issuing entity, indicate by check mark whether the transaction was registered under the Securities Act of 1933 (column (b)) and disclose the CIK number of the issuing entity (column (a)).

(iv) Disclose the name of the originator of the underlying assets (column (c)).

Instruction to paragraph (a)(1)(iv): Include all originators that originated assets in the asset pool for each issuing entity.

(v) Disclose the number, outstanding principal balance and percentage by principal balance of assets at the time of securitization (columns (d) through (f)).

(vi) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were subject of a demand to repurchase or replace for breach of representations and warranties (columns (g) through (i)).

(vii) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were repurchased or replaced for breach of representations and warranties (columns (j) through (l)).

(viii) Disclose the number, outstanding principal balance and percentage by principal balance of assets that are pending repurchase or replacement for breach of representations and warranties due to the expiration of a cure period (columns (m) through (o)).

(ix) Disclose the number, outstanding principal balance and percentage by principal balance of assets that are pending repurchase or replacement for breach of representations and warranties because the demand is currently in dispute (columns (p) through (r)).

(x) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were not repurchased or replaced because the demand was withdrawn (columns (s) through (u)).

(xi) Disclose the number, outstanding principal balance and percentage by principal balance of assets that were not repurchased or replaced because the demand was rejected (columns (v) through (x)).

Instruction to paragraphs (a)(1)(vii) – (xi): For purposes of these paragraphs (vii) – (xi) the outstanding principal balance shall be the principal balance as of the reporting period end date and the percentage by principal balance shall be the outstanding principal balance of an asset divided by the outstanding principal balance of the asset pool as of the reporting period end date.

(xii) Provide totals by asset class, issuing entity and for all issuing entities for columns that require number of assets and principal amounts (columns (d), (e), (g), (h), (j), (k), (m), (n) (p), (q), (s), (t), (v) and (w)).

Instruction 1 to paragraph (a)(1): The table should include any activity during the reporting period, including activity related to assets subject to demands made prior to the beginning of the reporting period.

Instruction 2 to paragraph (a)(1): Indicate by footnote and provide narrative disclosure in order to further explain the information presented in the table, as appropriate.

(2) If any of the information required by paragraph (a) is unknown and not available to the securitizer without unreasonable effort or expense, such information may be omitted, provided the securitizer provides the information it possesses or can acquire without unreasonable effort or expense, and the securitizer includes a statement showing that unreasonable effort or expense would be involved in obtaining the omitted information. Further, if a securitizer requested and was unable to obtain all information with respect to investor demands upon a trustee that occurred prior to July 22, 2010, so state by footnote. In this case, also state that the disclosures do not contain investor demands upon a trustee made prior to July 22, 2010.

(b) In the case of multiple affiliated securitizers for a single asset-backed securities transaction, if one securitizer has filed all the disclosures required in order to meet the obligations under paragraph (a) of this section, other affiliated securitizers shall not be required to separately provide and file the same disclosures related to the same asset-backed security.

(c) The disclosures in paragraph (a) of this section shall be provided by a securitizer:

(1) For the three year period ended December 31, 2011, by any securitizer that issued an asset-backed security during the period, or organized and initiated an asset-backed securities transaction during the period, by securitizing an asset, either directly or indirectly, including through an affiliate, in each case, if the underlying transaction agreements provide a covenant to repurchase or replace an underlying asset for breach of a representation or warranty and the securitizer has asset-backed securities, containing such a covenant,

outstanding and held by non-affiliates as of the end of the three year period. If a securitizer has no activity to report, it shall indicate by checking the appropriate box on Form ABS-15G (17 CFR 249.1400). The requirement of the subparagraph applies to all issuances of asset-backed securities whether or not publicly registered under the provisions of the Securities Act of 1933. The disclosures required by this subparagraph (c)(1) shall be filed no later than February 14, 2012.

Instruction to paragraph (c)(1): For demands made prior to January 1, 2009; the disclosure should include any related activity subsequent to January 1, 2009 associated with such demand.

(2) For each calendar quarter, by any securitizer that issued an asset-backed security during the period, or organized and initiated an asset-backed securities transaction by securitizing an asset, either directly or indirectly, including through an affiliate, or had outstanding asset-backed securities held by non-affiliates during the period, in each case, if the underlying transaction agreements provide a covenant to repurchase or replace an underlying asset for breach of a representation or warranty. The disclosures required by this subparagraph (c)(2) shall be filed no later than 45 calendar days after the end of such calendar quarter:

(i) Except that, a securitizer may suspend its duty to provide periodic quarterly disclosures if no activity occurred during the initial filing period in (c)(1) or during a calendar quarter that is required to be reported under paragraph (a). A securitizer shall indicate that it has no activity to report by checking the appropriate box on Form ABS-15G (17 CFR 249.1400). Thereafter, a periodic quarterly report required by paragraph (c)(2) will only be required if a change in the demand, repurchase or replacement activity occurs that is required to be reported under paragraph (a) during a calendar quarter; and

(ii) Except that, annually, any securitizer that has suspended its duty to provide quarterly disclosures pursuant to subparagraph (c)(2)(i) must confirm that no activity occurred during the previous calendar year by checking the appropriate box on Form ABS-15G (17 CFR 249.1400). The confirmation required by this subparagraph (c)(2)(ii) shall be filed no later than 45 days after each calendar year.

(3) Except that, if a securitizer has no asset-backed securities outstanding held by non-affiliates, the duty under paragraph (c)(2) of this section to file periodically the disclosures required by paragraph (a) shall be terminated immediately upon filing a notice on Form ABS-15G (17 CFR 249.1400).

9. Add § 240.17g-7 to read as follows:

§ 240.17g-7 Report of representations and warranties.

Each nationally recognized statistical rating organization shall include in any report accompanying a credit rating with respect to an asset-backed security (as that term is defined in Section 3(a)(77) of the Securities Exchange Act of 1934) a description of –

(a) The representations, warranties and enforcement mechanisms available to investors; and

(b) How they differ from the representations, warranties and enforcement mechanisms in issuances of similar securities.

Note to § 240.17g-7: For the purposes of this requirement, a "credit rating" includes any expected or preliminary credit rating issued by a nationally recognized statistical rating organization.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

10. The authority citation for part 249 is amended by adding an authority for § 249.1400 to read as follows:

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

* * * * *

Section 249.1400 is also issued under sec. 943, Pub. L. No. 111-203, 124 Stat. 1376.

* * * * *

11. Add Subpart O and Form ABS-15G (referenced in § 249.1400) to Part 249 to read as follows:

Subpart O – Forms for Securitizers of Asset-Backed Securities

§ 249.1400 Form ABS-15G, Asset-backed securitizer report pursuant to Section 15G of the Securities Exchange Act of 1934

This form shall be used for reports of information required by Rule 15Ga-1 (§240.15Ga-1 of this chapter).

Note: The text of Form ABS-15G does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM ABS-15G

ASSET-BACKED SECURITIZER
REPORT PURSUANT TO SECTION 15G OF
THE SECURITIES EXCHANGE ACT OF 1934

Check the appropriate box to indicate the filing obligation to which this form is intended to satisfy:

____ Rule 15Ga-1 under the Exchange Act (17 CFR 240.15Ga-1) for the reporting period ________________ to ________________

Date of Report (Date of earliest event reported)____________________

Commission File Number of securitizer: __________________

Central Index Key Number of securitizer: __________________

____

Name and telephone number, including area code, of the person to contact in connection with this filing

Indicate by check mark whether the securitizer has no activity to report for the initial period pursuant to Rule 15Ga-1(c)(1) [ ]

Indicate by check mark whether the securitizer has no activity to report for the quarterly period pursuant to Rule 15Ga-1(c)(2)(i) [ ]

Indicate by check mark whether the securitizer has no activity to report for the annual period pursuant to Rule 15Ga-1(c)(2)(ii) [ ]

GENERAL INSTRUCTIONS

A. Rule as to Use of Form ABS-15G.

This form shall be used to comply with the requirements of Rule 15Ga-1 under the Exchange Act (17 CFR 240.15Ga-1).

B. Events to be Reported and Time for Filing of Reports.

Forms filed under Rule 15Ga-1. In accordance with Rule 15Ga-1, file the information required by Part I in accordance with Item 1.01, Item 1.02, or Item 1.03, as applicable. If the filing deadline for the information occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the filing deadline shall be the first business day thereafter.

C. Preparation of Report.

This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report on paper meeting the requirements of Rule 12b-12 (17 CFR 240.12b-12). The report shall contain the number and caption of the applicable item, but the text of such item may be omitted, provided the answers thereto are prepared in the manner specified in Rule 12b-13 (17 CFR 240.12b-13). All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

D. Signature and Filing of Report.

1. Forms filed under Rule 15Ga-1. Any form filed for the purpose of meeting the requirements in Rule 15Ga-1 must be signed by the senior officer in charge of securitization of the securitizer.
2. Copies of report. If paper filing is permitted, three complete copies of the report shall be filed with the Commission.

INFORMATION TO BE INCLUDED IN THE REPORT

REPRESENTATION AND WARRANTY INFORMATION

Item 1.01 Initial Filing of Rule 15Ga-1 Representations and Warranties Disclosure

Provide the disclosures required by Rule 15Ga-1 (17 CFR 240.15Ga-1) according to the filing requirements of Rule 15Ga-1(c)(1).

Item 1.02 Periodic Filing of Rule 15Ga-1 Representations and Warranties Disclosure

Provide the disclosures required by Rule 15Ga-1 (17 CFR 240.15Ga-1) according to the filing requirements of Rule 15Ga-1(c)(2).

Item 1.03 Notice of Termination of Duty to File Reports under Rule 15Ga-1

If a securitizer terminates its reporting obligation pursuant to Rule 15Ga-1(c)(3), provide the date of the last payment on the last asset-backed security outstanding that was issued by or issued by an affiliate of the securitizer.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the reporting entity has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

____ (Securitizer)

Date ____

____ (Signature)*

*Print name and title of the signing officer under his signature.

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: January 20, 2011

Commissioner Casey
Commissioner Paredes
Disapproved
(corrected 12/22/11)

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229 and 230

[Release Nos. 33-9176, 34-63742; File No. S7-26-10]

RIN 3235-AK76

ISSUER REVIEW OF ASSETS IN OFFERINGS OF ASSET-BACKED SECURITIES

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting new requirements in order to implement Section 945 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act"). We are adopting a new rule under the Securities Act of 1933 to require any issuer registering the offer and sale of an asset-backed security ("ABS") to perform a review of the assets underlying the ABS. We also are adopting amendments to Item 1111 of Regulation AB that would require an ABS issuer to disclose the nature of its review of the assets and the findings and conclusions of the issuer's review of the assets.

DATES: Effective Date: [Insert 60 days after publication in the Federal Register]

Compliance Date: Any registered offering of asset-backed securities commencing with an initial bona fide offer after December 31, 2011, must comply with the new rules and forms.

FOR FURTHER INFORMATION CONTACT: Eduardo Aleman, Special Counsel, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549.

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SUPPLEMENTARY INFORMATION: We are adopting amendments to Item 1111[1] of Regulation AB[2] (a subpart of Regulation S-K). We also are adopting Rule 193[3] under the Securities Act of 1933[4] (the "Securities Act").

I. Background and Overview

On October 13, 2010, we proposed new requirements in order to implement Section 945 and a portion of Section 932 of the Dodd-Frank Act.[5] As discussed in the Proposing Release, Section 945 of the Act amends Section 7 of the Securities Act to require the Commission to issue rules relating to the registration statement required to be filed by an issuer of ABS. Pursuant to new Section 7(d), the Commission must issue rules to require that an issuer of an ABS perform a review of the assets underlying the ABS, and disclose the nature of such review. Section 945 of the Act reflects the testimony provided to Congress that due diligence practices in ABS offerings had eroded significantly.[6] We also proposed new requirements relating to the disclosure of third-party findings and conclusions in ABS transactions in order to implement Section 15E(s)(4)(A) of the Exchange Act, as added by Section 932 of the Act. We received over 50 comment letters on the Proposing Release.[7]

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1 17 CFR 229.1111.

2 17 CFR 229.1100 through 17 CFR 229.1123.

3 17 CFR 230.193.

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

5 Issuer Review of Assets in Offerings of Asset-Backed Securities, Release No. 33-9150 (Oct. 13, 2010) [75 FR 64182] ("Proposing Release").

6 See S. Rep. No. 111-176, at 133 (2010) ("Senate Report").

7 The comments on the Proposing Release are available at http://www.sec.gov/comments/s7-26-10/s72610.shtml.

As discussed below, after consideration of the comments received on the proposed amendments, we are adopting the proposed amendments to implement Section 7(d) of the Securities Act. We have revised the final rules from the proposal to establish a new minimum standard for the required review. We are postponing consideration of rules to implement Section 15E(s)(4)(A) of the Exchange Act, which requires issuers or underwriters of any asset-backed security to make publicly available the findings and conclusions of any third-party due diligence report the issuer or underwriter obtains, until a later date when we adopt rules to implement the rest of Section 15(E)(s)(4), which we anticipate proposing this year. We are persuaded by the suggestion by several commentators that new Exchange Act Section 15E(s)(4) should be read as a whole, and that we should postpone implementation of 15E(s)(4)(A) until the Commission implements the rest of Section 15E.[8]

II. Final Rules

A. Scope of Rule 193

1. Proposed Amendments

We proposed new Rule 193 under the Securities Act to require issuers of ABS to perform a review of the assets underlying registered ABS offerings.[9] This rule would implement Securities Act Section 7(d)(1),[10] as added by Section 945 of the Act. As proposed, Rule 193

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8 See comment letters from American Bar Association ("ABA"); National Association of Bond Lawyers ("NABL").

9 The requirement to perform a review should not be confused with, and is not intended to change, the due diligence defense against liability under Securities Act Section 11 [15 U.S.C. 77k] or the reasonable care defense against liability under Securities Act Section 12(a)(2) [15 U.S.C. 77l(a)(2)]. Our rule is designed to require a review of the underlying assets by the issuer and to provide disclosure of the nature, findings and conclusions of such review.

10 15 U.S.C. 77g(d)(1).

would require an issuer to perform a review of the assets underlying an ABS in a transaction that the issuer registers under the Securities Act.

2. Comments on the Proposed Amendments – Scope of Rule 193

With respect to the applicability of the proposed rule, some commentators agreed that the rule should apply only to registered offerings of ABS.[11] Some commentators recommended the review requirement be extended to also apply to unregistered offerings and predicted that unless the rule applies to unregistered offerings, abusive practices are likely to migrate into the market for unregistered offerings.[12] One such commentator supported the approach in the Proposing Release's request for comment conditioning the Commission's safe harbors from registration on a requirement that the underlying transaction agreements include a representation that the issuer performed an asset review that complies with Rule 193.[13] Three commentators expressed concern with such a requirement.[14] One commentator sought clarification that the issuer may rely on a review performed by an affiliated originator.[15]

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11 See comment letters from ABA; Securities Industry and Financial Markets Association ("SIFMA").

12 See comment letters from Center for Responsible Lending ("CRL"); Senator Levin, Permanent Subcommittee on Investigations, United States Senate Committee on Homeland Security and Governmental Affairs ("Levin"); Consumer Federation of America ("Consumer Federation"); Christopher Chuff.

13 See comment letter from Consumer Federation.

14 See comment letters from ABA; American Financial Services Association ("AFSA"); SIFMA.

15 See comment letter from SIFMA. Another commentator noted that the relationship between the issuer and originator is an important consideration in determining the appropriateness of a review, and suggested that in so-called "aggregator" transactions, where the issuer is unaffiliated with the originator of the assets, the review should be more fulsome. See comment letter from ABA.

3. Final Rule – Scope of Rule 193

Consistent with the proposal, final Rule 193 requires that the asset review be conducted by the issuer of the ABS.[16] The issuer, for purposes of this rule, is the depositor or sponsor of the securitization. A sponsor typically initiates a securitization transaction by selling or pledging to a specially created issuing entity a group of financial assets that the sponsor either has originated itself or has purchased in the secondary market. In some instances, the transfer of assets is a two-step process: the financial assets are transferred by the sponsor first to an intermediate entity, the depositor or the issuer, and then the depositor transfers the assets to the issuing entity for the particular asset-backed transaction. The issuing entity is typically a statutory trust.[17] In cases where the originator and sponsor may be different, including in transactions involving a so-called "aggregator," our final rule, consistent with the proposal, provides that the review may be performed by the sponsor, but a review performed by an unaffiliated originator will not satisfy Rule 193. An unaffiliated originator may have different interests in the securitization, especially if the securitization involves many originators where each originator may have contributed a

[16] Under Securities Act Rule 191 (17 CFR 230.191), the depositor for the asset-backed securities acting solely in its capacity as depositor to the issuing entity is the "issuer" for purposes of the asset-backed securities of that issuing entity. "Depositor" means the depositor who receives or purchases and transfers or sells the pool assets to the issuing entity. See Item 1101 of Regulation AB (17 CFR 229.1101). For asset-backed securities transactions where there is not an intermediate transfer of the assets from the sponsor to the issuing entity, the term depositor refers to the sponsor. For asset-backed securities transactions where the person transferring or selling the pool assets is itself a trust, the depositor of the issuing entity is the depositor of that trust. See id. As defined in Item 1101 of Regulation AB, the "sponsor" means the person who organizes and initiates an ABS transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity. See id.

[17] See Asset-Backed Securities, Release No. 33-8518 (Dec. 22, 2004) [70 FR 1506] ("2004 Regulation AB Adopting Release") at Section III.B.3. The issuing entity is designed to be a passive entity, and in order to meet the definition of ABS issuer in Regulation AB its activities must be limited to passively owning or holding the pool of assets, issuing the ABS supported or serviced by those assets, and other activities reasonably incidental thereto.

very small part of the assets in the entire pool, and may have differing approaches to the review.[18]

As discussed in the Proposing Release, Section 7(d)(1) relates to an asset-backed security, as defined in new Section 3(a)(77) of the Exchange Act.[19] This new statutory definition ("Exchange Act-ABS") is broader than the definition of "asset-backed security" in Regulation AB[20] and includes securities typically offered and sold in private transactions. Although the Exchange Act-ABS term is used in Section 7(d)(1), we have concluded that the review requirements mandated by Section 7(d)(1) are limited to registered offerings of ABS because Section 7(d)(1) requires the Commission to issue rules "relating to the registration statement." Therefore, the rule we adopt today that requires an ABS issuer to perform a review of the assets applies to issuers of ABS in registered offerings and not issuers of ABS in unregistered offerings.

As noted above, in the Proposing Release we asked whether, even though Section 7(d)(1) does not extend to unregistered offerings, we should condition reliance on the Securities Act safe harbors from registration on a requirement that the underlying transaction agreement for the ABS contain a representation that the issuer performed a review that complies with Rule 193, or, alternatively, that the issuer perform a Rule 193 review. Given the mixed comments on this question and our outstanding proposals from April 2010 related to offerings under the safe harbors from registration,[21] we are not adopting at this time a separate requirement to condition

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18 In the case of so-called aggregators, the sponsor acquires loans from many other unaffiliated sellers before securitization.

19 15 U.S.C. 78c(a)(77). This definition was added by Section 941(a) of the Act.

20 See Item 1101(c)(1) of Regulation AB [17 CFR 229.1101(c)(1)].

21 See Asset-Backed Securities, Release No. 33-9117 (April 7, 2010) [75 FR 23328] (the "2010 ABS Proposing Release"). In the 2010 ABS Proposing Release we proposed requiring that the underlying transaction

the Commission's safe harbors for an exemption from registration on a requirement that the issuer conduct a review of the assets. As we noted in the 2010 ABS Proposing Release, we have concerns about investor protection in the exempt ABS markets.[22] While we continue to have these concerns, at this point we believe a comprehensive approach to the Commission's safe harbors for an exemption from registration would better serve investors and provide more certainty to issuers than an incremental approach. In the future, we may determine that discrete amendments to the safe harbors addressing ABS matters are appropriate.

B. Standard of Review of Assets by Issuers of ABS

1. Proposed Amendments

Proposed Rule 193 provided that an issuer would be required to conduct a review of the assets and disclose the findings and conclusions of the review. Proposed Rule 193 did not specify the level or type of review an issuer would be required to perform, or require that a review be designed in any particular manner. However, the Proposing Release included detailed requests for comment on whether we should set a minimum review standard, including possible standards that could be included in a final rule. In particular, the Proposing Release sought comment on a possible review standard that would require issuers to perform a review that, at a minimum, must be designed to provide reasonable assurance that the disclosure in the prospectus regarding the pool assets is accurate in all material respects. We also sought comment on

agreement in a transaction relying on certain Commission safe harbors for an exemption from registration under the Securities Act contain a provision requiring the issuer to provide to any initial purchaser, security holder, and designated prospective purchaser the same information as would be required in a registered transaction. In addition, the Commission solicited comment concerning whether safe harbors from registration should not be available for offerings of structured finance products and whether any restrictions should be imposed on private offerings of asset-backed securities.

22 See id. at 23394.

whether the rule should mandate that the review should not only be designed, but also effected, to provide reasonable assurance that the prospectus disclosure was accurate in all material respects.

2. Comments on the Proposed Amendments – Standard of Review

Comments on the proposed review requirement, including the absence of a minimum review standard, were varied. Some commentators responded that the review requirement, as proposed, did not address the problems that Section 945 of the Act sought to address and suggested that the Commission set a minimum level of review.[23] One commentator recommended that ABS issuers be required to conduct reviews that are both "designed and effected" with sufficient scale and scope to discover assets that violate applicable law or standards as set forth in the prospectus.[24] This commentator explained that this would go beyond providing "reasonable assurance that the disclosure in the prospectus is accurate in all material respects." One commentator cautioned that the rule, as proposed, would create a perverse incentive to decrease due diligence reviews even further in order to decrease the likelihood that they reveal problems that would have to be disclosed to investors.[25]

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23 See comment letters from Chris Barnard ("Barnard"); Consumer Federation (supporting a principles-based review standard such as the "reasonable assurance" standard discussed in the Proposing Release's request for comment, and suggesting that where initial reviews uncover discrepancies, further reviews sufficient to uncover the extent of the problem should be conducted); CRL; Levin; American Society of Appraisers, American Society of Farm Managers and Rural Appraisals, National Association of Independent Fee Appraisers (collectively, "Appraisers"); Clayton Holdings, LLC ("Clayton"); Americans for Financial Reform ("AFR"); Fitch, Inc. ("Fitch"). See also comment letter from ABA (supporting Rule 193 as proposed, but agreeing that the "reasonable assurance" approach discussed in the Proposing Release's request for comment is workable if the Commission were to adopt a minimum level of review).

24 See comment letter from CRL.

25 See comment letter from Consumer Federation.

Some commentators suggested possible alternative review standards that encompass other aspects of the assets, instead of disclosure. Some commentators urged the Commission to require a review that assesses the actual quality of the underwriting of the assets[26] and exclude the type of review of assets that amounts to a mere comparison or "comforting" of data that relates to the prospectus disclosure. These commentators stated that in light of the existing liability framework under the federal securities laws, it is not necessary for the Commission to require that issuers conduct or disclose any particular review that merely verifies the accuracy of the disclosure in the prospectus.[27] Some commentators believed that the type of review that should be disclosed under Rule 193 is a review that relates to the underwriting of the assets[28] or quality of the underlying assets (e.g., credit quality).[29]

Other commentators suggested that at a minimum, the review should include, for example, verifying the accuracy of the loan data and related information, determining whether the assets complied with the underwriting guidelines, determining compliance with the originator's property valuation guidelines, and determining whether the loans were originated in compliance with applicable laws.[30]

Other commentators, in support of a minimum review standard, suggested that the issuer's review should include disclosure of key indicators of loan quality (e.g., weighted average FICO

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26 See comment letters from ASF; SIFMA.

27 See comment letters from ASF; SIFMA.

28 See comment letters from ASF; SIFMA.

29 See comment letter from BDO USA, LLP.

30 See comment letters from Clayton; CRL.

scores, loan-to-value ratios, borrower debt-to-income ratios, and the absence of data suggesting loan fraud)[31] and a minimum sample size requirement.[32] Some commentators suggested that this should include a statistically valid sample of assets whose analysis could be extrapolated to the entire asset pool.[33] Two of these commentators argued that such a requirement would ensure a level playing field and that no issuer gains a competitive cost advantage by using smaller sample sizes.[34] One commentator suggested that the Commission consider the minimum sample sizes set forth by the various rating agencies,[35] while another noted that sampling should be conducted in a manner appropriate to provide confidence that a representative portion of the pool has been examined (e.g., a sample size could be computed using a 95% confidence level and a 5% confidence interval).[36]

On the other hand, some commentators supported the Commission's proposal, which did not prescribe a minimum level of review.[37] One commentator opposed the "reasonable assurance" standard in the Proposing Release's request for comment and argued that the standard is inappropriate and unnecessary to address the intent of the Act or to improve disclosure because the new requirements mandated by the Act should address a review of the assets, as

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31 See comment letter from Levin.

32 See comment letters from ABA; Clayton; Fitch; Levin; SIFMA.

33 See comment letters from Clayton; Fitch; Levin; SIFMA.

34 See comment letters from Clayton; Levin.

35 See comment letter from Clayton.

36 See comment letter from Fitch.

37 See, e.g., comment letters from ABA; American Bankers Association Securities Association ("ABASA"); Association for Financial Markets in Europe ("AFME"); Commercial Real Estate Finance Council ("CRE Finance Council"); and Mortgage Bankers Association ("MBA").

opposed to a review of the disclosure about the assets.[38] This commentator cautioned that a "reasonable assurance" standard would require issuers to describe what they did to get comfortable that they met their disclosure obligations, and expose them to liability for failing to have used procedures that provided such "reasonable assurance" or for not having accurately described the nature of the procedures and their findings and conclusions, even if there was no material error or omission in the prospectus about the pool assets.[39]

One commentator requested confirmation that Rule 193 addresses a review of assets in connection with the preparation of the securitization, rather than a review performed in connection with origination of a securitized asset.[40] This commentator explained that in the context of CMBS transactions, the sponsor of the securitization is often also the originator (or an affiliate of the originator) of the assets being transferred into a securitization, and that it would be unusual for any extra level of diligence to be performed on the assets themselves in connection with the securitization since the sponsor previously underwrote the assets and is familiar with the assets.

3. Final Rule – Issuer Review Requirement

After considering the comments, we are adopting Rule 193 with a minimum review standard. We agree with commentators who suggested that Rule 193 should require a minimum

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38 See comment letter from ASF.

39 See comment letter from ASF (noting that the scope of a "reasonable assurance" standard is overly broad considering the substantial amount of disclosure regarding the pool assets that is contained in the prospectus including, in addition to numerical information about the assets, narrative disclosure about such matters as the pool assets generally, risk factors relevant to the pool assets, servicing of the pool assets, and legal aspects of the pool assets).

40 See comment letter from CRE Finance Council.

level of review to implement the directive in Section 7(d), as added by Section 945 of the Act. Absent a minimum standard of review, we are concerned that issuers could satisfy new Rule 193 with a review that was not designed or carried out in a way that would address the concerns that led to the enactment of section 7(d)(1) – that due diligence be "re-introduced" into the offering process.[41] We also believe a minimum standard of review is appropriate in light of Congress's direction that issuers "of an asset-backed security…perform a due diligence analysis of the assets."[42] Indeed, permitting issuers to satisfy the statutory requirement with such a review potentially could undercut the statutory purpose by erroneously suggesting that due diligence was conducted.

While we have concluded that a minimum review standard is appropriate for our final rule, we believe a flexible, principles-based standard that would be workable across a wide variety of asset classes and issuers would best accomplish our objectives. Consequently, we are adopting Rule 193 modified from the proposal to require an issuer to perform a review of the assets underlying an ABS in a transaction that will be registered under the Securities Act that, at a minimum, must be designed and effected to provide reasonable assurance that the disclosure in the prospectus regarding the assets is accurate in all material respects.[43]

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41 See Senate Report, at 133 (quoting Senate committee testimony by Professor John Coffee). We note that some commentators supported the standard described in the Proposing Release's request for comment. See comment letters from Consumer Federation; ABA (suggesting that this approach is workable if the Commission were to adopt a minimum level of review, though supporting Rule 193 as proposed).

42 Id.

43 Thus, for example, if the prospectus disclosed that the loans are limited to borrowers with a specified minimum credit score, or certain income level, the review, as designed and effected, would be required to provide reasonable assurance that the loans in the pool met this criterion.

We note that the minimum standard that we are adopting is similar to the standard many companies use in designing and maintaining disclosure controls and procedures required under Exchange Act Rule 13a-15.[44] Our rules, which have applied to reporting companies for many years, generally "require an issuer to maintain disclosure controls and procedures to provide reasonable assurance that the issuer is able to record, process, summarize and report the information required in the issuer's Exchange Act reports" within appropriate time frames.[45] We believe that many issuers and their advisers are familiar with this type of standard.[46]

Rule 193 does not specify the particular type of review an issuer is required to perform.[47]

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44 17 CFR 240.13a-15.

45 See Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release No. 33-8238 (June 5, 2003). See also Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 34- 8124 (June 14, 2002) ("Certification in Periodic Reports Release"). ABS issuers must provide in Form 10-K an assessment by each party participating in the servicing function regarding its compliance with specified servicing criteria set forth in Item 1122 of Regulation AB. See 17 CFR 229.1122. A registered public accounting firm must issue an attestation report on such party's assessment of compliance. See id.

46 Although ABS issuers are not subject to Rule 13a-15, ABS issuers that also issue corporate securities are familiar with it. We previously have recognized that, because the information ABS issuers are required to provide differs significantly from that provided by other issuers, and because of the structure of ABS issuers as typically passive pools of assets, the certification requirements should be tailored specifically for ABS issuers. See Certification in Periodic Reports Release.

47 We understand that various levels and types of review may be performed in a securitization. For example, commentators on the 2010 ABS Proposing Release have identified that the type of review conducted by a sponsor of a securitization of sub-prime mortgage loans typically falls into three general categories. First, a credit review examines the sample loans to ascertain whether they have been originated in accordance with the originator's underwriting guidelines. This would include a review of whether the loan characteristics reported by the originator are accurate and whether the credit profile of the loans is acceptable to the sponsor. A second type of review could be a compliance review which examines whether the loans have been originated in compliance with applicable laws, including predatory lending and Truth in Lending statutes. Third, a valuation review entails a review of the accuracy of the property values reported by the originators for the underlying collateral. This could include a review of each original appraisal to assess whether it appeared to comply with the originator's appraisal guidelines, and the appropriateness of the comparables used in the original appraisal process. See comment letter from The Commonwealth of Massachusetts Office of the Attorney General ("Massachusetts AG comment letter") on the 2010 ABS Proposing Release. The comment letters are available at http://www.sec.gov/comments/s7-08-10/s70810.shtml.

We expect that the type of review of the assets an issuer performs may vary depending on the circumstances. For example, the nature of review may vary among different asset classes. While Rule 193 does not require a particular type of review, as described below, disclosure describing the type of review is required. The "reasonable assurance" standard is similar to language in the Foreign Corrupt Practices Act of 1977.[48] We recognize that while "reasonableness" is an objective standard, there is a range of judgments that an issuer might make as to what will provide "reasonable assurance."[49] Thus, the term "reasonable assurance" in Rule 193 does not imply a single methodology, but encompasses the full range of reviews an issuer may perform to ensure that its review is designed and effected to provide reasonable assurance that the prospectus disclosure regarding the pool assets is accurate in all material respects.

We continue to believe that the nature of review may vary depending on numerous circumstances and factors which could include, for example, the nature of the assets being securitized and the degree of continuing involvement by the sponsor.[50] We note the suggestion by several commentators that sampling should be permitted.[51] While we agree that sampling may be appropriate depending on the facts and circumstances, we believe that whether sampling

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48 Title 1 of Pub. L. 95-213 (1977). Exchange Act Section 13(b)(7) defines "reasonable assurance" as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. 78m(b)(7). We have long been of the view that "reasonableness" is not an "absolute standard of exactitude for corporate records." Release No. 34-17500 (Jan. 29, 1981) [46 FR 11544].

49 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. 34-55929 (June 20, 2007).

50 We agree with one commentator's view that the review that is required is a review of the assets for purposes of the securitization and not the review conducted to originate the assets.

51 See, e.g., comment letters from ABA; Fitch; Levin; SIFMA.

is sufficient to satisfy the "reasonable assurance" standard in Rule 193 will depend on a variety of factors, such as the type of ABS being offered. For example, in offerings of residential mortgage-backed securities ("RMBS"), where the asset pool consists of a large group of loans, it may be appropriate, depending on all the facts, to review a sample of loans large enough to be representative of the pool, and then conduct further review if the initial review indicates that further review is warranted in order to provide reasonable assurance that disclosure is accurate in all material respects. By contrast, for ABS where a significant portion of the cash flow will be derived from a single obligor or a small group of obligors, such as ABS backed by a small number of commercial loans ("CMBS"), it may be appropriate for the review to include every pool asset. Moreover, in ABS transactions where the asset pool composition turns over rapidly because it contains revolving assets, such as credit card receivables or dealer floorplan receivables, a different type of review may be warranted than in ABS transactions involving term receivables, such as mortgage or auto loans. We are not adopting a minimum sample size for offerings where sampling may be appropriate for the review as we believe any appropriate sample size must be based on the facts and circumstances. While reviewing a sample of assets may or may not be appropriate under the particular facts, we agree with commentators who suggested that, where a sample of the assets is reviewed, the size of the sample and the criteria used to select the assets sampled should be disclosed. Accordingly, we are adding an instruction noting that this disclosure should be provided as part of the description of the nature of the review, as discussed further below.

We have considered comment letters stating that the required review should relate to the credit quality, or underwriting, of the assets rather than the accuracy of the disclosure in the prospectus. We believe that accuracy of disclosure in the prospectus is an appropriate objective for the required review. The minimum review standard we are adopting will necessarily include credit quality and underwriting of the assets since disclosure about these factors is required in the prospectus, but also will be broader than just a review of the underwriting of the assets. Because an issuer is required under Regulation AB to provide disclosure about material characteristics of the asset pool indicating the quality of the asset pool, under the review requirement we are adopting today, the issuer will be required to review whether the disclosure regarding the asset pool is accurate in all material respects.[52] In addition to credit quality, this will include the disclosure currently required by Item 1111 of Regulation AB. Further, under Item 1111 of Regulation AB, as revised today, prospectus disclosure of the nature of the review is required.

C. Third Party Reviews

1. Proposed Amendments

Proposed Rule 193 would have permitted an issuer to rely on third parties to satisfy its obligations under Rule 193 provided the third party is named in the registration statement and consents to being named as an "expert" in accordance with Section 7 of the Securities Act and Rule 436 under the Securities Act.[53]

2. Comments on the Proposed Amendments

Some commentators supported the proposal to permit issuers to rely on third-party firms

[52] We note that the federal securities laws currently require that disclosure in the prospectus not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements not misleading. See Securities Act Section 11 [15 U.S.C. 77k] and Securities Act Section 12 [12 U.S.C. 77l]. See also Securities Act Section 17 [15 U.S.C. 77q], Exchange Act Section 10(b) [15 U.S.C. 78j] and Rule 10b-5 under the Exchange Act [17 CFR 240.10b-5].

[53] Section 7 of the Securities Act requires the consent of 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.

to conduct the required review.[54] One commentator noted that issuers should be responsible for the sufficiency and accuracy of the reviews without regard to whether the review is conducted by a third party.[55] Another commentator recommended that any third-party review be at arm's length.[56] In contrast, another commentator did not believe that an independence requirement was needed because an issuer may perform the review itself and cannot be independent or conflict-free with respect to itself.[57] This commentator reasoned that since an issuer is not required to rely on a third party and could conduct the review itself, there is no greater likelihood that the independence would be impaired.[58]

Some commentators expressed concern that third-party due diligence providers would be considered experts under the Securities Act and asserted that this treatment would be inconsistent with the principles guiding Section 11(a)(4) of the Securities Act.[59] Some commentators predicted that this requirement is likely to result in these providers withdrawing from providing services to transactions where expert liability would attach.[60] One commentator noted that if these third-party due diligence providers are subject to expert liability and they refuse to consent to being named as experts, registered RMBS transactions will become impossible because many NRSROs require that a non-affiliated third party perform a due diligence review in order to rate

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54 See comment letters from ABA; Consumer Federation.

55 See comment letter from CRL.

56 See comment letter from Barnard.

57 See comment letter from CAQ.

58 See comment letter from CAQ.

59 See comment letters from ABASA; Clayton; SIFMA.

60 See comment letters from Clayton; SIFMA.

RMBS.[61] This commentator explained that if issuers are unable to obtain a third-party review because of expert liability they would be unable to obtain a credit rating because of the lack of a third-party review.[62]

Several commentators who expressed concern that third-party due diligence providers would be considered experts under the Securities Act reasoned that due diligence providers are not licensed professionals and are not part of a regulated industry that is governed by a formal professional association.[63] One commentator argued that in light of an issuer's continuing liability under Section 11 for its disclosure related to due diligence, the additional comfort to the Commission and investors as to the accuracy of the diligence results gained by requiring expert liability is outweighed by the loss of diligence firms that will not consent to becoming experts.[64]

3. Final Rule – Third-Party Review

We are adopting, as proposed, a requirement that if an issuer engages a third party for purposes of performing its Rule 193 review, then an issuer may rely on the third-party's review to satisfy its obligations under Rule 193 provided the third party is named in the registration statement and consents to being named as an "expert" in accordance with Section 7 of the Securities Act and Rule 436 under the Securities Act. We believe that allowing issuers to

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61 See comment letter from SIFMA.

62 See comment letter from SIFMA.

63 See comment letters from ABASA; Clayton; SIFMA.

64 See comment letter from SIFMA. See also comment letter from Clayton (noting there is a significant risk it will refrain from accepting engagements to perform the asset review mandated by Rule 193 leading issuers to more in-house reviews, which could give rise to potential conflicts of interest).

contract with a third-party due diligence provider[65] is consistent with Section 15E(s)(4) of the Exchange Act.[66]

We recognize that issuers may routinely hire third parties to conduct various types of reviews, and not all persons assisting an issuer in these reviews would be subject to the new requirements. Under our new rule, any third party hired by the issuer to perform the review required under Rule 193, and to whom the issuer attributes findings and conclusions of the review in the prospectus will be required to be named in the registration statement and consent to being named as an "expert" as described above. On the other hand, if an issuer obtains assistance from a third party but attributes to itself the findings and conclusions of the review required by Rule 193, the third party would not be required to consent to being named as an expert.[67] In either case, the prospectus disclosure should make clear whether the disclosed finding and conclusions are those of the issuer or of a third party.[68] We believe that the hiring by

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65 In this release, we refer to third parties engaged for purposes of reviewing the assets also as third-party due diligence providers.

66 As noted above, Section 15E(s)(4) of the Exchange Act requires the issuer or underwriter of an ABS to make publicly available the findings and conclusions of a third-party due diligence report obtained by the issuer or the underwriter and requires a third-party due diligence provider that is employed by a nationally recognized statistical rating organization ("NRSRO"), an issuer or an underwriter to provide a written certification to the NRSRO that produces a credit rating. Under Section 15E(s)(4) of the Exchange Act, the Commission is required to establish the appropriate format and content for the certifications "to ensure that providers of due diligence services have conducted a thorough review of data, documentation, and other relevant information necessary for a nationally recognized statistical rating organization to provide an accurate rating." As noted above, we will address these requirements in a subsequent rulemaking.

67 If the findings and conclusions are attributed to a third party, that portion of the disclosure would be expertised. If the findings and conclusions are instead attributed to the issuer, that portion of disclosure would not be expertised. See Securities Act Section 11 [15 U.S.C. 77k].

68 We note that this approach is comparable to the staff's position in the context of a registrant that has engaged a third-party expert to assist in determining the fair values of certain assets or liabilities disclosed in a Securities Act registration statement. See Compliance and Disclosure Interpretations, Division of Corporation Finance, at Section 233, available at http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm (whether a registrant that has engaged a third-party expert to assist in determining fair value must disclose the name

an issuer of a third party to perform the review and using that review to market its securities would be inconsistent with disclosure that the issuer attributes to itself the findings and conclusions of the review.[69] We also note that an issuer may rely on multiple third parties to fulfill its Rule 193 review obligation, provided the issuer complies with the above requirements for each third party.

We note commentators' concern that some third parties might not consent to being named as experts. We are not requiring a third-party review and, if the issuer obtains the assistance of a third party, the issuer can attribute the findings and conclusions of the review to itself and avoid the need to obtain consent. If, however, the issuer attributes the findings and conclusions to a third party, we believe that the third party should be named in the registration statement and be treated in the same manner as other experts, such as investment banks that provide fairness opinions. We believe, based on discussions with industry participants, that at least some third-party reviewers will continue to perform reviews for ABS issuers and will revise their review procedures as needed to be comfortable being named as experts in registered ABS transactions. We also note that third parties would not be required to provide consent in all instances, but only where the issuer attributes the findings and conclusions of the review to the third party.

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of the third-party expert in its registration statement and obtain the third-party's consent under Securities Act Section 7(a) depends on whether the disclosure attributes the statement to the third-party expert).

69 If an issuer obtains the assistance of a third party to perform the review, and discloses this fact pursuant to Item 1111 of Regulation AB, as discussed below, this would not be using the information to market the securities provided the only information disclosed is that which is required by the rule, and the issuer does not otherwise use this fact to market the securities. Similarly, we are of the view that consent to being named as an expert would not be required of a third party hired by the issuer to assist in performing the review solely based on the fact that the issuer provides disclosure pursuant to Item 1111 of Regulation AB that the issuer hired a third party for the purpose of assisting it to perform the Rule 193 review.

D. Disclosure Requirements

1. Proposed Rules

Item 1111 of Regulation AB[70] outlines several aspects of the pool that the prospectus disclosure for ABS should cover. We proposed amendments to Item 1111 to require disclosure regarding the nature of the issuer's review of the assets under Rule 193 and the findings and conclusions of the review. In addition, we re-proposed amendments from our 2010 ABS Proposing Release to require disclosure regarding the composition of the pool as it relates to assets that do not meet disclosed underwriting standards, as we believe this information would promote a better understanding of the impact of the review and the composition of the pool assets.

We proposed new Item 1111(a)(7) of Regulation AB to require that an issuer of ABS disclose the nature of the review it conducts to satisfy proposed Rule 193. This proposed requirement would implement Securities Act Section 7(d)(2),[71] as added by the Act. As discussed in the Proposing Release, this disclosure would include whether the issuer has hired a third-party firm for the purpose of reviewing the assets. We also proposed to amend Item 1111(a)(7) to require an ABS issuer to disclose the findings and conclusions of any review performed by the issuer or by a third party engaged for purposes of reviewing the assets.[72] We also proposed Item 1111(a)(8) which re-proposed additional requirements substantially similar to those we had previously proposed in the 2010 ABS Proposing Release. This item would have

[70] 17 CFR 229.1111.

[71] 15 U.S.C. 77g(d)(2).

[72] This language is intended to be consistent with the language used in Exchange Act Section 15E(s)(4)(A).

required disclosure of whether, and if so, how, any assets in the pool deviate from the disclosed underwriting criteria and data on the amount and characteristics of those assets that did not meet the disclosed standards. In addition to what we proposed in the 2010 ABS Proposing Release, we proposed a requirement that the issuer disclose the entity (e.g., sponsor, originator or underwriter) who determined that such assets would be included in the pool, despite not having met the disclosed underwriting standards.

2. Comments on the Proposed Amendments

Comments on the proposal were mixed. Some commentators supported the proposal in Item 1111(a)(7)[73] and another commentator expressed support for the proposal in Item 1111(a)(8).[74] Another commentator requested that the Commission modify the proposal in Item 1111(a)(8) such that the disclosure would be required only to the extent it is material to investors.[75] This commentator also suggested that the Commission clarify that subparagraph (8) not be read to require 100% diligence of the pool such that, to the extent that an issuer does a sampling of the pool, only the deviations that are discovered in that sampling would need to be reported.[76] This commentator also objected to the proposal to disclose the entity who made the decision to include the deviating assets as part of the pool, because multiple transaction parties could collectively agree on what assets are to be included in the pool.[77] To the extent that in a

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73 See comment letters from Chuff; SIFMA.

74 See comment letter from Fitch.

75 See comment letter from SIFMA.

76 See comment letter from SIFMA.

77 See comment letter from SIFMA.

particular transaction a single party makes the decision, this commentator argued that the disclosure is not material and should not be required to be reported.[78] Another commentator suggested that such disclosure not be required for offerings of CMBS because decisions about CMBS pool assets are not susceptible to being attributed to a particular party due to the fungible nature of CMBS assets and the fact that the decisions are an iterative process involving the sponsor, issuer, and at times investors, to largely the same degree.[79]

Some commentators recommended that the rule provide further guidance on the findings and conclusions that must be disclosed.[80] One commentator highlighted that third-party due diligence reviews typically evaluate a sample of assets according to underwriting guidelines provided by the asset seller and other criteria specified by the asset purchaser.[81] This commentator noted that the typical end product of a third-party due diligence review in RMBS offerings is the grading of specific loans in a sample provided by the asset purchaser, according to whether the loans meet the seller guidelines and buyer criteria or whether they comply with applicable laws.[82] In order for investors to be able to understand the loan "grades" and evaluate the quality of the reviewed assets, however, this commentator suggested that the rule require disclosure of the controlling guidelines and criteria used to produce the loan grades or

[78] See comment letter from SIFMA.

[79] See comment letter from CRE Finance Council.

[80] See comment letters from CRE Finance Council; Levin.

[81] See comment letter from Levin.

[82] See comment letter from Levin.

designations.[83]

One commentator argued that Item 1111(a)(8) seems to assume that all originators have uniform underwriting criteria that permit the evaluation of most loans on a mechanical basis.[84] In particular, this commentator explained that auto loan originators do not have hard and fast guidelines by which most loan applications can be evaluated. Instead, explained this commentator, such originators use electronic decision-making systems as a first filter for applications. Most decisions, however, are made by credit analysts at a variety of levels and the fact that a given loan required a higher level of approval does not mean that the loan should be considered an exception to the underwriting guidelines because there may be many reasons why a loan might require a higher level of approval and still fit within the "standard process" of the originator. While this commentator did not object to the Commission's formulation of Item 1111(a)(8), it believed that many sponsors of auto loan ABS would not provide any incremental disclosure in response to new Item 1111(a)(8) because the underwriting guidelines in their prospectuses indicate that they make judgmental underwriting decisions, and there are not disclosed standards by which loans are evaluated, so there will not be a need to describe loans that fail to meet those standards.

3. Final Rules

After considering the comments, we are adopting the amendments to Item 1111 of Regulation AB substantially as proposed. We agree with commentators that the disclosure should provide a clear picture of the review undertaken and the results and have thus revised the

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83 See comment letter from Levin.

84 See comment letter from AFSA.

item to make that clearer.

a. Nature of Review

New Item 1111(a)(7) of Regulation AB requires that an issuer of ABS disclose the nature of the review it conducts to satisfy proposed Rule 193. This would include whether the issuer has hired a third-party firm for the purpose of reviewing the assets, or to assist it in reviewing the assets. This would include a description of the scope of the review, such as whether the issuer or a third party conducted a review of a sample of the assets and what kind of sampling technique was employed (i.e., random or adverse).

b. Findings and Conclusions

Under new Item 1111(a)(7), the issuer will be required to disclose the findings and conclusions of the review performed by the issuer or by a third party engaged for purposes of reviewing the assets. Although Section 7(d) of the Securities Act does not require our rules to mandate that the issuer disclose the findings and conclusions of a review in its registration statement, we continue to believe this information is important for investors to consider along with the information in the registration statement relating to the nature of the issuer's review as required to be publicly disclosed by Securities Act Section 7(d). We continue to believe that disclosure of the findings and conclusions of the review will provide investors with a better picture of the assets than would be provided by disclosure only of the nature of the review and would provide a better ability to evaluate the review. We have revised the item to make clear that disclosure of the findings and conclusions necessarily requires disclosure of the criteria against which the loans were evaluated, and how the evaluated loans compared to those criteria along with the basis for including any loans not meeting those criteria.[85] In order to ensure that this requirement is clear, we have included an instruction to the rule.

c. Disclosure Regarding Exception Loans

We are adopting, as proposed, Item 1111(a)(8) of Regulation AB. Item 1111(a)(8) of Regulation AB requires issuers to disclose how the assets in the pool deviate from the disclosed underwriting criteria and include data on the amount and characteristics of those assets that did not meet the disclosed standards. Issuers are required to disclose the entity (e.g., sponsor, originator, or underwriter) who determined that such assets should be included in the pool, despite not having met the disclosed underwriting standards, and what factors were used to make the determination. For example, this could include compensating factors, such as those included in an issuer's waiver policies for including in the pool loans that fail to meet the disclosed underwriting criteria, or a determination that the exception was not material. If compensating or other factors were used, issuers will be required to provide data on the amount of assets in the pool, or in the sample or otherwise known to the issuer if only a sample was reviewed, that are represented as meeting each factor and the amount of assets that do not meet those factors. We also believe that this information will help provide investors with a more complete understanding of the quality and extent of the issuer's review of the assets (through hiring a third-party or otherwise) and how that relates to a determination to either include a loan in the pool or exclude it from the pool.

[85] Such disclosure would be required in order to provide meaningful context to disclosure of the findings and conclusions of the issuer or their-party due diligence providers. See comment letter from Levin (stating that disclosure of loan grades, as used by third-party due diligence providers, in isolation, without disclosure of controlling guidelines used to produce those grades, is not useful to investors).

To the extent the underwriting criteria outlined in the prospectus are broad or describe underwriting decisions involving the use of discretion, the prospectus would need to provide disclosure of how the broad subjective underwriting decisions were applied. We note that Item 1111 of Regulation AB requires a description of the underwriting criteria used to originate or purchase the pool assets. Thus, where originators may approve loans at a variety of levels, and the loans underwritten at an incrementally higher level of approval are evaluated based on judgmental underwriting decisions, the criteria for the first level of underwriting should be disclosed, and loans that are included in the pool despite not meeting the criteria for this first level of underwriting criteria should be disclosed under Item 1111(a)(8).

We also are adopting, with some clarification, the requirement that the issuer disclose the entity (e.g., sponsor, originator or underwriter) who determined that such assets would be included in the pool, despite not having met the disclosed underwriting standards. While we are aware of some commentators' objection to reporting this information because of the possibility that multiple transaction parties could collectively agree on what assets are to be included in the pool, we continue to believe that this additional requirement will assist investors in understanding the entities along the securitization chain that may be directing decisions to include exception loans in the pool, even where more than one entity may be involved.[86] We believe this information will be useful to investors because it will provide investors with information to gauge whether the decision to accept such loans may be subject to a potential conflict of interest. We have revised the rule to clarify that if multiple parties are involved in this decision, they should all be named.

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[86] See, e.g., Massachusetts AG comment letter.

E. Transition Period

Consistent with one commentator's suggestion, we have set a compliance date for the rule we adopt today that will allow market participants and industry groups sufficient time to develop procedures and systems required to comply with rule's requirements.[87] As this commentator noted, and as we recognize, other initiatives and changes to the markets are simultaneously affecting participants in the securitization industry.[88] Accordingly, any registered offering of ABS commencing with an initial bona fide offer after December 31, 2011, must comply with the new rules. We believe, consistent with one commentator's suggestion, a transition period will allow issuers time to design a review to meet the rule's minimum standard.[89] We also believe a transition period will benefit third parties who, under the rule, potentially may be subject to expert liability in certain circumstances and may require a transitional period to implement procedures, or revise current ones, in light of the potential expert liability.

III. Paperwork Reduction Act

Certain provisions of the final rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[90] We published a notice requesting comment on the collection of information requirements in the Proposing Release for

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87 See comment letter from SIFMA.

88 See, e.g., Improvements to the Asset-Backed Securitization Process, Title IX, Subtitle D of the Act; Treatment by the Federal Deposit Insurance Corporation as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection with a Securitization or Participation After September 30, 2010, Final Rule, Federal Deposit Insurance Corporation (Sept. 27, 2010).

89 See comment letter from SIFMA.

90 44 U.S.C. 3501 et seq.

the rule amendments, and we submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[91] 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. The titles for the collections of information are:[92]

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

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

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

Compliance with the proposed amendments is mandatory. Responses to the information collections will not be kept confidential and there is no mandatory retention period for the information disclosed.

Our PRA burden estimates for the final amendments are based on information that we receive on entities assigned to Standard Industrial Classification Code 6189, the code used with respect to ABS, as well as information from outside sources.[93] When possible, we base our estimates on an average of the data that we have available for the years 2004 through 2009.

In the Proposing Release, we requested comment on the PRA analysis. No commentators responded to our request for comment on the PRA analysis.

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91 44 U.S.C. 3507(d) and 5 CFR 1320.11.

92 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.

93 We rely on two outside sources of ABS issuance data. We use the ABS issuance data from Asset-Backed Alert on the initial terms of offerings, and we supplement that data with information from Securities Data Corporation (SDC).

Forms S-1 and S-3

The amendments to Item 1111 of Regulation AB will increase the disclosure required in offerings of ABS registered on either Forms S-1 or S-3. The amendment to Item 1111 requires issuers to disclose how the assets in the pool deviate from the disclosed underwriting criteria, and include data on the amount and characteristics of those assets that did not meet the disclosed standards. Issuers will be required to disclose the entity who determined that such assets should be included in the pool and what factors were used to make the determination. Under new Rule 193, if an issuer employs a third party to perform the review and attributes the findings and conclusions of the review to the third party, the third party must be named in the registration statement and consent to being named as an expert in accordance with Securities Act Rule 436. Thus, we anticipate that issuers will incur a burden in obtaining a consent from the third party.

We believe that the requirements will increase the annual incremental burden to issuers by 30 hours per form.[94] 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. From 2004 through 2009, an estimated average of four offerings was registered annually on Form S-1 by ABS issuers. We believe that the requirements will result in an increase to the internal burden to prepare Form S-1 of 30 burden hours (0.25 x30 x 4) and an increase in outside costs of $36,000 ($400 x 0.75 x 30 x 4). During 2004 through 2009, we estimate an annual average of 929 offerings of ABS registered on Form S-3. Therefore, we believe that the requirements we are

[94] This does not reflect burdens associated with the review that would be required as a result of Rule 193, which we believe does not impose a collection of information requirement for purposes of our PRA analysis.

adopting will result in an increase to the internal burden to prepare Form S-3 filings of 6,968 burden hours (0.25 x 30 x 929) and a total cost of $8,361,000 (400 x 0.75 x 30 x 929).

Regulation S-K

Regulation S-K includes the item requirements in Regulation AB and contains the disclosure requirements for filings under both the Securities Act and the Exchange Act. In 2004, we noted that the collection of information requirements associated with Regulation S-K as it applies to ABS issuers are included in Form S-1 and Form S-3.[95] The amendments that we are adopting revise Regulation S-K. The collection of information requirements, however, are reflected in the burden hours estimated for the various Securities Act and Exchange Act forms related to ABS issuers. The rules in Regulation S-K do not impose any separate burden. Consistent with historical practice, we have retained an estimate of one burden hour for Regulation S-K for administrative convenience.

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
S-1	1,168	1,168	247,982	30	248,012	$297,578,400	$36,000	$297,614,400
S-3	2,065	2,065	236,959	6,968	243,927	$284,350,500	$8,361,000	$292,711,500
Total				6,998			$8,397,000	

IV. Benefit-Cost Analysis

The amendments to our regulations for ABS relate to requiring an issuer of an ABS to perform a review of the assets underlying the security. The rules we are adopting are intended to implement the requirements under new Section 7(d) of the Securities Act. First, we are adopting

95 See 2004 Regulation AB Adopting Release.

a new Securities Act rule to require issuers of registered offerings of asset-backed securities to perform a review of the assets underlying the asset-backed securities that, at a minimum, must be designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in the prospectus is accurate in all material respects. Second, we also are adopting new requirements in Regulation AB to require disclosure regarding:

- The nature of the review of assets conducted by an ABS issuer;
- The findings and conclusions of a review of assets conducted by an ABS issuer or third party;
- Disclosure regarding assets in the pool that do not meet the underwriting standards; and
- Disclosure regarding which entity determined that the assets should be included in the pool, despite not having met the underwriting standards and what factors were considered in making this determination.

The Commission is sensitive to the costs and benefits imposed by the rules it is adopting. The discussion below focuses on the costs and benefits of the amendments made by the Commission to implement the Act within the Commission's permitted discretion and related amendments not required by the Act, rather than the costs and benefits of the Act itself. Except as discussed below, no commentators responded to our request for comment on the costs and benefits of the proposed rule identified in the Proposing Release.

A. Benefits

The amendments we are adopting are designed to increase investor protection by implementing the requirement in Section 7(d) of the Securities Act, which was added by Section

945 of the Act, for issuers to perform a review of the underlying assets and disclose the nature of the review. We expect that requiring a minimum level of review of the assets will result in loan pools that have fewer loans that do not conform to the disclosures in the prospectus regarding the pool assets. We also expect that establishing a minimum level of review will prevent some potential reviews that are not sufficiently thorough, and disclosures about the pool assets that are not sufficiently accurate. Finally, we also expect that a minimum standard of review will benefit investors by facilitating comparability among reviews performed by different issuers.

On the other hand, we believe that a principles-based approach is appropriate to allow for review procedures to be based upon the economic characteristics of the asset pool that is being examined. Accordingly, our rules do not prescribe specific guidelines to employ in reviews. This flexibility should help increase the usefulness of reviews for investors and limit their costs.

Further, the detailed description of the nature of the review and disclosure of findings and conclusions should encourage more rigorous asset reviews, whether by issuers or third parties engaged to perform the asset reviews. These disclosures would complement the requirement to perform a review by improving the quality, and investor understanding, of the review.

Although issuers in registered offerings are not required to use a third party to satisfy the review requirement, as a condition to such use, if the findings and conclusions of the review will be attributed to a third party, a third party would be required to consent to being named in the registration statement and thereby accept potential expert liability, which should increase the quality of that review. In registered offerings, where the third party consents to being named in the prospectus, the potential expert liability for the findings and conclusions of third-party reviews should provide accountability and creates stronger incentives to perform high-quality reviews that protect investors. The resulting disclosures should reduce the information risk of investing in these securities. Our amendments to require detailed disclosure by the issuer of the nature, findings and conclusions of its review could result in improved asset review practices. Moreover, this could be useful to investors if they prefer investing in securities about which there is disclosure indicating a more robust review over investing in securities about which the disclosure indicates a less robust review.

The requirement to disclose exception loans may provide important information to investors regarding the characteristics of the pool that may otherwise not be publicly known. For those issuers that currently provide asset-level information about the pool, an investor might be able, without this new requirement, to determine some information about the number of exception loans; however, even where this could be determined under current rules, the amendments would reduce investors' cost of information production by reducing duplicative efforts to gather such data on their own or purchase it through data intermediaries. We also are adopting amendments to require disclosure of the entities that have determined that an asset that deviates from underwriting standards should, nonetheless, be included in the pool. Because third-party asset review providers typically work for sponsors, there is potentially a conflict of interest when a sponsor can waive or overrule the third-party's conclusions that insufficient compensating factors exist to allow inclusion of an asset that does not meet the underwriting standards governing the pool.[96] We expect that information about which entity made the determination to include an asset in the pool despite not having met the underwriting standards will provide investors with information to gauge whether the decision to accept such loans

96 See, e.g., comment letter from Massachusetts AG.

otherwise may be subject to a conflict of interest. We also expect this will reduce the cost of information asymmetry and could be useful information to investors because investors may be able to price a securitization of a pool of assets more accurately. It also may assist credit rating agencies in assigning more informed credit ratings, and investors may be able to price ABS offerings more accurately.

Our amendments requiring detailed disclosure of the nature of the review, as well as the findings and conclusions of any such review, may increase investor confidence in the market for ABS. These disclosures could allow investors to better understand the information about the asset pool and credit risk of the asset pool.

B. Costs

The final rule would implement the requirement in Section 7(d) of the Securities Act, added by Section 945 of the Act, that all issuers of registered ABS offerings perform a review of the underlying assets and that those issuers disclose the nature of their review. Although issuers of ABS likely already perform some level of review of the underlying assets and many originators review the assets at origination, ABS issuers in registered offerings may incur additional costs to perform more extensive reviews that are sufficient to comply with the minimum level of review required by the rule, whether the issuer performs the review itself, or hires a third-party to perform the review. Moreover, this could be costly to issuers, if investors do not seek to invest in securities about which there is disclosure indicating a more robust review over investing in securities about which the disclosure indicates a less robust review.

It is possible that by establishing a minimum standard for the review, some issuers who otherwise may have performed a more thorough review may design their reviews to accomplish no more than the minimum required by the rule.[97] We note, however, that under Rule 193 issuers may obtain a third party to perform the required review and attribute the review to the third party provided the third party is named in the registration statement and consents to being named as an expert in the registration statement. This flexibility in the rule allows for those third-party reviewers that consent to being named as an expert in the registration statement to conduct more thorough reviews and separate themselves from other third-party reviewers that would not provide those higher levels of assurance. At the same time, commentators observed that there are incentives not to conduct adequate due diligence, which supports the need for a minimum standard required by law.[98]

Rule 193 permits an issuer to rely on a third party to perform the required review, provided the review satisfies the standard in Rule 193. If the issuer will attribute the findings and conclusions of the review to the third party, the third party will be required to be named in the registration statement and consent to be named as an expert in the registration statement. One commentator predicted that requiring third parties to be named in the registration statement as experts will materially impact the cost of due diligence services which will likely render securitizations non-economic for issuers.[99] Some asset classes may not have third-party due diligence providers available to be engaged to conduct a review. In instances where an issuer must conduct the review and attributes to itself the findings and conclusions of the review, we believe that the costs of conducting these reviews will not exceed the costs of engaging third

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[97] See, e.g., comment letter from Consumer Federation (observing that all members of the securitization supply change have "strong incentives…to skimp on due diligence").

[98] Id.

[99] See comment letter from SIFMA.

parties to conduct the reviews.

Further, it is possible that third-party providers may lack sufficient capabilities to provide the review for which they are retained. Additionally, third-party review firms are not registered with the Commission and some may not be subject to professional standards. However, our rules subject third-party review firms in registered transactions to potential expert liability for the disclosure regarding the findings and conclusions of their review of the assets. For certain firms, however, in particular smaller review firms that may lack the financial resources to cover their potential liabilities, expert liability may not be a significant deterrent because these firms have less financial resources exposed to potential liability and may not be as concerned about losing potential claims compared to firms that have more financial resources exposed to liability. This may create a burden on both qualified providers of due diligence and the securitizers that hire them.

We acknowledge that the potential for expert liability could impose costs on issuers and third-party due diligence providers, and they may be required to adjust their practices (and prices in the case of third parties) to account for this new requirement. Some commentators noted that it is possible that third parties engaged by issuers to perform the review required by Rule 193 may be unwilling to consent to being named in the registration statement as experts.[100] In the context of RMBS, some credit rating agencies require third-party reviews on all residential mortgage pools as a condition to rating the transaction.[101] If all third-party providers are unwilling to consent to being named in the registration statement as experts, issuers that are

100 See, e.g., comment letters from ASF; Clayton; SIFMA.

101 See comment letter from Fitch.

unwilling to attribute to themselves alone the findings and conclusions of the review may be unable to obtain a third party review and, consequently, be unable to obtain a credit rating. We note, however, that a third party would not be required to consent to being named as an expert if an issuer does not attribute the findings and conclusions of the review to the third party. We also believe, based on discussions with industry participants, including third-party review firms, that at least some third parties hired to perform the review will make any necessary adjustments to their review procedures and prices in order to be willing to be named in the registration statement as experts.

As adopted, the amendments requiring issuers to provide detailed disclosure relating to the nature of the review, the findings and conclusions of such review, and disclosure about loans that deviate from the disclosed underwriting criteria will impose a disclosure burden.

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a) of the Exchange Act[102] 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[103] and Section 3(f) of the Exchange Act[104] require the Commission, when engaging in rulemaking that requires it to consider whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection

[102] 15 U.S.C. 78w(a).

[103] 15 U.S.C. 77b(b).

[104] 15 U.S.C. 78c(f).

of investors, whether the action would promote efficiency, competition, and capital formation. Below, we address these issues for each of the substantive changes we are adopting regarding offerings of ABS.

As a result of the financial crisis and subsequent events, the market for securitization has declined due, in part, to perceived uncertainty about the accuracy of information about the pools backing the ABS and perceived problems in the securitization process that affected investors' willingness to participate in these offerings.[105] Greater transparency of the review performed on the underlying assets would decrease the uncertainty about pool information and, thus, should help investors price these products more accurately. The requirements we are adopting are likely to positively affect pricing, efficiency, and capital allocation in ABS capital markets. The minimum review standard that we are adopting helps to strengthen these effects by decreasing the possibility of low quality review providers entering the market and possibly precipitating a decrease in the quality of due diligence.

Finally, the introduction of expert liability on the third-party review providers may have consequences for the competition in this market. The possibility of expert liability may provide an incentive for due diligence providers to improve the quality of their reviews. Thus, one possible market outcome is for reviewers to compete on the quality of their services, because high quality providers may credibly separate themselves from lower quality providers by consenting to be named as experts, with potential liability resulting from that designation.

On the other hand, the possibility of expert liability may not be a significant deterrent for smaller due diligence providers that do not have the financial resources to cover their potential

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[105] See, e.g., David Adler, A Flat Dow for 10 Years? Why it Could Happen, BARRONS (Dec. 28, 2009).

liabilities. This may adversely affect competition in both the market for the provision of due diligence and the market for ABS. Diligent providers of asset reviews may be pressured to decrease their standards, their prices or both. In addition, ABS with reviews obtained from such parties may affect the pricing of competing securities.

One commentator predicted that imposing expert liability on third-party reviewers could result in new and less-qualified firms entering the market, particularly since the third-party diligence business does not have any barriers to entry like those that apply to other professions which have potential expert liability.[106] Alternatively, the possibility of expert liability could be an incentive for due diligence providers to compete on quality and improve their capabilities.

In summary, taken together the amendments and regulations we are adopting implement Congress' mandate under the Act and are designed to improve investor protection, improve the quality of the assets underlying an ABS, and increase transparency to market participants. We believe that the amendments also would improve investors' confidence in asset-backed securities and help recovery in the asset-backed securities market with attendant positive effects on efficiency, competition and capital formation.

VI. Regulatory Flexibility Act Certification

Under Section 605(b) of the Regulatory Flexibility Act,[107] we certified that, when adopted, the proposals would not have a significant economic impact on a substantial number of small entities. We included the certification in Part VIII of the Proposing Release. While we encouraged written comment regarding this certification, none of the commentators responded to

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106 See comment letter from Clayton.

107 5 U.S.C. 605(b).

this request.

VII. Statutory Authority and Text of Rule and Form Amendments

We are adopting the new rules and amendments contained in this document under the authority set forth in Sections 6, 7, 10, 19(a), and 28 of the Securities Act, and Sections 3(b), 23(a), and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 229 and 230

Advertising, Reporting and recordkeeping requirements, Securities.

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

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 — REGULATION S-K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u–5, 78w, 78ll, 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

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2. Amend §229.1111 by:

a. Revising the introductory text to paragraph (a):

b. Adding paragraphs (a)(7) and (a)(8).

The revision and additions read as follows:

§229.1111 (Item 1111) Pool assets.

* * * * *

(a) Information regarding pool asset types and selection criteria. Provide the following information:

* * * * *

(7)(i) The nature of a review of the assets performed by an issuer or sponsor (required by §230.193), including whether the issuer of any asset-backed security engaged a third party for purposes of performing the review of the pool assets underlying an asset-backed security; and

(ii) The findings and conclusions of the review of the assets by the issuer, sponsor, or third party described in paragraph (a)(7)(i) of this section.

Instruction to Item 1111(a)(7): The disclosure required under this item shall provide an understanding of how the review related to the disclosure regarding the assets. For example, if benchmarks or criteria different from that specified in the prospectus were used to evaluate the assets, these should be described, as well as the findings and conclusions. If the review is of a sample of assets in the pool, disclose the size of the sample and the criteria used to select the assets sampled. If the issuer has engaged a third party for purposes of performing the review of assets, and attributes the findings and conclusions of the review to the third party in the disclosure required by this item, the issuer must provide the name of the third-party reviewer and comply with the requirements of §230.436 of this chapter.

(8) If any assets in the pool deviate from the disclosed underwriting criteria or other criteria or benchmark used to evaluate the assets, or any assets in the sample or assets otherwise known to deviate if only a sample was reviewed, disclose how those assets deviate from the

disclosed underwriting criteria or other criteria or benchmark used to evaluate the assets and include data on the amount and characteristics of those assets that did not meet the disclosed standards. Disclose which entity (e.g., sponsor, originator, or underwriter) or entities determined that those assets should be included in the pool, despite not having met the disclosed underwriting standards or other criteria or benchmark used to evaluate the assets, and what factors were used to make the determination, such as compensating factors or a determination that the exception was not material. If compensating or other factors were used, provide data on the amount of assets in the pool or in the sample that are represented as meeting each such factor and the amount of assets that do not meet those factors. If multiple entities are involved in the decision to include assets despite not having met the disclosed underwriting standards, this should be described and each participating entity should be disclosed.

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PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

3. The authority citation for part 230 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

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Section 230.193 is also issued under sec. 943, Pub. L. No. 111-203, 124 Stat. 1376.

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4. Add §230.193 to read as follows:

§230.193 Review of underlying assets in asset-backed securities transactions.

An issuer of an "asset-backed security," as that term is defined in Section 3(a)(77) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(77)), offering and selling such a security pursuant to a registration statement shall perform a review of the pool assets underlying the asset-backed security. At a minimum, such review must be designed and effected to provide reasonable assurance that the disclosure regarding the pool assets in the form of prospectus filed pursuant to §230.424 of this chapter is accurate in all material respects. The issuer may conduct the review or an issuer may employ a third party engaged for purposes of performing the review. If the findings and conclusions of the review are attributed to the third party, the third party must be named in the registration statement and consent to being named as an expert in accordance with §230.436 of this chapter.

Instruction to §230.193: An issuer of an "asset-backed security" may rely on one or more third parties to fulfill its obligation to perform a review under this section, provided that the reviews performed by the third parties and the issuer, in the aggregate, comply with the minimum standard in this section. The issuer must comply with the requirements of this section for each third party engaged by the issuer to perform the review for purposes of this section. An issuer may not rely on a review performed by an unaffiliated originator for purposes of performing the review required under this section.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: January 20, 2011

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63743 / January 20, 2011

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3233 / January 20, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14201

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

I.

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

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

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Bur, age 49, was licensed to practice as a CPA in North Carolina starting in 1987, until that license was forfeited in 1988. He was also licensed to practice as a CPA in Missouri starting in 1988, and in Kansas starting in 1994, but these licenses lapsed. Bur's certificate status in Kansas is currently active. He served as Chief Financial Officer ("CFO") of NIC Inc. ("NIC") from April 2001, until June 2007. Bur also was a member of NIC's disclosure committee.

2. NIC, Inc. was, at all relevant times, a Colorado corporation with its principal place of business in Kansas. NIC was engaged in the business of developing and managing web sites, online services, and secure payment processing systems for state, local, and federal government agencies. At all relevant times, NIC's common stock was registered under Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ Global Select Market.

3. On January 12, 2011, the Commission filed a complaint against Bur in Securities and Exchange Commission v. NIC Inc., et al., Civil No. 2:11-cv-02016 (EFM-JPO) (D. Kansas). On January 18, 2011, the court entered a final judgment permanently enjoining Bur, by consent, from future violations of Exchange Act Rules 13a-14 and 13b2-1, and aiding and abetting violations of Sections 13(a), 13(b)(2)(A), 13(b)(2)(B), and 14(a) of the Exchange Act and Rules 12b-20, 13a-1, 14a-3, and 14a-9 thereunder. Bur was also ordered to pay a $75,000 civil money penalty.

4. The Commission's Complaint alleged, among other things, that NIC's former CEO (the "CEO") received more than $1.18 million in undisclosed perquisites from at least 2002 to 2007. The Complaint alleged that Bur, NIC's CFO and a member of NIC's disclosure committee, had responsibility, along with NIC's Chief Accounting Officer, for NIC's internal controls, books and records, and executive compensation disclosures in public filings. The Complaint alleged that Bur was informed that the CEO was not submitting documentation supporting a business purpose for his expenses as required by NIC's policies. The Complaint alleged that a subordinate raised concerns to Bur that some of the CEO's expenses were not

business related. The Complaint alleged that Bur permitted NIC to pay the CEO's expenses, which caused NIC's books, records and accounts to falsely characterize the CEO's perquisites as business expenses. In addition, the Complaint alleged that Bur was aware of the Commission's rules requiring the disclosure of perquisites in proxy statements and annual reports, yet he reviewed, signed, and/or certified NIC's filings with the Commission for 2002 through 2006, which failed to disclose the CEO's perquisites and contained false statements concerning the CEO's compensation.

IV.

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

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

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

B. After one year 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 that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 63744 / January 20, 2011

Admin. Proc. File No. 3-13304

In the Matter of DAN RAPOPORT	ORDER DENYING MOTION TO SET ASIDE DEFAULT ORDER

Dan Rapoport, formerly a managing director of OOO Centreinvest Securities ("CI-Moscow"),[1] asks us to set aside an administrative law judge's decision making findings of violation and imposing sanctions by default.[2] The law judge found that Rapoport, a resident of Russia, willfully violated Section 15(a) of the Securities Exchange Act of 1934[3] by illegally effecting transactions in securities without being registered with the Commission as a broker or being associated with a registered broker-dealer. He based this finding on the allegations made in the Commission's order instituting proceedings ("OIP"), which, because of Rapoport's default, he deemed to be true. The law judge barred Rapoport and ordered him to cease and desist from

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1 CI-Moscow is a Moscow-based securities firm that apparently has never been registered with the Commission as a broker or dealer.

2 Order Making Findings and Imposing Sanctions by Default as to Centreinvest, Inc., Dan Rapoport, and Svyatoslav Yenin, Securities Exchange Act Rel. No. 60413 (July 31, 2009), 96 SEC Docket 19387 (the "Default Order"). The law judge subsequently denied Rapoport's motion to set aside the Default Order, but modified the sanctions imposed to correct a mathematical error in the calculation of civil penalties. Order Denying Motion to Set Aside Default Order and Correcting Sanction, Exchange Act Rel. No. 61751 (Mar. 22, 2010), 98 SEC Docket 26614.

3 15 U.S.C. § 78*o*(a).

further violations of Section 15(a), to pay a civil penalty,[4] and to provide an accounting regarding the income he received in connection with the misconduct at issue.

I.

A. The Order Instituting Proceedings

The OIP was issued on December 8, 2008, pursuant to Exchange Act Sections 15(b) and 21C.[5] It named as respondents CI-Moscow; CentreInvest, Inc. ("CI-New York"), a New-York based registered broker-dealer affiliated with CI-Moscow; and four individuals: Rapoport, Svyatolslav Yenin, Vladimir Chekholko, and William Herlyn.[6] The OIP alleged, among other things, that "[f]rom about 2003 through November 2007, CI-Moscow and its executive director Rapoport [and other respondents] solicited institutional investors in the United States to purchase and sell thinly-traded stocks of Russian companies, without registering as a broker-dealer as required by Section 15(a) of the Exchange Act . . . [and that Rapoport] failed to qualify for any exemption from registration."[7] The OIP explicitly required each respondent to file an answer to

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4 The law judge imposed a second-tier civil penalty, based on his finding that Rapoport's actions demonstrated a deliberate or reckless disregard of regulatory requirements. *See* Exchange Act Section 21B(b)(2), 15 U.S.C. § 78u-2(b)(2) (setting forth requirements for imposition of second-tier penalty). The penalty, a total of $315,000, consists of penalties of $60,000 per year for conduct in 2003 and 2004, and $65,000 per year for conduct in 2005, 2006, and 2007. *See* 17 C.F.R. §§ 201.1002, 201.1003 (setting forth maximum civil penalty amounts for conduct after February 2, 2001 and February 14, 2005 respectively).

5 15 U.S.C. §§ 78*o*(b), 78u-3.

6 The proceeding has concluded with respect to all respondents other than Rapoport. *See OOO CentreInvest Sec.*, Exchange Act Rel. No. 61448 (Jan. 29, 2010), 97 SEC Docket 25072 (order dismissing petition for review and giving notice that initial decision granting unopposed motion for summary disposition as to CI-Moscow has become final decision of Commission); *CentreInvest, Inc.*, Exchange Act Rel. No. 60485 (Aug. 12, 2009), 96 SEC Docket 19739, 19739 (accepting offer of settlement as to Herlyn); *CentreInvest, Inc.*, Exchange Act Rel. No. 60450 (Aug. 5, 2009), 96 SEC Docket 19569, 19569 (accepting offer of settlement as to Chekholko); *CentreInvest, Inc.*, Exchange Act Rel. No. 60413 (July 31, 2009), 96 SEC Docket 19387, 19388 (making findings by default and imposing sanctions as to CI-New York and Yenin).

7 The OIP further stated that, "[w]hile at CI-Moscow [from 2003 to February 2008], Rapoport was responsible for the brokerage operations at both CI-Moscow and CI-New York," that under Rapoport's direction, employees of CI-New York "regularly solicited U.S. institutional investors for the purchase and sale of Russian securities," that "[i]nvestors who expressed interest

(continued...)

the allegations contained in the OIP within twenty days after service of the OIP and stated that if any respondent failed to file such an answer, the respondent "may be deemed in default and the proceedings may be determined against the [r]espondent upon consideration of [the OIP], the allegations of which may be deemed to be true."

B. Service of the OIP

In September 2008, Richard Kraut notified the Division of Enforcement that he represented Rapoport. On December 9, 2008, the day after the OIP was issued, the Office of the Secretary mailed a copy to Kraut. Kraut did not accept service of the OIP. A week later, on December 16, 2008, the Division asked the law judge to authorize service on Rapoport by service on Kraut. Having received no opposition to the Division's motion (the "Motion to Serve"),[8] the law judge issued an Order Directing Service as to Foreign Respondents (the "Order Directing Service") on December 31, 2008, allowing service on Rapoport to be directed through Kraut. The law judge acted pursuant to Rule of Practice 141(a)(2)(iv),[9] which provides, in relevant part, that "[n]otice of a proceeding to a person in a foreign country may be made by any method . . . reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country."

Although a copy of the OIP had already been mailed to Kraut, the Office of the Secretary sent the OIP again, on December 31, 2008, with the Order Directing Service. A return receipt (U.S. Postal Service Form 3811) for that mailing showed that it was received by Kraut's office on January 6, 2009. The Office of the Secretary received the return receipt on January 8, 2009.

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7 (...continued)
in a transaction were referred to CI-Moscow to complete the transaction," that "[i]n some cases, Rapoport and other employees of CI-Moscow, who were not licensed to sell securities under U.S. law or registered as brokers or dealers under U.S. Law and were not exempt from such licensing and registration requirements, solicited U.S. investors directly," and that "Rapoport knew that any representative of CI-Moscow who solicited a U.S. investor would have to be licensed and registered with the Commission or an appropriate U.S. self-regulatory organization." The OIP specified that the proceedings instituted by the OIP were to determine, among other things, "[w]hat, if any remedial action is appropriate in the public interest against [Rapoport] . . . including, but not limited to, an accounting, disgorgement and civil penalties . . . ; [and w]hether . . . [Rapoport] should be ordered to cease and desist from committing or causing violations of and any future violations of Section 15(a) of the Exchange Act."

8 Commission Rule of Practice 154(b), 17 C.F.R. § 201.154(b), provides that briefs in opposition to a motion "shall be filed within five days after service of the motion."

9 17 C.F.R. § 201.141(a)(2)(iv).

In the meantime, on January 5, 2009, the Office of the Secretary received a memorandum in opposition to the Division's Motion to Serve, filed by Kraut on behalf of Rapoport and dated December 23, 2008.[10] The Division, having already received Rapoport's opposition, filed a reply, dated January 2, 2009, which the Office of the Secretary also received on January 5. The law judge held a prehearing conference on January 9, 2009 to discuss the service of the OIP. Kraut represented Rapoport at the conference.[11] Because the law judge had not received Rapoport's opposition and the Division's reply before issuing the Order Directing Service, he offered the parties the opportunity to make additional filings. Rapoport filed a supplemental memorandum in opposition to the Division's Motion to Serve, which he alternatively styled as a motion for reconsideration of the Order Directing Service, and the Division filed a memorandum opposing reconsideration.

On February 5, 2009, the law judge issued an Order Denying Motions for Reconsideration (the "Order Denying Reconsideration"), affirming the December 31 Order Directing Service and declaring service on Rapoport effective as of January 8, 2009. Later in the day on February 5, the law judge held a prehearing conference, at which Kraut represented Rapoport. At the conference, Kraut told the law judge that he "need[ed] to discuss the service issue with [his] clients,"[12] because "[l]ast I heard from them, service was ordered, my representation was terminated upon the issuance of the order," and that he "really need[ed] to bring the [Order Denying Reconsideration] to their attention" before committing to a hearing date.

On February 6, Kraut filed a change of address notice in which he identified himself as counsel for Rapoport. By notice dated February 12, Kraut withdrew as counsel for Rapoport.

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10 The memorandum was also filed on behalf of Yenin. It stated that "[c]ounsel for [Rapoport and Yenin] appears solely for the purpose of opposing the Division's motion. By submitting this Memorandum, [Rapoport and Yenin] do not admit to the Commission's jurisdiction over them."

11 Kraut stated that his representation of Rapoport was "for limited purposes." The Rules of Practice make no provision for such limited appearances. As discussed below, Kraut's representation of Rapoport continued until after the law judge entered a further order regarding service on February 5, 2009, and Kraut withdrew as counsel for Rapoport by notice dated February 12.

12 Kraut represented both Rapoport and Yenin.

C. The Default Order

The Order Denying Reconsideration required Rapoport to file his Answer to the OIP by March 2, 2009.[13] Rapoport did not file an answer. On April 9, 2009, more than a month after the filing deadline had passed, the Division filed a Motion for Default Judgments as to Rapoport and several other respondents (the "Default Motion"). For reasons that are not apparent from the record, it appears that the Default Motion was served on Kraut by Federal Express; there is no indication that the Division attempted to serve Rapoport directly. Rapoport filed no opposition to the Default Motion.

The law judge held prehearing conferences on April 28 and May 19, 2009. Copies of the orders scheduling these conferences were sent to Rapoport at his Moscow business address.[14] Rapoport did not participate in either conference. On July 31, 2009, finding that Rapoport had failed to file an answer, appear at prehearing conferences, or otherwise defend the proceeding, the law judge granted the Default Motion and issued an Order Making Findings and Imposing Sanctions by Default as to Rapoport (the "Default Order"). On the same day it was issued, a copy of the Default Order was sent to Rapoport at his Moscow business address.[15]

On October 23, 2009, Rapoport arrived in New York on a flight from Moscow via Helsinki.[16] A U.S. Customs and Border Patrol officer, while processing Rapoport's entry into the United States, determined that the Commission was trying to locate Rapoport. The officer alerted Commission staff to Rapoport's presence in the United States. Commission staff thereupon sent the officer a copy of the Default Order by facsimile transmission, and the officer personally served Rapoport by handing him the copy.

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13 Additionally, the law judge issued an order establishing a procedural schedule on February 18, 2009. The order was not sent to Kraut, who, as noted above, had withdrawn from representing Rapoport. A copy of the scheduling order was, however, sent to Rapoport at BrokerCredit Service, Prospect Mira, 69, Bldg. 1, Moscow 129110, Russia, by U.S. Postal Service International Registered Mail. No return receipt was received for this mailing, or for subsequent mailings to the same address, which included copies of orders setting dates for prehearing conferences and the Default Order. In a subsequently filed declaration, Rapoport stated that he was employed by BrokerCredit Service between February 2, 2008 and September 2009.

14 *See supra* note 13.

15 *See id.*

16 Although a resident of Russia, Rapoport presented a United States passport.

Two months later, on December 23, 2009, Rapoport filed a motion seeking to set aside the Default Order as to Rapoport ("Motion to Set Aside I").[17] The law judge denied the motion. Applying Rule of Practice 155(b),[18] he found that Rapoport did not file his motion to set aside within a reasonable time and that the reasons for his failure to defend the proceeding did not justify setting aside the Default Order.[19] Rapoport then filed the Motion to Set Aside that we now consider ("Motion to Set Aside II").[20]

II.

Rule of Practice 155(b) provides, in relevant part, that "[a] motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate . . . the Commission, at any time, may for good cause shown set aside a default."

A. Reasons for Rapoport's Failure to Defend the Proceeding

Rapoport asserts that he failed to defend the proceeding because he reasonably believed that he could wait until he was personally served to file his answer to the OIP. We find, however, that Rapoport could not reasonably have believed that he could wait to respond until he was personally served. Rule 141(a)(2) permits, but in no way requires, service by handing a copy of an OIP to an individual.[21] The rule permits many other forms of service, including service authorized by a law judge pursuant to Rule 141(a)(2)(iv).

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17 With Motion to Set Aside I, Rapoport filed a memorandum and five exhibits, including a proposed answer to the OIP, and a Declaration of Rapoport. The Division filed a memorandum in opposition that included similarly a declaration and ten attached exhibits. The Division also cited to three exhibits that are part of the record in these proceedings because they were submitted in connection with the Division's Motion for Summary Disposition against CI-Moscow. *See supra* note 6. Rapoport filed a second declaration with his reply to the Division's opposition to Motion to Set Aside I.

18 17 C.F.R. § 201.155(b).

19 Rapoport asserts that the law judge misapplied the relevant standard for setting aside a default order. We find no error in the law judge's action, and, in any event, our own consideration of Rapoport's motion reaches the same conclusion.

20 Rapoport styled his motion, in the alternative, as a petition for review of the law judge's denial of Motion to Set Aside I. Our consideration and disposition of Motion to Set Aside II make it unnecessary to address separately Rapoport's petition for review.

21 Rule 141(a)(2)(i), 17 C.F.R. § 201.141(a)(2)(i).

Rapoport knew that the Division was seeking to serve him by service on Kraut; he retained Kraut to argue on his behalf that such service should not be allowed. The question of directed service was vigorously disputed, with multiple filings and a conference devoted to the matter. The law judge ruled against Rapoport, and Kraut represented to the law judge that he would bring the order to Rapoport's attention.[22] We conclude that Rapoport received notice of the order.

Rapoport makes several narrowly worded assertions related to his dealings with Kraut, his receipt of legal documents, and his awareness of the Order Denying Reconsideration. None of these assertions persuades us that Rapoport did not know that the law judge had ruled that Rapoport could be served through Kraut.

First, in a declaration filed before the law judge, Rapoport stated, among other things, that he "never authorized Kraut to accept service of legal documents on [his] behalf." However, by the Order Directing Service, the law judge authorized service on Rapoport through Kraut. Thereafter, service on Kraut constituted service on Rapoport, whether or not Rapoport had authorized Kraut to accept service.[23]

Second, Rapoport stated that he "communicated with Kraut as [his] attorney for the last time on or about January 17, 2009, when Kraut informed me that he would be withdrawing as my counsel after filing the necessary papers with the Court." However, Kraut continued to act as Rapoport's attorney for nearly a month after January 17: he filed a supplemental memorandum opposing the Motion to Serve on January 27; he filed a change of address notice on February 6; and he did not file a notice withdrawing as Rapoport's counsel until February 12. At the February 5 prehearing conference, a week before he submitted the withdrawal notice, Kraut said he would bring the Order Denying Reconsideration to Rapoport's attention. These facts cast

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22 Rapoport has not tendered a declaration from Kraut.

23 Under Federal Rule of Civil Procedure 4(f)(3), which permits service on individuals not within any judicial district of the United States by means ordered by the court, service of process on a litigant through an attorney has been allowed even when the attorney was not authorized to accept service or declined to accept service. *See, e.g.*, *Rio Props., Inc.*, 284 F.3d 1007, 1016-17 (9th Cir. 2002) (approving court-authorized service on attorney who "had been specifically consulted" regarding the matter at issue by the litigant even though the attorney had declined to accept service); *RSM Prod. Corp.*, 2007 US Dist. LEXIS 58194, at *17- *18 (S.D.N.Y. 2007) (rejecting argument that court-ordered service on U.S. attorney of resident of Russia would be improper because attorney was not the litigant's designated agent to receive service of process: "Court-ordered service on counsel made under Rule 4(f)(3) serves as effective authorization 'by law' for counsel to receive service."); *Forum Fin. Grp.*, 199 F.R.D. 22, 24-25 (D. Me. 2001) (authorizing service on resident of Russia by certified mail to U.S. attorney even though attorney was not authorized to accept service). We find a similar result appropriate under Rule of Practice 141(a)(2)(iv).

doubt on Rapoport's assertion that he did not "communicate with Kraut as [his] attorney" after January 17. In any event, Rapoport's narrowly worded statement that he did not "communicat[e] with Kraut as [his] attorney" does not preclude Rapoport's having learned about the Order Denying Reconsideration from Kraut. For example, Kraut could have told Rapoport about the Order Denying Reconsideration after February 12, at a time when Rapoport may not have regarded Kraut as his attorney.[24] As noted, Rapoport has not provided an affidavit from Kraut about the timing or content of their discussions.[25]

Finally, Rapoport stated that he "never received any legal documents" from Kraut after January 17, 2009 and stated that he "was not personally served with any legal papers until approximately October 2009." "Accordingly," Rapoport contends, "I was unaware of the Court's February 5, 2009 Order regarding service."

Even if Rapoport did not receive a copy of the Order Denying Reconsideration from Kraut, and even if Rapoport was not personally served until October 2009, those factual premises do not lead to the conclusion that Rapoport was "unaware" of the crucial aspects of the Order Denying Reconsideration. Kraut told the law judge that he would bring the order to Rapoport's attention. Whether Rapoport received a copy of that order, as opposed to learning about it in some other manner, is not dispositive. The crucial question is whether Rapoport knew about the law judge's ruling as to directed service. We find that he did.[26]

Having found that Rapoport knew that the law judge had authorized service on him through Kraut, we conclude that Rapoport could not have reasonably believed that he could disregard the ruling and ignore the service effected on him through service on Kraut. Rapoport's active engagement in arguing against directed service is inconsistent with his asserted belief that he did not have to respond unless personally served: if Rapoport believed that only personal service was effective, it would have made no sense for him to retain Kraut to argue against

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24 The withdrawal notice stated that Kraut's withdrawal as counsel for Rapoport was "effective February 5, 2009." However, under Rule of Practice 102(d)(4), a notice of withdrawal must be filed "at least five days before the proposed effective date of the withdrawal." 17 C.F.R. § 201.102(d)(4). Thus, a withdrawal notice filed on February 12 could not be effective before February 17 at the earliest.

25 In denying Motion to Set Aside I, the law judge pointed out that Rapoport "has not provided any evidence or an affidavit from Kraut that would substantiate his claim . . . that he last spoke with Kraut in January 2009." Despite having had his attention called to this gap in the evidence, Rapoport has still not provided such an affidavit.

26 Moreover, as noted above, copies of the scheduling order, orders setting dates for prehearing conferences, and the Default Order were sent to Rapoport as the proceeding continued. *See supra* note 13.

directed service.[27] We have previously refused to set aside default orders where respondents failed to make defense of a proceeding a priority.[28] For these reasons, we find that Rapoport's reason for failing to defend the proceeding does not support setting aside the Default Order.[29]

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27 In the declaration filed with Motion to Set Aside I, Rapoport stated, among other things, that "[i]t was my understanding that under United States law, I had no legal obligation to respond to the OIP until I was personally served." He also stated: "Without revealing my specific communications with Kraut, I understood that there were valid legal bases for me to contest the Division's attempt to serve me with the OIP and other legal documents by providing them to Kraut. I also understood that I could contest the service issue without subjecting myself to the jurisdiction of the U.S. courts." We understand Rapoport to be implying that discussions with counsel informed his view that he could wait to respond to the OIP until he was personally served.

Rapoport did not, however, indicate what he told counsel about his situation, nor did he identify specific advice that he received. Such vague allusions to legal advice are not sufficient to establish that Rapoport was relying on the advice of counsel in waiting to respond to the OIP until he was personally served. *See, e.g.*, *Howard Brett Berger*, Exchange Act Rel. No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11632-33 (rejecting argument that reliance on advice of counsel should be mitigating factor in sanctions analysis where respondent did not provide information about the disclosures he made to counsel or the advice he received from counsel), *petition denied*, 2009 WL 3160620 (2d Cir. 2009) (summary order); *Eugene T. Ichinose*, 47 S.E.C. 393, 395 (1980) (finding that respondent could not rely on advice of counsel where record did not "show with any specificity what advice he may have received" from counsel). Rapoport was free to decline to reveal his "specific communications" with Kraut, but he cannot simultaneously refuse to reveal them and benefit from their alleged or implied contents. *Cf.* *Berger*, 94 SEC Docket at 11631 n.65 (finding that attorney-client privilege "'cannot at once be used as a shield and a sword'" (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)(citations omitted)).

28 *See George T. Hellen*, Exchange Act Rel. No. 44536 (July 11, 2001), 75 SEC Docket 1126, 1128 (finding that participation in divorce proceedings and inability to retain counsel are not adequate reasons for failure to defend); *cf. James M. Russen*, 51 S.E.C. 675, 677 & n.9 (1993) (finding that respondent's asserted inability to remember signing receipt for or receiving complaint in NASD disciplinary proceeding did not constitute good cause for failure to participate in hearing and citing analogous cases applying Federal Rule of Civil Procedure 60(b)).

29 Rapoport contends that service on him through Kraut was not in accordance with Rule 141(a)(2)(iv) because the Division failed to show that such service was consistent with Russian law. There is nothing in our rules that places the burden of such a showing on the Division. Rapoport also contends that service on him through Kraut failed to satisfy basic

(continued...)

B. Acting within a Reasonable Time

Rapoport contends that, by filing Motion to Set Aside I on December 23, 2009, he satisfied the Rule 155(b) requirement that he act "within a reasonable time." He argues that he acted reasonably by filing his motion two months after October 23, 2009, the date he was personally served with the Default Order.

We disagree. In determining whether Rapoport acted within a reasonable time, we look at more than just the date that he was personally served with the Default Order. The OIP put Rapoport on notice of the possibility of default on January 8, 2009, when service on Rapoport through his counsel, Kraut, was effective.[30] The OIP stated explicitly that the respondents could be deemed to be in default if they failed to file an answer to the allegations contained in the OIP. Thus, Rapoport was on notice that a default order could be entered against him at any time after March 2, when he failed to file a timely answer.[31]

The Division filed the Default Motion on April 9, 2009. The law judge held one prehearing conference in April and another in May; Rapoport did not participate in either one, although copies of the orders scheduling the conferences had been sent to him at his Moscow business address. The judge waited more than three months after the Division filed the Default Motion to issue the Default Order, doing so on July 31, 2009. On the same day it was issued, a copy of the Default Order was mailed to Rapoport at his Moscow business address. Thus, Rapoport filed his Motion to Set Aside almost five months after the Default Order was issued and mailed to him. By that time, Rapoport had been on notice of the possibility of default for more than eleven months (since the OIP was served on Kraut on January 8), and had been in default for more than nine months (since he failed to file his answer by March 2). Under these circumstances, we find that Rapoport did not move to set aside the Default Order within a reasonable time when he filed Motion to Set Aside I two months after he was personally served with the Default Order.

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29 (...continued)
notions of due process. Due process requires that Rapoport had notice of the pendency of the proceeding and an opportunity to respond. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). These requirements were satisfied. Under all the circumstances, we find nothing unfair or inconsistent with due process in the manner in which Rapoport was served.

30 In its opposition to Motion to Set Aside I, the Division asserted that "Rapoport does not dispute that he received actual notice of the issuance of the OIP." Rapoport has not taken issue with this statement.

31 Rapoport does not claim that he was unaware that the February 5, 2009 Order Denying Reconsideration required him to file his answer by March 2.

C. Rapoport's Proposed Defenses

In the memorandum in support of Motion to Set Aside I, Rapoport contended that he did not violate Exchange Act Section 15(a) because he did not solicit United States investors directly or indirectly. He also contended that his conduct fit within one of the enumerated exceptions to the requirements of Section 15(a). In the proposed answer he attached to Motion to Set Aside I, Rapoport asserted more than a dozen additional defenses, and he "expressly reserve[d]" the right to assert additional affirmative defenses "as they become known or available to him."

In addition to requiring that a motion to set aside a default order state the reasons for the failure to appear or defend and be made within a reasonable time, Rule of Practice 155(b) also requires that a motion to set aside a default should "specify the nature of the proposed defense in the proceeding." If Rapoport had established that his reasons for the failure to defend the proceeding supported setting aside the Default Order, and that Motion to Set Aside I was filed within a reasonable time, then we would consider whether his proposed defenses had potential merit. Here, however, Rapoport's reasons for failing to defend do not support setting aside the Default Order, and he did not file Motion to Set Aside I within a reasonable time. Evaluating the merits of his defenses would in effect grant him the hearing that he chose to forego by failing to defend the proceeding.

The prospect that a default order could be entered based on the allegations in an OIP should motivate respondents who have meritorious defenses to engage in the proceeding. Considering whether proposed defenses are meritorious after a default order has been entered would remove or weaken the incentive to so engage. We therefore do not consider whether Rapoport's defenses might have had merit if asserted at the proper time and if supported by evidence.

D. Alleged Injustice

Rapoport contends that the Default Order should be set aside in order to prevent injustice. In support, he contends that the OIP made no allegations against Rapoport with respect to the years 2003-05 and that the civil penalties imposed are "legally impermissible and factually unwarranted."

Rapoport's contentions of injustice do not support setting aside the Default Order. The OIP charged Rapoport with violating Section 15(a) "from about 2003 through November 2007"; it specified that remedial action "including, but not limited to," an accounting, disgorgement, and civil penalties could be taken, and that cease-and-desist orders could be imposed; and it alleged facts sufficient to support the imposition of second-tier penalties.[32] It was not unjust for the law

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[32] *See supra* note 7 (quoting excerpts from OIP).

judge to issue the Default Order, which did not go beyond the allegations in the OIP, or to impose sanctions accordingly, when Rapoport failed to file a timely answer to the OIP.[33]

* * *

Accordingly, IT IS ORDERED that the motion to set aside the Default Order filed by Dan Rapoport be, and it hereby is, DENIED.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

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33 Rapoport's contentions that the Default Order should be set aside because the law judge "erroneously concluded" that his proposed defenses have no likelihood of success and "erred by denying Rapoport the opportunity to argue that his conduct fit within a Rule 15a-6 exemption to [Section] 15(a)" do not establish good cause for setting aside the Default Order. As discussed above, we do not reach the merits of Rapoport's proposed defenses and thus do not review the law judge's findings regarding them. Rapoport denied himself the opportunity to present these defenses when he failed to file a timely answer to the OIP.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63749 / January 21, 2011

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

The Commission's orders in administrative proceedings may lead to the payment of disgorgement and/or penalties for distribution. Such distribution funds may create qualified settlement funds ("QSFs") under Treasury Regulation 1.468B-1(c), 26 CFR § 1.468B-1(c), and have a variety of tax-related obligations. The Division of Enforcement ("Division") has evaluated the proposals received from potential tax administrators for the QSFs and, of those proposals, has determined that Damasco & Associates LLP ("Damasco"), a certified public accounting firm located in Half Moon Bay, California, is best suited to act as tax administrator for the QSFs for calendar years 2011 and 2012 in such administrative proceedings.

Accordingly,

IT IS ORDERED that:

A. Pursuant to the Commission's Rules on Fair Fund and Disgorgement Plans (17 CFR §§ 201.1101, *et seq.*), Damasco is appointed as the tax administrator (the "Tax Administrator") when requested by staff in calendar years 2011 and 2012 in those administrative proceedings where distribution funds have been established. Damasco will have the limited authority and power to: (1) act as the administrator for tax purposes for each QSF; (2) prepare, sign, and file the necessary tax returns and tax-related documents for the QSFs; (3) make the tax payments on behalf of the QSFs; (4) obtain the necessary tax-related documents and identifiers, such as an employer identification number, on behalf of the QSFs; (5) perform other tax-related and reporting duties on behalf of the QSFs as required by Department of the Treasury regulations relating to QSF administrators; and (6) communicate on behalf of the QSFs on matters set forth in this paragraph.

B. The Tax Administrator will, from time to time, have custody or control of monies transferred to the Tax Administrator to make tax payments. Therefore, the Tax Administrator, before taking possession of those monies, will obtain a bond, pursuant to the 2011-2012 Letter Agreement executed between the Commission and the Tax Administrator.

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

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

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

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

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

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

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

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

E. The Tax Administrator shall keep records and bill each QSF for the services provided to it, pursuant to the 2011-2012 Letter Agreement executed between the Commission and the Tax Administrator.

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

2. Where the money in the QSF is held by an escrow agent, the Tax Administrator will submit the bill to the assigned Commission staff member for approval. Where services have been billed according to the terms of the Tax Administrator's 2011-2012 Letter Agreement with the Commission, and are for an amount less than or equal to $10,000 per case per tax filing per quarter, payment may be approved by staff to whom authority is delegated by

paragraph F., below. For bills totaling an amount greater than $10,000 per case per tax filing per quarter, the Commission staff assigned to the proceeding must seek Commission approval for payment. After payment of the Tax Administrator's bill has been approved, the escrow agent is authorized to pay the bill of the Tax Administrator by check or wire transfer from the QSF. Payment shall come first from any earnings or interest in the QSF and second, if necessary, from the principal of the QSF.

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

In all proceedings, the fees billed shall be as agreed upon in the Tax Administrator's 2011-2012 Letter Agreement with the Commission, as executed by the Secretary of the Commission on behalf of the Commission.

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

G. The Secretary of the Commission shall, upon request by the Division staff during calendar years 2011 and 2012, issue orders that appoint Damasco as the Tax Administrator in administrative proceedings.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63759 / January 24, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14203

In the Matter of	
Canadian Mono Mines, Inc., Carlin Resources Corp. (n/k/a Carlin Gold Corp.), CBX Ventures, Inc. (n/k/a Remstar Resources, Ltd.), Chase Resource Corp., Chell Group Corp., and Chic by H.I.S., Inc. (n/k/a Durango Apparel, 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 Canadian Mono Mines, Inc., Carlin Resources Corp. (n/k/a Carlin Gold Corp.), CBX Ventures, Inc. (n/k/a Remstar Resources, Ltd.), Chase Resource Corp., Chell Group Corp., and Chic by H.I.S., Inc. (n/k/a Durango Apparel, Inc.).

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Canadian Mono Mines, Inc. (CIK No. 855920) is a Canadian corporation located in White Rock, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Canadian Mono 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 February 29, 1996, which reported a net loss of $2.1 million (Canadian) for the prior twelve months. The company's common stock was delisted from the Vancouver Stock Exchange on May 9, 1994.

2. Carlin Resources Corp. (n/k/a Carlin Gold Corp.) (CIK No. 1017121) is a Canadian corporation located in Vancouver, British Columbia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Carlin is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-FR registration statement on June 10, 1996, which reported a net loss of $353,000 for the prior twelve months. As of January 21, 2011, the company's common stock (symbol "CNGDF") was traded on the over-the-counter markets.

3. CBX Ventures, Inc. (n/k/a Remstar Resources, Ltd.) (CIK No.1067422) is a British Columbia corporation located in Toronto, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CBX 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, 2000, which reported a net loss of $116,808 (Canadian) for the prior twelve months. As of January 21, 2011, the company's stock (symbol "REMJF") was traded on the over-the-counter markets.

4. Chase Resource Corp. (CIK No. 942131) is a British Columbia corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Chase Resource 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 March 31, 2000, which reported a net loss of $4.8 million (Canadian) for the prior twelve months.

5. Chell Group Corp. (CIK No. 797313) is a New York corporation located in Calgary, Alberta, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Chell 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, 2004, which reported a net loss of $870,095 (Canadian) for the prior three months. As of January 21, 2011, the company's common stock (symbol "CHEL") traded on the over-the-counter markets.

6. Chic By H.I.S. Inc. (n/k/a Durango Apparel, Inc.) (CIK No. 895519) is a delinquent Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Chic 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 5, 2000, which reported a net loss of $13,276 for the prior thirteen weeks. On March 19, 2001, Chic filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York, and the case was terminated on February 13, 2003.

B. DELINQUENT PERIODIC FILINGS

7. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, 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 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 registered pursuant to Section 12 of the Exchange Act of the Respondents identified in Section II hereof, 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 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

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. 63757 / January 24, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3143 / January 24, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14202

In the Matter of **Horseman Capital Management, L.P.,** **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 public 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 Horseman Capital Management, L.P. ("Respondent").

II.

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

Summary

In a follow-on offering on July 29, 2008, Horseman Capital Management, L.P. received 300,000 shares of Merrill Lynch & Co. ("Merrill Lynch") common stock for $22.50 per share. On July 23, 2008, during the five business days prior to the pricing of the offering, Horseman sold short 75,000 shares of Merrill Lynch common stock. By engaging in these transactions, Horseman violated Rule 105 of Regulation M and thereby realized profits of $1,295,138.

Respondent

1. Horseman Capital Management, L.P., is a London-based limited partnership with over $867 million in assets. Horseman currently manages four funds, including two funds incorporated in the United States, and its funds trade securities through United States markets. Horseman is not registered with the Commission, but is regulated by the Financial Services Authority in the United Kingdom.

Background

2. Rule 105 of Regulation M of the Exchange Act makes it unlawful for a person to purchase securities in a public offering if that person sold short the security that is the subject of the offering during the restricted period defined in the rule. Rule 105 defines the "restricted period" as the shorter of the period: (1) beginning five business days prior to the pricing of the offered securities and ending with such pricing; or (2) beginning with the initial filing of such registration statement or notification on Form 1-A or Form 1-E and ending with the pricing. 17 C.F.R. § 242.105.

3. As amended in 2007, Rule 105 does not require that the shares purchased in the offering be used to "cover" the restricted period short sales. Short Selling in Connection with a Public Offering, Rel. No. 34-56206, 72 Fed. Reg. 45094 (Aug. 10, 2007).

4. Rule 105 applies irrespective of the short seller's intent in effectuating the short sale. "The prohibition on purchasing offered securities . . . provides a bright line demarcation of prohibited conduct consistent with the prophylactic nature of Regulation M." Id. at 45096.

Respondent's Violation of Rule 105 of Regulation M

5. From the middle of 2007 through the summer of 2008, Respondent maintained short positions in the stocks of numerous financial institutions, including Merrill

Lynch. On July 29, 2008, shares of Merrill Lynch common stock were offered on a follow-on basis at a price of $22.50 per share. The restricted period therefore ran from July 22 through July 28. On July 23, during the restricted period, Respondent increased its existing short position to 748,500 shares by selling short 75,000 additional shares of Merrill Lynch common stock.

6. On July 29, Respondent participated in the follow-on offering, receiving 300,000 shares of Merrill Lynch common stock at $22.50 per share, which it used to cover a portion of its outstanding short position. This is the only U.S.-originated follow-on offering in which Respondent has participated.

7. With respect to the offering of Merrill Lynch common stock on July 29, 2008, Respondent "purchas[ed] the offered securities from an underwriter or broker or dealer . . . participating in the offering" after having sold short the same security "during the period . . . [b]eginning five business days before the pricing of the offered securities and ending with such pricing." 17 C.F.R. § 242.105(a). As a result of this conduct, Respondent willfully[1] violated Rule 105 of Regulation M under the Exchange Act.

8. The difference between Respondent's proceeds from its restricted period short sale of 75,000 shares and the price for the shares purchased in the follow-on offering on July 29, 2008 was $851,910. Respondent also improperly obtained a benefit of $443,228 from the remaining 225,000 offering shares it received at a discount from Merrill Lynch's market price. Accordingly, Respondent's total profits from its participation in the follow-on offering of Merrill Lynch common stock on July 29, 2008 were $1,295,138.

9. After Respondent learned of its Rule 105 violation, it developed and implemented policies, procedures, and training programs pertaining to Rule 105 compliance. In determining to accept the Offer, the Commission considered Respondent's remedial efforts.

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. Respondent cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M.

B. Respondent is censured.

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[1] 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)).

C. Respondent shall, within fourteen (14) days of the entry of this Order, pay disgorgement of $1,295,138, and prejudgment interest of $124,814, and a civil penalty of $65,000, to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. § 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312-0003; and (D) submitted under cover of a letter that identifies Horseman Capital Management, L.P. as a Respondent in these proceedings and includes the file number of these proceedings, a copy of which cover letter and money order, check, or wire transfer shall be sent to Yuri B. Zelinsky, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, DC 20549-5041.

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. 63760 / January 25, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14204

In the Matter of **MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Respondent" or "Merrill").

II.

In anticipation of the institution of these proceedings, Merrill 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, Merrill consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

On the basis of this Order and the Offer submitted by Merrill, the Commission finds[1] that:

A. RESPONDENT

Merrill, a Delaware corporation with its principal offices in New York, New York, is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act. Merrill engages in a nationwide securities business. On January 1, 2009, Merrill and its parent company, Merrill Lynch & Co., were acquired by Bank of America Corporation, a Delaware corporation with its principal offices in Charlotte, North Carolina. Bank of America's common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the New York Stock Exchange.

B. SUMMARY

This matter involves two kinds of misconduct at Merrill. First, Merrill's proprietary traders misused institutional customer order information which was improperly disclosed by the firm's market makers. Second, Merrill traders improperly charged mark-ups and mark-downs on certain riskless principal trades[2] of institutional and high net worth customers for which the firm had agreed to charge only a commission equivalent.[3]

Between February 2003 and February 2005, Merrill operated a proprietary trading desk, known as the Equity Strategy Desk ("the ESD"), which traded securities solely for the firm's own benefit and had no role in executing customer orders. The ESD was located on Merrill's equity trading floor in New York City, where traders on Merrill's market making desk received and executed orders for Merrill's institutional customers. While Merrill represented to customers that their order information would be maintained on a strict need-to-know basis, Merrill's ESD traders obtained information about institutional customer orders from traders on the market making desk and used it to place trades on Merrill's behalf. In doing so, Merrill misused this information and acted contrary to its representations to customers.

Between 2002 and 2007, Merrill had agreements with certain institutional and high net worth customers that Merrill would charge only a commission equivalent for executing riskless principal trades. In certain instances in which Merrill had these arrangements, Merrill also charged customers, in addition to a commission equivalent, undisclosed mark-ups and mark-downs by filling customer orders at prices less favorable to the customer than the prices at which Merrill purchased or sold the securities in the market. This charging of undisclosed mark-ups and mark-downs was improper and contrary to the agreements the firm had with its customers.

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

[2] A "riskless principal" trade occurs when a broker-dealer, after receiving a customer order to buy (or sell) a security, buys (or sells) the security for its own account from (or to) another person in a contemporaneous offsetting transaction and then allocates the shares to the customer order.

[3] As a general matter, when executing transactions on a principal or riskless principal basis, broker-dealers use the term "commission equivalent" to describe their remuneration for the trade.

As a result of the conduct described herein, Merrill violated Section 15(c)(1)(A) of the Exchange Act by effecting transactions in securities by means of manipulative, deceptive or other fraudulent devices or contrivances. Merrill also violated Section 15(g) of the Exchange Act[4] by failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information.[5] Under Section 15(b)(4)(E) of the Exchange Act, Merrill failed reasonably to supervise its traders with a view towards preventing them from violating the federal securities laws. In addition, Merrill violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(6) thereunder by failing to record certain terms and conditions of customer orders.

C. FACTS

Misuse of Institutional Customer Order Information

In February 2003, Merrill opened a proprietary trading desk, known within Merrill as the Equity Strategy Desk, which traded securities solely for the firm's own benefit and had no role in executing customer orders. The ESD, which had authority to trade over $1 billion in capital, was physically located on Merrill's equity trading floor in New York City, where traders on the firm's market making desk received and executed orders for institutional customers. The ESD operated from February 2003 through February 2005 and had between one and three proprietary traders at any given time.

Merrill failed to establish policies and procedures reasonably designed to prevent the ESD traders from obtaining institutional customer order information. Although the ESD traders did not have direct access to the computer system the market makers used to execute customer orders, by virtue of being located on Merrill's equity trading floor, ESD traders could see customer order information on the market makers' computer screens and hear market makers discuss customer orders. Moreover, Merrill encouraged its market makers to generate and share "trading ideas" with the ESD traders, promising higher bonuses to market makers whose ideas were profitable.

Merrill represented to customers that information concerning their orders and other business affairs would be kept confidential. Merrill's *Guidelines for Business Conduct: Merrill Lynch's Code of Ethics for Directors, Officers and Employees* (dated January 2003), which it published on its website, expressly stated that Merrill's employees "may not discuss the business affairs of any client with any other person, except on a strict need-to-know basis." In certain instances, customer order information -- particularly information concerning potentially market moving orders submitted by institutional customers -- was material, nonpublic information.

Contrary to Merrill's representations to customers, traders on Merrill's market making desk at times shared institutional customer order information with the firm's ESD traders, both orally and through instant messages. An ESD trader on one occasion told a market maker in an instant message: "[I] always like to do what the smart guys are doing." In certain instances after

[4] Section 15(g) of the Exchange Act was formerly Section 15(f). The provision was recently renumbered by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[5] Section 15(g) of the Exchange Act seeks to protect investors and ensure the integrity of the markets by preventing broker-dealers and others from misusing material, nonpublic information.

receiving information about a customer order -- sometimes within minutes -- ESD traders placed orders similar to the customer orders. The following are examples of improper ESD trades made shortly after, and on the basis of information about, customer trades:

On September 3, 2003, an institutional customer placed an order with Merrill to sell approximately 40,000 shares of Teva Pharmaceutical Industries Ltd. Approximately three minutes after this order was placed, a Merrill market maker sent an instant message to an ESD trader informing him about the trade. Two minutes later, the ESD trader placed an order to sell 10,000 shares of Teva for the ESD account, which executed 31 minutes after the customer order.

On October 23, 2003, an institutional customer placed an order to buy 25,000 shares of Comverse Technology, Inc. An ESD trader sent an instant message to a firm market maker asking who was buying the stock. The market maker provided the requested information. Seconds after receiving this information, the ESD trader placed an order to buy 50,000 shares of Comverse, which executed seven minutes after Merrill completed the customer order.

On November 24, 2003, an ESD trader again asked a Merrill market maker who was selling shares of Comverse. The market maker responded that a particular institutional customer that had just bought 25,000 shares. One minute later, the ESD trader submitted an order to buy 25,000 shares of Comverse, which executed four minutes after the customer order. Minutes later, the market maker told the ESD trader that the same customer was "still interested on buy side." The ESD trader then placed an order to buy an additional 25,000 shares, which executed one minute after Merrill completed the customer order.

On February 12, 2004, an institutional customer placed two orders to purchase a total of 120,000 shares of Harmony Gold Mining Co. Ltd. A Merrill market maker sent an instant message to an ESD trader stating that the institutional customer was "buying hmy." Nineteen minutes after receiving this information, the ESD trader placed an order to buy 60,000 shares of Harmony, which executed seven minutes after Merrill completed the customer's second order.

In these and other instances, Merrill market makers executing institutional customer orders shared information concerning those trades with ESD traders. At times, Merrill's proprietary traders used that information to place trades for Merrill. This disclosure and use of institutional customer order information by Merrill's traders was improper and contrary to Merrill's confidentiality representations to its customers.

Improper Charging of Mark-Ups and Mark-Downs

During the relevant time period, Merrill operated one of the largest NASDAQ market making operations in the world. Most of the institutional and high net worth customer orders for NASDAQ securities that Merrill received were executed on an agency basis through a computer system at the firm. At times, however, Merrill also executed orders for these customers on a principal basis through traders on Merrill's market making desk.

Between 2002 through 2007, Merrill had agreements with certain institutional and high net worth customers to charge them only an agreed upon commission equivalent for executing riskless principal trades. These arrangements normally applied to trades in which the customer did not ask Merrill to risk its own capital in executing the trade, such as by guaranteeing the customer a particular price.

In certain instances between 2002 and 2007, Merrill improperly charged institutional and high net worth customers an undisclosed mark-up or mark-down, in addition to a commission equivalent, on certain riskless principal trades for which Merrill had agreed only to charge a commission equivalent. The following are examples:

In December 2002, Merrill agreed to sell shares of a public company for an executive pursuant to a "10b5-1 plan."[6] The plan required Merrill to execute market orders for the customer every Monday between January 2003 and January 2005. The customer did not ask Merrill to place its own capital at risk in executing these market orders, and Merrill and the customer agreed that Merrill would charge only a commission equivalent. Contrary to this agreement, in addition to charging the customer a commission equivalent, Merrill also charged an undisclosed mark-down on the transaction by filling the customer order at a lower price than it actually obtained selling the securities in the market.

In July 2003, Merrill received from an institutional customer an order to buy 300,000 shares of NetApp, Inc. over the course of the day. The customer did not ask Merrill to place its own capital at risk, and Merrill had agreed that its only compensation for executing the trade would be a commission equivalent. Contrary to this agreement, Merrill also charged the customer, in addition to a commission equivalent, an undisclosed mark-up, by filling the customer's order at a higher price than it paid to purchase the securities in the market.

In November 2003, Merrill received from an institutional customer a series of orders to sell more than 5 million shares of Novell, Inc. The customer did not ask Merrill to place its own capital at risk, and Merrill had agreed that its only compensation for executing the trade would be a commission equivalent. Contrary to this agreement, Merrill also charged this customer, in addition to a commission equivalent, an undisclosed mark-down, by filling the customer order at prices below the prices at which Merrill sold the securities in the market.

In November 2006, Merrill received from an institutional customer an order to buy 800,000 shares of BEA Systems, Inc. The customer did not ask Merrill to place its own capital at risk, and Merrill and the customer had agreed that Merrill's only compensation for executing the order would be a commission equivalent. Contrary to this agreement with the customer, Merrill charged the customer, in addition to a commission equivalent, an undisclosed mark-up, by filling the order at a higher price than it paid to purchase the securities in the market.

In these and other instances, Merrill charged institutional and high net worth customers undisclosed mark-ups and mark-downs on riskless principal trades for which Merrill had agreed to charge the customer only a commission equivalent. In doing so, Merrill acted improperly and contrary to its agreements with its customers.

[6] So-called 10b5-1 plans are pre-arranged trading plans that derive their name from Rule 10b5-1(c) of the Exchange Act.

Merrill Failed to Make Records of Certain Terms and Conditions of Customer Orders

From 2002 through 2007, Merrill generally made written records of customer orders to buy or sell equity securities that included, among other terms and conditions of the order, the name of the security, whether it was a buy or sell order, the quantity of shares, and the price for any limit on the order. During that time period, in response to certain orders placed by institutional customers, Merrill at times agreed to guarantee the customer a specific per-share execution price or a price tied to an agreed upon benchmark, such as the volume weighted average price of the security on a particular date. Merrill's traders usually made these price guarantees orally during telephone conversations with the customer representatives and, in many instances, did not make written records of the guarantees.

Section 17(a)(1) of the Exchange Act provides that each broker-dealer "shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter." Exchange Act Rule 17a-3(a)(6)(i) requires broker-dealers to make and keep current "[a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. The memorandum shall show the terms and conditions of the order or instructions..." An agreement by Merrill to guarantee an execution price for a customer is part of the terms and conditions of the customer's order.

During the period 2002 through 2007, Merrill failed in many instances to make records of price guarantees that were part of the terms and conditions of institutional customer orders.

VIOLATIONS

As a result of the conduct described above, Merrill willfully violated Section 15(c)(1)(A) of the Exchange Act, in that Merrill, while acting as a broker-dealer, effected transactions in securities by means of manipulative, deceptive or other fraudulent devices or contrivances.

As a result of the conduct described above, Merrill willfully violated Section 15(g) of the Exchange Act, in that Merrill, while acting as a broker-dealer, failed to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse, in violation of the Exchange Act or rules thereunder, of material, nonpublic information by Merrill or persons associated with it.

As a result of the conduct described above, Merrill willfully violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(6) thereunder, in that it, while acting as a registered broker-dealer, failed to make records of certain terms and conditions of customer orders.

FAILURE TO SUPERVISE

Section 15(b)(4)(E) of the Exchange Act requires broker-dealers reasonably to supervise persons subject to their supervision, with a view toward preventing violations of the federal securities laws. *See, e.g., Dean Witter Reynolds, Inc.*, Exchange Act Rel. No. 46578 (October 1, 2002). The Commission has emphasized that the "responsibility of broker-dealers to supervise their employees by means of effective, established procedures is a critical component in the federal investor protection scheme regulating the securities markets." *Smith Barney, Harris Upham & Co. Incorporated and Robert G. Heck*, Exchange Act Rel. No. 21813 (March 5, 1985).

As a result of the conduct described above, Merrill failed reasonably to supervise traders associated with the ESD and its NASDAQ market making operations, with a view to detecting and preventing violations of the Exchange Act. Specifically, Merrill failed to detect and prevent the conduct of these traders in misusing confidential customer order information and improperly charging customers undisclosed mark-ups and mark-downs on trades for which Merrill had agreed to charge only to a commission equivalent.

REMEDIAL EFFORTS

In determining whether to accept the Offer, the Commission considered significant remedial acts voluntarily taken by Merrill.

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. Respondent Merrill shall cease and desist from committing or causing any violations and any future violations of Sections 15(c)(1)(A), 15(g) and 17(a) of the Exchange Act and Rule 17a-3(a)(6) thereunder;

B. Respondent Merrill be and hereby is censured pursuant to Section 15(b)(4) of the Exchange Act; and

C. Pursuant to Section 15(b)(4) and Section 21B of the Exchange Act, Respondent shall, within ten (10) days of the entry of this Order, pay a civil money penalty to the United States Treasury in the amount of $10 million. Such payment shall be: (1) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (2) made payable to the Securities and Exchange Commission; (3) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312-0003; and (4) submitted under a cover letter that identifies Merrill Lynch, Pierce, Fenner & Smith Incorporated as the Respondent in this proceeding and includes the file number of this proceeding, a copy of which cover letter and money order or check shall be sent to Antony Richard Petrilla, Division of Enforcement, Securities and Exchange Commission, 100 F Street N.E., Washington, D.C. 20549-5010-B.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230, 239, 270, and 275

RELEASE NOS. 33-9177; IA-3144; IC-29572; File No. S7-04-11

RIN 3235-AK90

NET WORTH STANDARD FOR ACCREDITED INVESTORS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to the accredited investor standards in our rules under the Securities Act of 1933 to reflect the requirements of Section 413(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 413(a) requires the definitions of "accredited investor" in our Securities Act rules to exclude the value of a person's primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. This change to the net worth standard was effective upon enactment by operation of the Dodd-Frank statute, but Section 413(a) also requires us to revise our current Securities Act rules to reflect the new standard. We also are proposing technical amendments to Form D and a number of our rules to conform them to the language of Section 413(a) and to correct cross-references to former Section 4(6) of the Securities Act, which was renumbered Section 4(5) by Section 944 of the Dodd-Frank Act.

DATES: Comments should be received on or before March 11, 2011.

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 S7-04-11 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 S7-04-11. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Anthony G. Barone, Special Counsel, or Gerald J. Laporte, Chief, Office of Small Business Policy, at (202) 551-3460, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are requesting public comment on proposed amendments to Rule 144(a)(3)(viii),[1] Rule 155(a),[2] Rule 215,[3] and Rule 501(a)(5)[4] of

[1] 17 CFR 230.144(a)(3)(viii).

[2] 17 CFR 230.155(a).

[3] 17 CFR 230.215.

Regulation D[5] of our general rules under the Securities Act of 1933 ("Securities Act")[6]; Rule 500(a)(1)[7] of our Securities Act form rules; Form D[8] under the Securities Act; Rule 17j-1(a)(8)[9] under the Investment Company Act of 1940;[10] and Rule 204A-1(e)(7)[11] under the Investment Advisers Act of 1940.[12]

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I. BACKGROUND AND SUMMARY

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") became law on July 21, 2010.[13] Among other things, the Dodd-Frank Act changed certain

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[4] 17 CFR 230.501(a)(5).

[5] 17 CFR 230.501 through 230.508.

[6] 15 U.S.C. 77a *et seq.*

[7] 17 CFR 239.500(a)(1).

[8] 17 CFR 239.500.

[9] 17 CFR 270.17j-1(a)(8).

[10] 15 U.S.C. 80a-1 *et seq.*

[11] 17 CFR 275.204A-1(e)(7).

[12] 15 U.S.C. 80b-1 *et seq.*

[13] Pub. L. No. 111-203, 124 Stat. 1376.

legal requirements governing private and other limited offers and sales of securities without registration under the Securities Act.

Section 413(a) of the Dodd-Frank Act requires us to adjust the net worth standards for accredited investors in our rules under the Securities Act.[14] These standards delineate investors to whom issuers may sell securities in specified private and other limited offerings without registration of the offering under the Securities Act. The Dodd-Frank Act requires us to adjust the net worth standards in these rules that apply to a natural person individually, or jointly with the spouse of that person, to "more than $1,000,000 . . . excluding the value of the primary residence of such natural person."[15] Previously, these standards required a minimum net worth of more than $1,000,000, but permitted the primary residence to be included in calculating net worth.[16] Under Section 413(a), the change to remove the value of the primary residence from the net worth calculation became effective upon enactment of the Dodd-Frank Act.

In addition, Section 413(b) specifically authorizes us to undertake a review of the definition of the term "accredited investor" as it applies to natural persons, and requires us to undertake a review of the definition "in its entirety" every four years, beginning four years after enactment of the Dodd-Frank Act. We are also authorized to engage in rulemaking to make adjustments to the definition after each such review. We are not proposing to make revisions to the definitions of "accredited investor" that are not required by the Dodd-Frank Act at this time,

[14] *Id.* § 413(a), 124 Stat. 1577 (to be codified at 15 U.S.C. 77b note).

[15] The text of Section 413(a) reads as follows:

> The Commission shall adjust any net worth standard for an accredited investor, as set forth in the rules of the Commission under the Securities Act of 1933, so that the individual net worth of any natural person, or joint net worth with the spouse of that person, at the time of purchase, is more than $1,000,000 (as such amount is adjusted periodically by rule of the Commission), excluding the value of the primary residence of such natural person, except that during the 4-year period that begins on the date of enactment of this Act, any net worth standard shall be $1,000,000, excluding the value of the primary residence of such natural person. *Id.*

[16] *See* 17 CFR 230.215(e), 230.501(a)(5) (2010).

but may consider doing so in future rulemaking. Section 415 of the Dodd-Frank Act requires the Comptroller General of the United States to conduct a "Study and Report on Accredited Investors" examining "the appropriate criteria for determining the financial thresholds or other criteria needed to qualify for accredited investor status and eligibility to invest in private funds."[17] The study is due three years after enactment of the legislation. We expect that the results of this study will inform any future rulemaking in this area that takes place after the study is completed.[18]

Section 944 of the Dodd-Frank Act deleted former Section 4(5) of the Securities Act and renumbered former Section 4(6) as Section 4(5).[19] Former Section 4(6) provides an exemption from the registration requirements of the Securities Act for certain limited offerings to accredited investors if there is no advertising or public solicitation by the issuer. Our proposals include technical corrections to cross-references necessitated by this change.[20]

II. DISCUSSION

(A) Net Worth Standard for Accredited Investors

[17] Pub. L. No. 111-203, § 415, 124 Stat. 1376, 1578 (to be codified at 15 U.S.C. 80b-18c).

[18] To facilitate public input on its Dodd-Frank Act rulemaking before issuance of rule proposals, the Commission has provided a series of e-mail links, organized by topic, on its website at http://www.sec.gov/spotlight/regreformcomments.shtml. In this release, we refer to comment letters we received in response to this invitation as "advance comment letters." The advance comment letters we received in anticipation of this rule proposal, concerning revisions to the accredited investor net worth standards under Section 413(a) of the Dodd-Frank Act, are available at http://www.sec.gov/comments/df-title-iv/accredited-investor/accredited-investor.shtml. One of those comment letters, from the North American Securities Administrators Association, Inc. ("NASAA"), urged us to modify the accredited investor definition to incorporate an "investments owned" standard. *See* Advance Comment Letter from NASAA (Nov. 4, 2010) (available at http://www.sec.gov/comments/df-title-iv/accredited-investor/accredited-investor-11.pdf). This topic may be considered in connection with our future review of the definition of "accredited investor" and any resultant rulemaking.

[19] Pub. L. No. 111-203, § 944, 124 Stat. 1376, 1897 (renumbering Securities Act Section 4(6), 15 USC 77d(6) (2006), as Section 4(5), 15 USC 77d(5)). Former Section 4(5) exempted transactions involving mortgages with a minimum aggregate sales price per purchaser of $250,000, as well as the resales of those securities. 15 USC 77d(6) (2006).

[20] Section 926 of the Dodd-Frank Act requires the Commission to revise the standards for offerings under Rule 506 of Regulation D, 17 CFR 230.506, to impose certain "bad actor" disqualifications. We will propose those changes in a subsequent rulemaking.

(1) Proposed Language

As discussed above, Section 413(a) of the Dodd-Frank Act requires us to adjust the net worth standards for an accredited investor in our Securities Act rules that apply to any natural person individually, or jointly with the spouse of that person, to "more than $1,000,000 . . . excluding the value of the primary residence of such natural person." Previously, these standards required a minimum net worth of more than $1,000,000, but permitted the primary residence to be included in calculating net worth. The relevant rules are Securities Act Rules 501 and 215.[21]

Rule 501 sets the standards for accredited investor status under certain exemptive provisions for private and other limited offerings under Regulation D. Rule 215 defines the term "accredited investor" under Section 2(a)(15) of the Securities Act.[22] Section 2(a)(15) and Rule 215 set the standards for accredited investor status under Section 4(5) of the Securities Act, formerly Section 4(6).[23] While Regulation D is frequently relied upon,[24] exclusive reliance on Section 4(5) is rare.[25]

Neither the Securities Act nor our rules promulgated under the Securities Act define the term "net worth." The conventional or commonly understood meaning of the term is the

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[21] 17 CFR 230.501(a)(5) and 230.215(e) (2010).

[22] 15 U.S.C. 77b(a)(15).

[23] 15 U.S.C. 77d(5). As discussed above, former Section 4(6) of the Securities Act was renumbered Section 4(5) by Section 944 of the Dodd-Frank Act.

[24] In fiscal year 2010, we received 16,856 initial filings on Form D notifying us of a claim of exemption under Rules 504(b)(1)(iii), 505 and 506, 17 CFR 230.504(b)(1)(iii), 230.505 and 230.506, the three exemptive provisions in Regulation D where accredited investor status affects the availability of an exemption. This represented 96% of the 17,593 initial Form D filings we received for that year.

[25] In fiscal year 2010, we received 900 initial filings on Form D notifying us of a claim of exemption under Section 4(5), formerly Section 4(6), representing 5% of the 17,593 initial Form D filings we received for that year. Only 66 of those filings, or less than 0.4%, claimed the Section 4(5) exemption exclusively. The other 844 of these Form D filings indicated that both Section 4(5) and a Regulation D exemption were being relied upon.

difference between the value of a person's assets and the value of the person's liabilities.[26]

The proposed amendments would set the same standard under both Rule 501 and Rule 215 for individuals to qualify as accredited investors on the basis of net worth, either individually or with their spouses.[27] The amendments would implement Section 413(a) by adding to the relevant rules the language from Section 413(a)—"excluding the value of the primary residence of such natural person"—after the requirement that the investor's net worth "exceeds $1,000,000" currently in the rules.

In addition, our proposed amendments would add, after the Dodd-Frank statutory language, the phrase "calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property." As so amended, the accredited investor net worth standards in the relevant rules would define as an accredited investor:

> Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of purchase, exceeds $1,000,000, excluding the value of the primary residence of such natural person, calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property.

The purpose of adding the phrase introduced by the words "calculated by" is to clarify that net worth is calculated by excluding only the investor's net equity in the primary residence.[28]

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[26] *See, e.g., Interpretive Release on Regulation D,* Release No. 33-6455 (Mar. 3, 1983) [48 FR 10045] (Questions 21 and 45). *See also Barron's Financial Guides*, Dictionary of Finance and Investment Terms, at 457 (7th ed. 2006).

[27] Historically, we have maintained identical accredited investor standards under both rules.

[28] Soon after enactment of Section 413(a), the staff of the Division of Corporation Finance issued the following interpretation:

> Question: Under Section 413(a) of the Dodd-Frank Act, the net worth standard for an accredited investor, as set forth in Securities Act Rules 215 and 501(a)(5), is adjusted to delete from the calculation of net worth the "value of the primary residence" of the investor. How should the "value of the primary residence" be determined for purposes of calculating an investor's net worth?

We believe this approach is appropriate because it is consistent with, and advances the regulatory purposes of, Section 413(a). It reduces the net worth measure by the amount or "value" that the primary residence contributed to the investor's net worth before enactment of Section 413(a). Consequently, it removes the value of the primary residence from net worth without reducing net worth by more than the amount contributed by the residence before the amendment.[29]

We note that some of our existing rules follow an approach similar to our proposal in calculating net worth. For example, Rule 701 under Regulation R, which provides for the exclusion of the value of a person's primary residence in applying a net worth standard, provides for the exclusion of "associated liabilities," such as mortgages on the property.[30]

Under our proposed amendments, if an investor with a net worth of $2 million (calculated

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> Answer: Section 413(a) of the Dodd-Frank Act does not define the term "value," nor does it address the treatment of mortgage and other indebtedness secured by the residence for purposes of the net worth calculation. As required by Section 413(a) of the Dodd-Frank Act, the Commission will issue amendments to its rules to conform them to the adjustment to the accredited investor net worth standard made by the Act. However, Section 413(a) provides that the adjustment is effective upon enactment of the Act. When determining net worth for purposes of Securities Act Rules 215 and 501(a)(5), the value of the person's primary residence must be excluded. Pending implementation of the changes to the Commission's rules required by the Act, the related amount of indebtedness secured by the primary residence up to its fair market value may also be excluded. Indebtedness secured by the residence in excess of the value of the home should be considered a liability and deducted from the investor's net worth.

Securities Act Rules Compliance & Disclosure Interpretation, Question No. 255.47 (July 23, 2010) (available at http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#255.47).

[29] Moreover, this approach to calculating net worth is generally consistent with the manner in which net worth has conventionally been determined since the adoption of Regulation D in 1982, which served as the background for Congress when it enacted Section 413(a).

[30] 17 CFR 247.701(d)(1)(A) (defining "high net worth customer" as a natural person who, individually or jointly with his or her spouse, has at least $5 million in net worth "excluding the primary residence and associated liabilities of the person and, if applicable, his or her spouse"). Rule 701 was jointly adopted by the Securities and Exchange Commission and the Federal Reserve Board after consultation with and the concurrence of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision. *See Definitions of Terms and Exemptions Relating to the "Broker" Exception for Banks*, Release No. 34-56501 (Sept. 24, 2007) [72 FR 56514 (Oct. 3, 2007)]. In addition, Rule 17a-3(a)(17)(i)(A) under the Exchange Act requires exchange members, brokers, and dealers to make and keep records of accounts of natural persons, including a record of the person's net worth "excluding the value of primary residence." 17 CFR 240.17a-3(a)(17)(i)(A). Our Division of Trading and Markets, which administers this rule, interprets this provision to exclude the associated liabilities of the primary residence for purposes of the net worth test.

in the conventional manner by subtracting from the investor's total assets, including primary residence, the investor's total liabilities, including indebtedness secured by the residence) has a primary residence with an estimated fair market value of $1.2 million and a mortgage loan of $800,000, the investor's net worth for purposes of the new accredited investor standard would be $1.6 million. Before enactment of Section 413(a), the primary residence would have contributed a net amount of $400,000 to the investor's net worth for purposes of the accredited investor net worth standard—the value of the primary residence ($1.2 million) less the mortgage loan ($800,000). Under the proposed rule, exclusion of the value of the primary residence would reduce the investor's net worth by the same amount of $400,000.

We believe our approach is preferable to possible alternative interpretations. One alternative interpretation, excluding the fair market value of the residence without netting out the secured indebtedness, would reduce the net worth of any investor who has a mortgage by more than the amount that the primary residence contributed to the investor's net worth before enactment of Section 413(a). In the example above, if the new standard did not allow exclusion of the associated indebtedness, removal of the primary residence would reduce the investor's net worth by $1.2 million, for a revised net worth of $800,000, since the entire fair market value of the house ($1.2 million) would be subtracted from the investor's net worth of $2 million and the $800,000 mortgage loan would still be included as a liability in the calculation.

We believe that following this alternative approach and reducing the net worth by the value of the primary residence without excluding associated indebtedness would not accord with the manner in which net worth was determined before enactment of Section 413(a).[31] Absent

[31] In addition, this alternative approach would also result in a substantially greater reduction in the pool of accredited investors. Using data from the 2007 Federal Reserve Board Survey of Consumer Finances, the latest data available, our Division of Risk, Strategy and Financial Innovation estimates that 10,496,312 of the 116,122,128 U.S. households (9.04%) qualified for accredited investor status on the basis of the net worth standard before it was

legislative history suggesting Section 413(a) was clearly intended to be implemented in that fashion, we believe our proposed approach is appropriate and consistent with the purpose of Section 413(a)—to remove the "value of the primary residence" from the calculation of net worth for accredited investor determinations.[32]

Under our proposed amendments, indebtedness secured by the primary residence would be netted against the value of the primary residence only up to the fair market value of the property. For example, if an investor with a net worth of $2 million has a primary residence with an estimated fair market value of $600,000 and secured indebtedness of $800,000, a $600,000 portion of the secured indebtedness would be netted against the entire $600,000 value of the house, so the investor's net worth for purposes of the new accredited investor standard would remain at $2 million. The $200,000 in secured indebtedness in excess of the value of the property would already have been accounted for (i.e., subtracted from the value of other assets) in determining the investor's net worth.

In comparison, another possible interpretation of Section 413(a) would be to exclude

modified by Section 413(a) of the Dodd-Frank Act; 7,604,374 (6.55%) would have qualified on the basis of the net worth standard after modification based on Section 413(a), as interpreted by our proposed approach to exclude from the net worth calculation both the estimated fair market value of the primary residence and all indebtedness secured by the residence up to the fair market value of the property; and 6,858,335 (5.91%) would have qualified if we adopted a standard based on the alternative interpretation of Section 413(a) to exclude from the net worth calculation the fair market value of the primary residence but not any indebtedness secured by the residence. More information regarding the survey may be obtained at http://www.federalreserve.gov/pubs/oss/oss2/scfindex.html. *See also* note 49 below and accompanying text.

[32] Section 413(a) was one element of an amendment introduced on the floor of the Senate and adopted by voice vote. *See* 156 Cong. Rec. S3817 (daily ed. May 17, 2010). The amendment, as explained by Senator Dodd, *id.* at S3813, would (1) "disqualify felons and other 'bad actors' who have violated Federal and State securities laws from continuing to take advantage of the rule 506 private placement process," (2) "amend the 'accredited investor' wealth threshold by excluding the value of an investor's primary residence," and (3) direct the SEC "to review the [accredited investor] financial standards at least [every] 4 years," and replaced a provision that would have required the Commission to adjust both the net worth and the income standards for accredited investors to reflect inflation from the date of their determination in 1982 to the date of enactment of the Dodd-Frank Act in 2010. *See* Amendment as Substitute No. 3789 to S. 3217, 111th Cong., 2d Sess. § 412 (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s3217as.txt.pdf). The legislative history does not suggest that the amount of associated mortgage debt should not also be deleted in calculating net worth.

from net worth both the fair market value of the primary residence and all indebtedness secured by the primary residence, regardless of whether the indebtedness exceeds the fair market value of the property. This alternative interpretation is the same as our proposal when the value of the property exceeds the secured indebtedness, but provides a different result if the amount of secured debt exceeds the value of the property (*i.e.*, the case of an underwater mortgage). For example, under this interpretation, if an investor with a net worth of $2 million has a primary residence with an estimated fair market value of $600,000 and a mortgage loan of $800,000 and no other secured indebtedness, the investor's net worth for purposes of the new accredited investor standard would be $2,200,000. Net worth is effectively increased over the conventional net worth calculation by $200,000 (the amount the underwater mortgage exceeds the value of the property). We do not believe, however, that it would be appropriate for us to implement Section 413(a) in a way that results in increased net worth (compared to a conventional calculation) for investors with underwater mortgages.

As noted above, the requirement to exclude the value of the primary residence became operative when the statute was enacted. Therefore, we are not making any special provision for the transition to the new requirement. We are nevertheless specifically requesting comment below on whether some transition provisions would be appropriate.

(2) Other Issues Considered

We considered a number of issues described below, as to which the proposed amendments reflect our preliminary determinations. These issues are the subject of specific requests for comment at the end of this section.

Defining "Primary Residence." We considered proposing amendments that would have defined the term "primary residence" for purposes of the rules we are amending. While we are soliciting comment on whether a definition should be added to the rule, the proposal does not contain a definition, consistent with our past policies in this area,[33] and in an attempt to avoid unnecessary complexity.[34]

Issuers and investors should be able to use the commonly understood meaning of "primary residence"—the home where a person lives most of the time.[35] If additional analysis is needed under complex or unusual circumstances, helpful guidance may be found in rules that apply in other contexts, such as income tax rules and rules that apply when acquiring a mortgage loan for a primary residence, which often bears a lower interest rate than other mortgage loans.[36]

Proceeds of Debt Secured by Primary Residence Incurred to Invest in Securities. The North American Securities Administrators Association ("NASAA") has recommended that we not permit the exclusion of debt secured by a primary residence from the calculation of net worth if proceeds of the debt are used to invest in securities.[37] NASAA is concerned that, in the absence of such a rule, an "unscrupulous salesperson might encourage a

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[33] None of our three other rules that use the term "primary residence" have a definition of the term. *See* 17 CFR 240.17a-3(a)(17)(i)(A), 17 CFR 247.701(d)(1)(A) & 17 CFR 210.2-01(c)(1)(ii)(A)(*4*). Regulation D also does not define the similar term "principal residence," as used in Rule 501(e)(1)(i) of Regulation D. 17 CFR 230.501(e)(1)(i). There, Regulation D uses the term "principal residence" to exclude any purchasers who are relatives or spouses of the purchaser and who share the same principal residence as the purchaser for purposes of calculating the number of purchasers in a Regulation D offering. As explained below, we propose to change this reference from "principal residence" to "primary residence" so that it conforms to the terminology of the Dodd-Frank Act. *See* note 44 below and accompanying text.

[34] We followed this approach when we adopted Regulation D originally and decided not to define the term "income," an element of another of our accredited investor standards. At the time, we explained that, "[r]ather than adopting a definition [of the term "income," we] determined to utilize a flexible approach" to avoid problems with a defined term. *Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales*, Release No. 33-6389 (Mar. 8, 1982) [47 FR 11251, 11255 (Mar. 18, 1982)].

[35] *See* IRS Publication 523, *Selling Your Home* 2 (Mar. 8, 2010) ("Usually, the home you live in most of the time is your main home…").

[36] For example, the IRS Publication *Selling Your Home* lists the following factors to be used, in addition to the amount of time a person lives in each of several homes, to determine a person's "principal residence" under Section 121 of the Internal Revenue Code, 26 U.S.C. 121: place of employment; location of family members' main home; mailing address for bills and correspondence; address listed on federal and state tax returns, driver's license, car registration, and voter registration card; location of banks used and recreational clubs and religious organizations. *Id.* at 4.

[37] Advance Comment Letter from NASAA, note 18 above.

person with a significant amount of equity in the person's home, which is not uncommon for older investors, to take out a mortgage on the residence in order to manipulate their status under the accredited investor test and to use the proceeds to invest in what would otherwise be unsuitable private placement securities."[38] We agree that such actions would raise serious concerns under the federal securities laws. If broker-dealer sales personnel engage in this type of activity, their conduct can be addressed under the standards governing broker-dealer sales practices.[39] However, we preliminarily do not believe that the potential for inappropriate sales practices, whether by issuers or by broker-dealers, necessitates adding significant complexity to the calculation of net worth. As noted above, Regulation D is designed to be relatively straightforward to apply, and we are concerned that a rule that attempts to trace the use of mortgage or home equity loan proceeds and to distinguish between permissible and impermissible uses of proceeds would introduce undue complexity into Regulation D. We request public comment on this preliminary judgment below.

We also are soliciting comment on whether the proposed amendments should contain a timing provision in order to prevent investors from inflating their net worth by purchasing assets with the proceeds of indebtedness secured by their homes with the intent to qualify as accredited investors and purchase Regulation D securities. For example, the proposed amendments could provide that the net worth calculation must be as of a date 30 or 60 days before the sale of the

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[38] *Id.* at 2.

[39] NASD (now known as FINRA) Rule 2310 requires registered representatives of broker-dealers to make only suitable recommendations to their customers. *See* Financial Industry Regulatory Authority, NASD Rule 2310: Recommendations to Customers (Suitability) (2010) (available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3638). Depending on the facts and circumstances, such behavior may also rise to the level of fraud under Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), or Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), or the Commission's antifraud rules issued under those statutory provisions.

securities, as well as at the time of sale. Because we have some concern that this could complicate issuers' and investors' calculations, particularly as the date of the sale may not be known sufficiently in advance, we are not proposing such a timing provision, but request comment on this preliminary judgment.

Transition and Other Rules on Subsequent Investments. We are not proposing any special rules for transition to the new accredited investor net worth standards, since these new standards were effective upon enactment of the Dodd-Frank Act. Under the current rules, a company or fund is not permitted to treat an investor as accredited if the investor subsequently loses that status, even if the investor has previously invested in the company or fund at a time when it satisfied the accredited investor standard. Investors must satisfy the applicable accredited investor income or net worth standard in effect at the time of every exempt sale of securities to the investor that is made in reliance upon the investor's status as such. The proposed amendments would not change this situation.

We nevertheless are seeking comment below on whether some transition and other rules might be appropriate to facilitate subsequent investments by an investor who previously qualified as accredited but was disqualified by the change effected by the Dodd-Frank Act. For example, an investor that qualified as an accredited investor in a previous sale under Regulation D before enactment of the Dodd-Frank Act may wish to invest in the same company or fund in order to retain its proportionate interest in the company or fund or to exercise rights that have arisen because of that interest.[40] Or a company may wish to make a rights offering to current investors who invested as accredited investors. In this case, the company may not wish to be subject to the

[40] Such contractual rights may include preemptive rights, rights of first refusal, rights of co-sale, buy-sell agreements and so-called pay to play provisions that provide for dilution or other adverse consequences to affected investors who do not fund capital calls or otherwise reinvest in future rounds of financing.

additional information requirements it may incur under Regulation D if it offers and sells securities to non-accredited investors,[41] and the company may be precluded from making the offering if the number of non-accredited investors exceeds the limit of 35 non-accredited investors imposed in Rule 505 and Rule 506 offerings. In some of these cases, the investor may have spent a substantial amount of time and money performing due diligence on the company or fund before his or her previous investments and may be familiar with the issuer as an existing investor. Under these circumstances, some have argued that the investor should be able to invest again as an accredited investor even if the investor does not satisfy the standards applicable at the time of the subsequent investment.[42]

Specific Requests for Comment

1. Should the value of the residence be calculated by netting out the debt secured by the residence, as proposed? Or would it be more appropriate to exclude the entire fair market value of the residence from net worth, without netting out any associated debt?
2. Would it be more appropriate to substitute the word "equity" for the word "value" when referring to the primary residence in our accredited investor net worth standards?
3. Should we interpret Section 413(a) to exclude from the net worth calculation both the fair market value of the primary residence and all indebtedness secured by the primary residence, regardless of whether such indebtedness exceeds the fair market value of the property?

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[41] *See* CFR 230.502(b)(1).

[42] A speaker at the SEC Forum on Small Business Capital Formation conducted on November 18, 2010 suggested that an investor that qualified as an accredited investor when initially investing in a company or fund should be able to continue to invest in future offerings of that issuer, even if the investor no longer meets any new elevated accredited investor standards. *See* Record of Proceedings of 29th Annual SEC Government-Business Forum on Small Business Capital Formation, at 18 (Nov. 18, 2010) (remarks of Alan J. Berkeley) (available at http://www.sec.gov/info/smallbus/sbforumtrans-111810.pdf).

4. Is another interpretation of Section 413(a) superior to those we discussed?
5. Should we define the term "primary residence" for purposes of our accredited investor net worth rules? If we define the term, should we use a definition under the federal income tax code? If so, should we also incorporate into our definition a reference to guidelines issued under the federal income tax code? Alternatively, should we define "primary residence" as the commonly understood meaning of the term—the home where a person lives most of the time? What alternative definitions would you recommend? For example, should we define the term by listing several factors to consider? Would the factors from the IRS publication listed in note 35 be the appropriate factors, or are there different factors that should be included?
6. Should we require inclusion of debt secured by a primary residence in our proposed accredited investor net worth standard if proceeds of the debt are used to invest in securities? How would these proceeds be traced? Would companies and their prospective investors find this standard workable? Should distinctions be made among different kinds of securities? Are there other assets besides securities that should be taken into account?
7. Should the rule provide that the calculation of net worth must be made as of a specified date before the sale of securities under Regulation D, for example, 30, 60 or 90 days, as well as at the time of sale? If not, would investors be likely to inflate their net worth by borrowing against their homes to attain accredited investor status? If we required that the net worth calculation be made a significant period of time in advance of the sale, would such a requirement make the calculation unduly complex or otherwise make exempt offerings to accredited investors less useful for issuers?

8. Issuers and investors have calculated net worth under the Regulation D accredited investor standards for many years without specific instructions in the rules on how the calculation should be performed. Would guidance in the rules on how to calculate net worth, in addition to the new standards governing valuing the primary residence and treating related mortgage debt, be helpful? For example, should we adopt rules specifying what should be included as assets and debt, and how various kinds of assets should be valued? If so, what additional rules would be appropriate?

9. Should we adopt any transition or other rules providing that an investor who previously qualified as an accredited investor before enactment of Section 413(a), or adoption of the proposed amendments, may continue to qualify as such for purposes of subsequent or "follow-on" investments, such as investments to protect its proportionate interest in a company or fund or to exercise rights that arise because of that interest, or would that be inconsistent with the purposes of Section 413(a)? If we should adopt such an approach, are there other types of investments that should qualify for such treatment? Would investors' ability to protect their then-existing investments be inappropriately adversely affected if we did not provide such treatment? Would issuers' ability to raise capital be inappropriately impeded if we did not provide such treatment? If we did this, should we limit the amount of permissible follow-on investments, such as limiting them to the amount necessary to protect the investor from dilution? What conditions should we place on qualifying for such treatment? Is this unnecessary because the Section 4(2) private placement exemption may be available for sales to such an existing investor? Instead, should we provide that an investor who previously qualified as an accredited investor, but no longer qualifies as a result of Section 413(a), would not count towards the 35 non-

accredited investor limitation of Rules 505(b) and 506(b)[43] for offerings by issuers in which the investor held investments at the time the Dodd-Frank Act was enacted?

(B) Technical and Conforming Amendments

In order to avoid confusion, we are proposing to change the reference currently in Rule 501(e)(1)(i) of Regulation D to "principal residence" so that it reads "primary residence" and conforms to the language we are adding to Rule 501 to implement Section 413(a) of the Dodd-Frank Act. We believe the terms are synonymous and should read the same.[44]

Also to avoid confusion, we propose to revise the references to former Securities Act Section 4(6) in Form D and several of our rules to refer to Section 4(5), as former Section 4(6) was renumbered by Section 944(a)(2) of the Dodd-Frank Act. Specifically, we propose to amend Rule 144(a)(3)(viii) (definition of "restricted securities") and Rule 155(a) (integration of abandoned offerings) of the general Securities Act rules; Rule 500(a)(1) of the Securities Act form rules; Form D under the Securities Act; Rule 17j-1(a)(8) (personal investment activities of investment company personnel) under the Investment Company Act, and Rule 204A-1(e)(7) (investment adviser codes of ethics) under the Investment Advisers Act.

We are also removing the authority citation preceding the Preliminary Notes to Regulation D.

III. GENERAL REQUEST FOR COMMENT

We request comment, both specific and general, on each component of the proposals. We request and encourage any interested person to submit comments regarding:

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[43] 17 CFR 230.505(b) and 230.506(c).

[44] For purposes of calculating the number of purchasers in a Regulation D offering, Rule 501(e)(1)(i) uses the term "principal residence" to exclude any purchasers who are relatives or spouses of a purchaser of a Regulation D security and who share the same "principal residence" as the purchaser of the security. 17 CFR 230.501(e)(1)(i).

- the proposals that are the subject of this release; and
- other matters that may have an effect on the proposals contained in this release.

Comment is solicited from the point of view of both investors and issuers, as well as of capital formation facilitators, such as broker-dealers, and other regulatory bodies, such as state securities regulators. Any interested person wishing to submit written comments on any aspect of the proposal is requested to do so.

IV. PAPERWORK REDUCTION ACT

The proposed amendments do not contain a "collection of information" requirement within the meaning of the Paperwork Reduction Act of 1995.[45] Accordingly, the Paperwork Reduction Act is not applicable.

V. COST-BENEFIT ANALYSIS

A. Background and Summary of Proposals

As discussed above, we are proposing amendments to the accredited investor standards in our rules under the Securities Act to reflect the requirements of Section 413(a) of the Dodd-Frank Act.

Section 413(a) of the Dodd-Frank Act requires the definitions of "accredited investor" in the Securities Act rules to exclude the value of a person's primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. Under the previous standard, individuals qualified as accredited investors if they had a net worth of more than $1 million, including the value of the primary residence. The substantive change to the net worth standards was effective by operation of the Dodd-Frank Act upon enactment; however, Section 413 also requires us to adjust the accredited

[45] 44 U.S.C. 3501-3521.

investor definitions in our Securities Act rules to reflect the new standard. We therefore propose to revise Securities Act Rule 501(a)(5) of Regulation D and Securities Act Rule 215(e) to reflect the new standard.

Our proposed revisions go beyond the minimum language necessary to reflect the new standard by providing guidance on how to exclude the value of the primary residence from the net worth calculation. This language would explain that the value of the primary residence would be "calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property."

Our analysis here focuses on the costs and benefits to the economy of including our proposed explanatory language, as compared to the alternatives discussed, rather than the costs and benefits of the new heightened accredited investor net worth standard, which was mandated by Congress in Section 413(a) of the Dodd-Frank Act.

The language we propose reflects our exercise of discretion in choosing one interpretation of the statutory language set forth in Section 413(a) over two other possible interpretations. These two other interpretations of the Section 413(a) language are: (1) excluding from net worth the fair market value of the primary residence, without netting out indebtedness secured by the primary residence; and (2) excluding from net worth the fair market value of the primary residence and all indebtedness secured by the primary residence, regardless of whether it exceeds the fair market value of the residence.

We are also proposing technical changes to Form D and a number of rules to conform them to the Dodd-Frank Act, in all but one instance to revise cross-references to former Section 4(6) of the Securities Act, which was renumbered Section 4(5) in Section 944 of the Dodd-Frank Act.

We have identified certain benefits and costs that may result from the proposed explanatory language. We encourage the public to identify, discuss, analyze and supply relevant data regarding these or any additional benefits and costs in comment letters on these proposed amendments.

B. Benefits

We preliminarily believe the proposed explanatory language provides the most appropriate interpretation of the words of Section 413(a). The proposed explanatory language would result in the following benefits:

- We believe the proposed amendments most accurately reflect the manner in which net worth has conventionally been determined and understood. We believe investors and issuers would benefit from implementing rules that are easy to understand and consistent with conventional net worth calculation concepts.[46]
- The interpretation reflected in the proposed amendments would result in a smaller reduction in the pool of accredited investors than the first alternative interpretation.[47] To the extent that exempt offerings to accredited investors are less costly for issuers to complete than registered offerings, a larger pool of accredited investors that may participate in these offerings could result in cost savings for issuers conducting these offerings.
- Limiting the amount of debt secured by the primary residence that may be excluded from net worth to the estimated fair market value of the property, as proposed, would limit investors' incentives to incur indebtedness secured by their primary residence in

[46] *See* note 26 above and accompanying text.

[47] *See* note 31 above.

an amount greater than the value of their property. This result is preferable to an alternative possible interpretation of Section 413(a) that would allow investors to exclude both the fair market value of the property and all indebtedness secured by the property, regardless of whether such indebtedness exceeded the fair market value of their property. Under this alternative interpretation, investors with underwater mortgages would have a higher net worth than they would under a conventional calculation, since all such indebtedness would be excluded in determining whether they qualify as accredited investors on the basis of their net worth. In contrast, under our proposal, the investor's net worth would continue to be reduced to reflect any liability in the amount of any shortfall between the mortgage indebtedness and the estimated fair market value of the property.

C. Costs

Like our analysis of the benefits, our analysis of the costs focuses on the costs attributable to our proposed language on how to calculate the "value of the primary residence" to be excluded from the net worth calculation. Many of the costs of our proposal are dependent on a number of factors, but may include the following:

- The proposed amendments could encourage investors to obtain indebtedness secured by their primary residence up to the estimated fair market value of the property with the primary motive to inflate their net worth in order to satisfy the new heightened accredited investor net worth standard in Section 413(a) by purchasing assets unrelated to their home, such as stocks, bonds, cars, etc. The net effect would be to increase net worth under the rule, since these assets, unrelated to the home, would be included in their net worth calculation, but the indebtedness secured by the primary residence to acquire these assets would be excluded from the net worth calculation under our proposed amendments.[48]

- The proposed approach would require that an investor's net worth reflect the amount that the investor's secured indebtedness exceeds the estimated fair market value of the property. While the 2007 Federal Reserve Board Survey of Consumer Finances does not indicate that there was any difference in the number of households that would qualify under the two standards,[49] given recent downward trends in real estate values, our proposed approach could result in a smaller pool of eligible accredited investors than if we implemented an alternative approach that would exclude all indebtedness secured by the primary residence. This could result in increased costs for companies and funds that are seeking accredited investors to participate in their exempt offerings.
- The proposed approach involves more complex calculations than the two alternative possible approaches we have identified. The proposed approach involves estimating the fair market value of the investor's primary residence, subtracting the indebtedness secured by the residence, and subtracting the difference or net amount from the investor's net worth calculation. Both of the alternative net worth calculations, however, could be performed merely by ignoring the primary residence as an asset in determining the net worth amount, and in the case of the second alternative interpretation also ignoring the

[48] NASAA has recommended that we not permit the exclusion of debt secured by a primary residence from the calculation of net worth if the proceeds of the debt are used to invest in securities. *See* Advance Comment Letter from NASAA, note 18 above, and note 37 above and accompanying text. We have solicited comment above on this issue.

[49] Based on its analysis of the data from the 2007 Federal Reserve Board Survey of Consumer Finances, discussed in note 31 above, our staff estimates that approximately 7.6 million households would have qualified for accredited investor status under both our proposed approach and the second alternative interpretation of Section 413(a), which would exclude from the net worth calculation both the fair market value of the primary residence and all indebtedness secured by the residence, regardless of whether the indebtedness exceeds the fair market value of the property.

indebtedness secured by the primary residence.

D. Request for Comment

We solicit comments on the costs and benefits of the proposed amendments. We request your views on the costs and benefits described above, as well as on any other costs and benefits that could result from the adoption of our proposals. We encourage the public to identify, discuss, analyze, and supply relevant data regarding these or any additional costs and benefits in comment letters.

In general, we request comment on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of the proposals not already identified, that may result from the adoption of these proposed amendments. We request that comment letters responding to these requests provide empirical data and other factual support for their views to the extent possible.

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

Section 2(b) of the Securities Act[50] requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. We believe our proposed amendments may facilitate capital formation and promote efficiency. We do not anticipate that the proposed amendments would have any effects on competition.

We believe the proposed amendments impose no burden on efficiency, competition and capital formation beyond what is required by implementation of the Dodd-Frank Act. As

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[50] 15 U.S.C. 77b(b).

discussed in the cost-benefit analysis in Part V above, however, the language of Section 413(a) could be subject to alternative interpretations if our rules do not provide guidance on how to calculate the value of the primary residence. In this regard, we propose to add explanatory language to our rules on how to calculate and exclude the value of the primary residence in determining whether a person qualifies under the accredited investor net worth standard. We believe these proposed amendments further the purposes underlying the requirements of Section 413(a) of the Dodd-Frank Act.

The proposed explanatory language states that the value of the primary residence would be "calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property." As described above, we believe this approach is consistent with Section 413(a) of the Dodd-Frank Act, as well as with the conventional and commonly understood method of determining net worth, and, as a result, is preferable to an alternative approach that would exclude from net worth the fair market value of the primary residence, without netting out indebtedness secured by the primary residence. To the extent that exempt offerings to accredited investors are less costly for issuers to complete compared to registered offerings, since the explanatory language would reduce the size of the accredited investor pool to a lesser extent than the alternative approach,[51] issuers conducting these exempt offerings potentially could experience greater cost savings than under the alternative interpretation.

The least restrictive approach to excluding the value of the primary residence under Section 413(a) would be to exclude from net worth the fair market value of the primary residence and all indebtedness secured by the primary residence, regardless of whether the debt exceeds

[51] *See* note 31 above and accompanying text.

the fair market value of the property. Based on the survey data, this approach would not result in a larger pool of eligible accredited investors than under our proposal, and therefore would not appear to result in additional cost savings for capital raising transactions by issuers relying on exempt sales to accredited investors compared to our proposal.[52]

We do not believe the proposed amendments place any significant burden on or otherwise affect competition beyond what is required by the Congressionally-mandated requirements of Section 413(a). The proposed amendments would apply equally to all investors and issuers participating in exempt offerings under Regulation D and Section 4(5). Nevertheless, we request comment on our proposal in the event members of the public perceive it as advantaging one group or category of issuers or investors over another.

We believe the proposed amendments may positively affect efficiency and capital formation. Providing clear guidance on how to calculate and exclude the value of the primary residence, we believe, should generally benefit investors and issuers by making the requirements of Section 413(a) easier to apply. Clear rules will also serve to promote efficiency by reducing the risk of issuers' inability to raise capital because of uncertainty in interpreting our rules, as well as the risk of sales by issuers to investors who do not meet the new heightened accredited investor net worth standards. Avoiding this latter problem would also serve to lower the risk that an issuer may need to make a rescission offer. Greater clarity and certainty in our accredited investor net worth standards also should foster greater confidence in our private placement markets and ultimately reduce the cost of capital, promoting increased capital formation.

We request comment on whether the proposed amendments, if adopted, would promote or burden efficiency, competition and capital formation. Finally, we request those who submit

[52] *See* note 49 above and accompanying text.

comment letters to provide empirical data and other factual support for their views if possible.

VII. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This initial regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 603. It relates to proposed amendments to our accredited investor rules under the Securities Act to reflect the requirements of Section 413(a) of the Dodd-Frank Act.

A. Reasons for the Proposed Action

The reason for the proposed amendments is to implement the requirements of the Dodd-Frank Act, primarily the requirements of Section 413(a) of that statute. Section 413(a) requires the definitions of "accredited investor" in the Securities Act rules to exclude the value of a person's primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. Under the previous standard, individuals qualified as accredited investors if they had a net worth of more than $1 million, including the value of the primary residence. The change to the net worth standard was effective upon enactment by operation of the Dodd-Frank Act. But Section 413(a) also requires us to revise the Securities Act accredited investor definitions to reflect the new standard, which we propose to do by revising Securities Act Rule 501(a)(5) of Regulation D and Rule 215(e).

B. Objectives

Our primary objective is to implement the requirements for a new accredited investor net worth standard in Section 413(a) of the Dodd-Frank Act. We also propose to add language explaining how to "exclude the value of the primary residence" properly so that implementation proceeds in the most efficient way possible, with a minimum amount of uncertainty. We believe this proposal will reduce the cost of exempt offerings under Regulation D and Section 4(5) by reducing uncertainty among issuers and investors in interpreting the new heightened accredited investor net worth standard mandated by Section 413(a) of the Dodd-Frank Act. By providing greater specificity, we are attempting to remove a possible impediment to issuers using this form of offering, thereby potentially lowering the cost of capital generally, and facilitating capital formation for smaller issuers, while protecting investors.

We note that Section 413(a) of the Dodd-Frank Act does not prescribe the method for calculating the value of the primary residence, nor does it address specifically the treatment of mortgage and other indebtedness secured by the residence for purposes of the net worth determination. Accordingly, we have proposed to exercise our discretion by adding explanatory language to the accredited investor net worth standard stating that the value of the primary residence should be calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property. We believe this interpretation is consistent with conventional and commonly understood methods of determining net worth, and is preferable to other possible interpretations of the statutory language set forth in Section 413(a), such as: (1) excluding from net worth the fair market value of the primary residence without netting out indebtedness secured by the primary residence; and (2) excluding from net worth the fair market value of the primary residence and all indebtedness secured by the primary residence, regardless of whether it exceeds the fair market value of the property.

C. Legal Basis

The amendments to the accredited investor net worth standards are being proposed under the authority set forth in Sections 2(a)(15), 3(b), 4(2), 19, and 28 of the Securities Act and in Section 413(a) of the Dodd-Frank Act, which is to be codified in a note to Section 2 of the

Securities Act, 15 U.S.C. 77b.

D. Small Entities Subject to the Proposed Rules

The proposals would affect issuers that are small entities, because issuers that are small entities must believe or have a reasonable basis to believe that prospective investors are accredited investors at the time of the sale of securities if they are relying on the definition of "accredited investor" for an exemption under Regulation D or Section 4(5). For purposes of the Regulatory Flexibility Act under our rules, an issuer is a "small business" or "small organization" if it has total assets of $5 million or less as of the end of its most recent fiscal year.[53] 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. The proposed amendments would apply to all issuers that rely on the accredited investor net worth standards in the exemptions to Securities Act registration in Regulation D and Section 4(5).

All issuers that sell securities in reliance on Regulation D and Section 4(5) must file a notice on Form D with the Commission. However, the vast majority of companies and funds filing notices on Form D are not required to provide financial reports to the Commission. For the fiscal year ended Sept. 30, 2010, 22,941 issuers filed a notice on Form D. We believe that many of these issuers are small entities, but we currently do not collect reliable information on total assets to determine if they are small entities for purposes of this analysis.

E. Reporting, Recordkeeping and Other Compliance Requirements

None of our proposed amendments would increase the information or time required to complete the Form D that must be filed with the Commission in connection with sales under

[53] 17 CFR 230.157.

Regulation D and Section 4(5). Our proposed amendments merely adjust our rules so they reflect the requirements of Section 413(a) of the Dodd-Frank Act. They would not require any further disclosure than is currently required in offerings made in reliance on Regulation D and Section 4(5).

F. Duplicative, Overlapping or Conflicting Federal Rules

We believe that there are no rules that conflict with or duplicate the proposed amendments.

G. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objective of our proposals, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, we considered the following alternatives:

- the establishment of different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- the clarification, consolidation, or simplification of the rule's compliance and reporting requirements for small entities;
- the use of performance rather than design standards; and
- an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

With respect to the establishment of special compliance requirements or timetables under our proposed amendments for small entities, we do not think this is feasible or appropriate. As described earlier, we believe our proposed amendments are preferable to other possible interpretations of the statutory language set forth in Section 413(a) and are consistent with

Congressional intent. Our proposals do not establish any compliance requirements or timetables for compliance that we could adjust to take into account the resources available to small entities. Moreover, the proposals are designed to eliminate uncertainty among issuers and investors that may otherwise result from inserting only the bare operative language from Section 413(a) of the Dodd-Frank Act in our rules. Providing greater specificity in our rules should provide issuers, including small entities, and investors with greater certainty concerning the availability of the Regulation D and Section 4(5) exemptions to Securities Act registration and thereby further facilitate efficient access to capital for both large and small entities consistent with investor protection.

Likewise, with respect to potentially clarifying, consolidating, or simplifying compliance and reporting requirements, the proposed rules do not impose any new compliance or reporting requirements or change any existing requirements.

With respect to using performance rather than design standards, we do not believe doing so in this context would be consistent with our objective or with the statutory requirement. Our proposal seeks to specify how issuers should calculate the value of a person's primary residence for purposes of excluding its value in determining whether the person qualifies as an accredited investor on the basis of net worth. Specifying that issuers should calculate the value and leaving the method of attaining that end to the discretion of the issuer, as a performance standard would do, would frustrate our purpose and deny small entities and others of the benefits of certainty that the proposal is designed to provide.

With respect to exempting small entities from coverage of these proposed amendments, we believe such a proposal would increase rather than decrease regulatory burdens on small entities. Our proposals are designed to provide sufficient protection of investors without unduly burdening both issuers and investors, including small entities and their investors. They also are designed to minimize confusion among issuers and investors. Exempting small entities would increase their regulatory burdens and increase confusion. We have endeavored to minimize the regulatory burden on all issuers, including small entities, while meeting our regulatory objectives. Nevertheless, we request comment on ways in which we could exempt small entities from coverage of any aspects of the proposed amendments that members of the public consider unduly onerous.

H. Request for 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 proposals;
- the existence or nature of the potential impact of the proposals on small entities discussed in this analysis; and
- how to quantify the impact of the proposed amendments.

We request members of the public to submit comment letters on our proposals and ask them to describe the nature of any impact on small entities they identify 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,[54] a rule is "major" if it has resulted, or is likely to result in:

[54] Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996).

- an annual effect on the economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

We request comment on whether our proposals would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- the potential effect on the U.S. economy on an annual basis;
- any potential increase in costs or prices for consumers or individual industries; and
- any potential effect on competition, investment or innovation.

IX. STATUTORY AUTHORITY AND TEXT OF PROPOSED AMENDMENTS

We are proposing the amendments contained in this document under the authority set forth in Sections 2(a)(15), 3(b), 4(2), 19 and 28 of the Securities Act, as amended,[55] Section 38(a) of the Investment Company Act,[56] Section 211(a) of the Investment Advisers Act[57] and Sections 413(a) and 944(a) of the Dodd-Frank Act.

List of Subjects in 17 CFR Parts 230, 239, 270 and 275

Reporting and recordkeeping requirements, Securities.

For the reasons set out above, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority citation for Part 230 is revised to read as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d,

[55] 15 U.S.C. 77b(a)(15), 77c(b), 77d(2), 77s and 77z-3.

[56] 15 U.S.C. 80a-38(a).

[57] 15 U.S.C. 80b-11(a).

78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37 and Pub. L. No. 111-203, § 413(a), 124 Stat. 1577 (2010) (15 U.S.C. 77b note), unless otherwise noted.

2. Amend § 230.144, paragraph (a)(3)(viii) by removing the reference to "4(6) 15 U.S.C. 77d(6)" and adding in its place "4(5) 15 U.S.C. 77d(5)".

3. Amend § 230.155, paragraph (a), by removing the references to "4(6)" and "77(d)(6)" and adding in their places "4(5)" and "77(d)(5)", respectively.

4. Amend § 230.215 by revising paragraph (e) to read as follows:

§ 230.215 Accredited Investor.

* * * * *

(e) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of purchase, exceeds $1,000,000, excluding the value of the primary residence of such natural person, calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property;

* * * * *

5. Amend Part 230 by removing the authority citation after the undesignated center heading "Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933" and preliminary notes preceding §§ 230.501 to 230.508.

6. Amend § 230.501 by:

a. revising paragraph (a)(5); and

b. removing the word "principal" and adding in its place the word "primary" in paragraph (e)(1)(i);

The revision read as follows:

§ 230.501 Definitions and terms used in Regulation D.

* * * * *

(a) * * *

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of purchase, exceeds $1,000,000, excluding the value of the primary residence of such natural person, calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property;

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The general 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(e), 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

8. Amend § 239.500 by removing the reference to "4(6)" and adding in its place "4(5)" in the heading and in the first sentence of paragraph (a)(1).

9. Amend Item 6 in Form D (referenced in § 239.500) by:

a. removing the phrase "Securities Act Section 4(6)" and adding in its place "Securities Act Section 4(5)" next to the appropriate check box; and

b. removing the reference to "4(6)" and adding in its place "4(5)" in the first sentence of the first paragraph of the General Instructions.

(Note: The text of Form D does not, and the amendments will not, appear in the Code of Federal Regulations.)

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

10. The general 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.

* * * * *

11. Amend § 270.17j-1, paragraph (a)(8), by removing the references to "4(6)"and "77d(6)" and adding in their places "4(5)" and "77d(5)", respectively.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

12. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

13. Amend § 275.204A-1, paragraph (e)(7) by removing the references to "4(6)" and "77d(6)" and adding in their places "4(5)"and "77d(5)", respectively.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: January 25, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63765 / January 25, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-13446

In the Matter of

AMERICAN SKANDIA INVESTMENT SERVICES, INC.

Respondents.

ORDER DIRECTING DISBURSEMENT OF FAIR FUND

On May 13, 2010, the United States Securities and Exchange Commission ("Commission") published a plan of distribution ("Distribution Plan") and issued a Notice of Proposed Distribution Plan and Opportunity for Comment (Exchange Act Rel. No. 62106) pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. §201.1103. The Notice advised parties that they could obtain a copy of the Distribution Plan at www.sec.gov. The Notice also advised that all persons desiring to comment on the Distribution Plan could submit their comments, in writing, within thirty (30) days of the date of the Notice. No comments were received by the Commission in response to the Notice. On August 16, 2010, the Commission issued an Order Approving Plan of Distribution, Appointing Fund Administrator, and Waiving Bond (Exchange Act Rel. No. 62733).

The Distribution Plan provides that the Commission will arrange for distribution of the Fair Fund when an electronic payment file listing the payees and the payment amounts with the identification information required to make the distribution has been received and accepted. The validated electronic payment file has been received and accepted for tranche one of the distribution in the amount of $60,945,010.08, which represents 89.47% of the total distribution amount.

Accordingly, it is ORDERED that the Commission staff shall transfer the Fair Fund to the escrow bank in the amount stated in the validated electronic payment file of $60,945,010.08, as provided for in the Distribution Plan.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

be compelled to publish filings that are later found to raise concerns under the Exchange Act, in which case the Commission may decide to institute proceedings subsequent to the initial publication of the proposed rule change in the Federal Register.[24]

When instituting proceedings, Section 19(b)(2)(B)(i)(II) of the Exchange Act requires the Commission to provide the SRO with an opportunity for a hearing. Accordingly, new Rule 700(c) outlines the conduct of the proceedings and establishes the opportunity for the SRO that filed the proposed rule change, as well as any other interested parties, to be heard on the matter. Specifically, Rule 700(c) states that all parties, including the SRO, will be given a specified amount of time (as indicated in the notice of the grounds for disapproval) to submit supporting or opposing materials, in writing, for the Commission's consideration in determining whether to approve or disapprove a proposed rule change.[25] In particular, the SRO that submitted the proposed rule change could file a written statement in support of its proposed rule change demonstrating, in specific detail, how such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the

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24 As required by Section 19(b)(2)(E) of the Exchange Act (added by Section 916(a) of the Dodd-Frank Act), the Commission must send notice of an SRO's proposed rule change to the Federal Register for publication within 15 calendar days of the date on which the SRO posts its proposed rule change on its website. Failure to meet the 15 calendar day statutory timeframe results in the "publication date" being deemed to be the day on which the SRO posted its proposal on its website. Because the 45-day statutory deadline for Commission action is keyed off of the "publication date," and because failure to act by that deadline results in a proposal being "deemed approved," failure to notice a proposal within 15 calendar days can effectively reduce the time that the Commission and commenters have to fully consider a proposal.

25 A request for an opportunity for an oral presentation of views should be submitted as a written request to the Secretary of the Commission and should include a reference to the proposed rule change's file number. See Exchange Act Rule 19b-4(g). The Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views. See Rule 700(c)(2).

SRO.[26] The statement could include a response to each of the grounds for disapproval under consideration as well as any specific representations or undertakings (e.g., representations or undertakings concerning the SRO's plans for surveillance or enforcement of a proposed new trading rule).

At the conclusion of the initial opportunity to submit written materials, the rules provide an opportunity for the SRO whose proposed rule change is under consideration to respond to any comments received on its proposal (i.e., a "rebuttal period").[27] The rules state that any failure by the SRO to respond to comments received on the proposal may result in the Commission not having a sufficient basis to make an affirmative finding as to whether the SRO's proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to the SRO.[28]

Further, the new rules state that the Commission may consider any failure by the SRO to provide all of the information required by Form 19b-4 in the manner required by the Form, as well as any failure to explain how the proposed rule change is consistent with the requirements of the Exchange Act and the applicable rules and regulation thereunder or any failure by the SRO to provide a complete response to the Commission's grounds for disapproval under

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26 Notably, the instructions to Form 19b-4 require an SRO to present, in a clear and comprehensible manner, how every proposed rule change it files with the Commission is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the SRO. These standards are reflected in Rule 700(b)(3).

27 The Commission will indicate in the notice of the grounds for disapproval the specified amount of time for the rebuttal period. See Rule 700(c)(3).

28 The standard for approval of a proposed rule change is that the Commission "shall approve a proposed rule change… if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations issued under [the Exchange Act] that are applicable to [the SRO]." 15 U.S.C. 78s(b)(2)(C)(i). The standard for disapproval is that the Commission "shall disapprove a proposed rule change of [an SRO] if it does not make [such finding]." 15 U.S.C. 78s(b)(2)(C)(ii).

consideration, in determining whether to approve or disapprove the proposed rule change.[29] In particular, such failure may result in the Commission not having a sufficient basis to make an affirmative finding that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to the SRO.

After conclusion of the initial comment period and the rebuttal period, the opportunity for interested parties to comment on the proposed rule change would close. Thereafter, the Commission would issue a written order either approving or disapproving the SRO's proposed rule change that sets out the reasons for the Commission's determination.[30]

The new rules also specify the record that the Commission will consider in the context of a proceeding to determine whether to disapprove an SRO's proposed rule change. Specifically, Rule 700(d)(3) states that the Commission will determine the matter on the basis of the record, which shall include the SRO's proposed rule change filed on Form 19b-4, any written materials received from any party on the proposed rule change, and any written materials that reflect communications between the Commission and any interested parties.[31] Further, the rules reflect

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29 In addition, a filing that does not comply with all applicable requirements, including the requirements of Form 19b-4, may be rejected as not properly filed under the circumstances outlined in Section 19(b)(10) of the Exchange Act. See Section 19(b)(10) of the Exchange Act, 15 U.S.C. 78s(b)(10) (setting forth the rule of construction relating to the filing date of proposed rule changes and the ability of the Commission to reject incomplete filings). Specifically, as stated in the general instructions to Form 19b-4, any filing that does not comply with the requirements of Form 19b-4 may be returned to the SRO and any filing so returned shall for all purposes be deemed not to have been filed with the Commission. See also Rule 0-3 under the Exchange Act, 17 C.F.R. 254.0-3 ("[t]he date on which papers are actually received by the Commission shall be the date of filing thereof if all of the requirements with respect to the filing have been complied with…").

30 See Rule 701; see also Exchange Act Section 19(b)(2)(C); 15 U.S.C. 78s(b)(2)(C).

31 In the event that an oral presentation of supporting or opposing views is ordered by the Commission, the written transcript of the remarks would become part of the record.

that written materials shall be filed with the Secretary of the Commission and that all materials received will generally be made publicly available.

Further, the Commission is making conforming edits to Rule 19b-4 in light of new Rules of Practice 700 and 701. In particular, the Commission is removing existing paragraph (g) of that rule, which references the opportunity for interested persons to be heard in the context of a proceeding to determine whether to disapprove a proposed rule change, and is replacing it with a cross reference to new Rules of Practice 700-701.[32] In addition, the Commission is amending paragraph (l) of Rule 19b-4 concerning the obligation of an SRO to post and maintain a copy of each proposed rule change on its website to provide specific guidance to the SRO as to when to remove a proposed rule change that is disapproved by the Commission. Currently, Rule 19b-4(l) does not specifically reference a Commission disapproval order as one of the potential final actions on a proposal.

Finally, the Commission is adding Rule 170 to Regulation P[33] to provide that § 201.700 et seq. establishes the procedures for instituting proceedings to determine whether a PCAOB proposed rule should be disapproved. Specifically, and consistent with Section 107 of the Sarbanes-Oxley Act, new Rule 170 clarifies that § 201.700 et seq applies to proposed rules of the PCAOB as fully as if it were a proposed rule change of a "registered securities association". Rule 170, like Section 107(b)(4)(A) of the Sarbanes-Oxley Act, substitutes the approval criteria to be "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors...." Further, given that the PCAOB is not

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32 Rule 19b-4(g) is consistent with the process outlined in new Rules of Practice 700 and 701. However, to avoid any confusion or overlap, the Commission is amending the Rule 19b-4(g) to cross reference the new Rules of Practice.

33 17 CFR 202.100 et seq.

explicitly subject to Rule 19b-4, Rule 170 also clarifies the requirement for the PCAOB to demonstrate that a proposed rule is "consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors."[34]

II. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with the Administrative Procedure Act ("APA"),[35] that the new rules and rule amendments relate solely to agency organization, procedures or practices. Accordingly, these new rules and rule amendments are not subject to the provisions of the APA requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act,[36] therefore, does not apply. Similarly, because these rules relate to "agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties," analysis of major status under the Small Business Regulatory Enforcement Fairness Act is not required.[37] The new rules and rule amendments do not contain any new collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[38] Rather, the new rules and rule amendments govern a process that the Commission will be able to institute when an SRO's proposed rule change submitted on Form 19b-4 failed to provide the Commission with a sufficient basis to make a finding whether the proposed rule change was or was not consistent with the Exchange Act and the rules and regulations thereunder

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34 15 U.S.C. 7217(b)(4)(A).

35 5 U.S.C. 553(b)(3)(A).

36 5 U.S.C. 601 et seq.

37 5 U.S.C. 804(3)(C).

38 44 U.S.C. 3501 et seq.

applicable to the SRO. The required scope of information that an SRO must submit to the Commission to explain each proposed rule change and demonstrate that each proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder is established in existing Form 19b-4, and the rules and rule amendments do not contain any additional collection of information requirements beyond what SROs are already required to provide to the Commission.

III. Consideration of the Costs and Benefits of the Rule Amendments and Burden on Competition

The Commission is sensitive to the costs and benefits imposed by its rules and has identified certain costs and benefits of these rules. The rules and rule amendments that the Commission is adopting are intended to implement the mandate imposed by the Dodd-Frank Act. The benefits of the new rules and rule amendments also include increased transparency of the Commission's conduct of proceedings to determine whether to disapprove an SRO's proposed rule change. New Rules 201.700 and 701 and new Rule 170 under Regulation P establish procedures for the Commission to follow when instituting and conducting proceedings to determine whether to disapprove a proposed rule filing. The new rules and rule amendments provide procedures for the Commission, SROs, the PCAOB, and the public concerning the administration of certain of the Commission's responsibilities under Section 19 of the Exchange Act and Section 107 of the Sarbanes-Oxley Act, and reflect a process that is intended to help ensure that only those proposed rule changes that are consistent with the Exchange Act and title I of the Sarbanes-Oxley Act, respectively, are permitted.

There also are potential costs of the new rules. An SRO or the PCAOB may incur costs as a result of the new rules, for example, when submitting written material in support of its proposed rule change or providing a response to any adverse comments received. However, the

Commission believes that such costs typically are already incurred by the SROs when filing proposed rule changes on Form 19b-4, particularly since Form 19b-4 contains comprehensive and rigorous requirements that an SRO must follow when presenting, explaining, and offering a thorough legal analysis of each proposed rule change. Further, SROs already typically submit responses to adverse substantive comments received during the rule filing process. Similarly, the PCAOB has incurred costs by presenting, explaining, and offering similarly rigorous legal analysis of each of its proposed rules.

Further, because the new rules and rule amendments relate to agency organization, procedures or practice, the Commission believes that they will have no adverse impact on capital formation, nor are they expected to have any potential adverse impact on efficiency. In particular, the new rules and rule amendments are intended to add transparency to the Commission's institution and conduct of proceedings to determine whether to disapprove a proposed rule change. To the extent that interested parties identify issues and present information that informs the Commission's decision-making with respect to a particular proposed rule change that itself may affect capital formation or price efficiency, then the Commission's new rules and rule amendments could, in turn, promote capital formation and efficiency.

Section 23(a) of the Exchange Act[39] requires the Commission, when making rules and regulations under the Exchange Act, to consider the impact a new rule would have on competition. Exchange Act 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.

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39 15 U.S.C. 78w(a).

The new rules and rule amendments implement the Dodd-Frank Act statutory changes to the rule change process and are intended to enhance transparency with respect to the Commission's conduct of proceedings under the Exchange Act to determine whether to disapprove an SRO's proposed rule change or a proposed rule of the PCAOB. The new rules, which set forth the administrative procedures concerning the Commission's conduct of such proceedings, apply equally to all SROs, including all national securities exchanges, FINRA, and clearing agencies that are required to submit proposed rule filing changes with the Commission. We note that many of the substantive requirements of the new rules come directly from the amendments to Exchange Act Section 19(b) by the Dodd-Frank Act. In addition, these rules are intended to codify and reflect the typical process that the Commission has followed when conducting proceedings to determine whether to disapprove an SRO's proposed rule change. Therefore, the Commission does not expect the rules to have an anti-competitive effect. To the contrary, the new rules provide all interested parties with an opportunity to express their views to the Commission concerning an SRO's proposed rule change or a proposed rule of the PCAOB that the Commission is considering potentially disapproving. To that extent, the new rules are expected to promote competition and help ensure that SRO rules are consistent with the Exchange Act and the rules and regulations thereunder and PCAOB rules and standards are consistent with the Sarbanes-Oxley Act and the rules and regulations thereunder.

IV. Statutory Basis and Text of Rules

The Commission is amending its Rules of Practice and Rule 19b-4 pursuant to authority set forth in the Exchange Act, including Sections 19(b) and 23(a). The Commission is amending Regulation P pursuant to authority set forth in the Sarbanes-Oxley Act, including Sections 3(b) and 107and the Exchange Act, including Sections 19(b) and 23(a).

List of Subjects in 17 CFR Parts 201, 202 and 240

Administrative practice and procedures.

Text of Amendments

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

PART 201 – RULES OF PRACTICE

1. The authority citation for part 201 is amended by adding authority citations for §201.700 to 201.702 to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 78x, 80a–37, and 80b–11; 5 U.S.C. 504(c)(1).

Sections 201.700 to 201.702 are also issued under sec. 916, Pub. L. 111-203, 124 Stat. 1376.

2. Section 201.100 is amended by adding new paragraph (b)(3) to read as follows:

§201.100 Scope of the rules of practice.

* * * * *

(b) * * *

(3) Initiation of proceedings for SRO proposed rule changes under 17 CFR 201.700-701, except where made specifically applicable therein.

* * * * *

3. Add Sections 201.700 and 201.701 to read as follows:

Sec. 201.700 Initiation of proceedings for SRO proposed rule changes.

(a) *Rules of Practice incorporated herein.* For purposes of these Rules of Practice contained at 17 CFR 201.700-701, the following Rules of Practice are incorporated by reference:

(1) Rule 103, 17 CFR 201.103 (Construction of Rules);

(2) Rule 104, 17 CFR 201.104 (Business Hours); and

(3) Rule 160, 17 CFR 201.160 (Time Computation).

(b) *Institution of proceedings; notice and opportunity to submit written views.*

(1) *Generally.* If the Commission determines to initiate proceedings to determine whether a self-regulatory organization's proposed rule change should be disapproved, it shall provide notice thereof to the self-regulatory organization that filed the proposed rule change, as well as all interested parties and the public, by publication in the Federal Register of the grounds for disapproval under consideration.

(i) *Prior to notice.* If the Commission determines to institute proceedings prior to initial publication by the Commission of the notice of the self-regulatory organization's proposed rule change in the Federal Register, then the Commission shall publish notice of the proposed rule change simultaneously with a brief summary of the grounds for disapproval under consideration.

(ii) *Subsequent to notice.* If the Commission determines to institute proceedings subsequent to initial publication by the Commission of the notice of the self-regulatory organization's proposed rule change in the Federal Register, then the Commission shall publish separately in the Federal Register a brief summary of the grounds for disapproval under consideration.

(iii) *Service of an order instituting proceedings.* In addition to publication in the Federal Register of the grounds for disapproval under consideration, the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the grounds for disapproval under consideration to the self-regulatory organization that filed the proposed rule change by serving notice to the person listed as the contact person on the cover page of the Form 19b-4 filing. Notice shall be made by delivering a copy of the order to such contact person either by any method specified in 17 CFR 201.141(a) or by electronic means including email.

(2) *Notice of the grounds for disapproval under consideration.* The grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission instituted the proceedings, including the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change. The Commission may consider during the course of the proceedings additional matters of fact and law beyond what was set forth in its notice of the grounds for disapproval under consideration.

(3) *Demonstration of consistency with the Exchange Act.* The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b-4, the Form is designed to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those

requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient. Instead, the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.

(c) *Conduct of hearings.*

(1) *Initial comment period in writing.* Unless otherwise specified by the Commission in its notice of grounds for disapproval under consideration, all interested persons will be given an opportunity to submit written data, views, and arguments concerning the proposed rule change under consideration and whether the Commission should approve or disapprove the proposed rule change. The self-regulatory organization that submitted the proposed rule change may file a written statement in support of its proposed rule change demonstrating, in specific detail, how such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization, including a response to each of the grounds for disapproval under consideration. Such statement may include specific representations or undertakings by the self-regulatory organization. The Commission will specify in the summary of the grounds for disapproval under consideration the length of the initial comment period.

(2) *Public availability of materials received.* During the conduct of the proceedings, the Commission generally will make available publicly all written comments it receives without change. In its notice setting forth the grounds for disapproval under consideration for a proposed rule change, the Commission shall inform interested parties of the methods by which they may view all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552.

(3) *Record before the Commission.* The Commission shall determine each matter on the basis of the record. The record shall consist of the proposed rule change filed on Form 19b-4 by the self-regulatory organization, including all attachments and exhibits thereto, and all written materials received from any interested parties on the proposed rule change, including the self-regulatory organization that filed the proposed rule change, through the means identified by the Commission as provided in paragraph (1), as well as any written materials that reflect communications between the Commission and any interested parties.

(e) *Amended notice not required.* The Commission is not required to amend its notice of grounds for disapproval under consideration in order to consider, during the course of the proceedings, additional matters of fact and law beyond what was set forth in the notice of the grounds for disapproval under consideration.

§201.701 Issuance of order.

At any time following conclusion of the rebuttal period specified in Section 201.700(b)(4), 17 CFR 201.700(b)(4), the Commission may issue an order approving or disapproving the self-regulatory organization's proposed rule change together with a written statement of the reasons therefor.

PART 202 – INFORMAL AND OTHER PROCEDURES

4. The authority citation for part 202 continues to read as follows:

Authority: 15 U.S.C. 77s, 77t, 78d-1, 78u, 78w, 78ll(d), 79r, 79t, 77sss, 77uuu, 80a-37, 80a-41, 80b-9, 80b-11, and 7201 et seq., unless otherwise noted.

5. Add section 202.170 to read as follows:

§202.170 Initiation of disapproval proceedings for PCAOB proposed rules.

Initiation of disapproval proceedings for proposed rules of the Public Company Accounting Oversight Board are subject to the provisions of Section 201.700 and 201.701 of this chapter as fully as if it were a *registered securities association,* except that:

(a) For purposes of proposed rules of the Public Company Accounting Oversight Board, subsection (b)(3) of 201.700 is revised to read as follows: *Demonstration of Consistency with the Sarbanes-Oxley Act of 2002.* The burden to demonstrate that a proposed rule is consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder, or as necessary or appropriate in the public interest or for the protection of investors, is on the Public Company Accounting Oversight Board. In its filing the Public Company Accounting Oversight Board must explain in a clear and comprehensible manner why the proposed rule change is consistent with the requirements of title I of the Sarbanes-Oxley Act of 2002 and the rules and regulations thereunder, or as necessary or appropriate in the public interest or for the protection of investors. A mere assertion that the proposed rule change is consistent with those requirements is not sufficient. Instead, the description of the proposed rule, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure by the Public Company Accounting Oversight

Board in its proposed rule filing with the Commission may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder, or as necessary or appropriate in the public interest or for the protection of investors.

(b) Each reference to *the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization* shall be read as *title I of the Sarbanes-Oxley Act of 2002, and the rules and regulations issued thereunder applicable to such organization, or as necessary or appropriate in the public interest or for the protection of investors.*

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

6. The authority for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll(d), 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, unless otherwise noted.

7. Section 240.19b-4 is amended by revising paragraphs (g), (l)(1) and (l)(4) to read as follows:

§240.19b-4 Filings with respect to proposed rule changes by self-regulatory organizations.

* * * * *

(g) Proceedings to determine whether a proposed rule change should be disapproved will be conducted pursuant to 17 CFR 201.700-701 (Initiation of Proceedings for SRO Proposed Rule Changes).

* * * * *

(l) * * *

(1) In the case of a proposed rule change filed under section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)), the Commission approves or disapproves the proposed rule change or the self-regulatory organization withdraws the proposed rule change, or any amendments, or is notified that the proposed rule change is not properly filed; or

* * * * *

(4) In the case of a proposed rule change, or any amendment thereto, that has been disapproved, withdrawn or not properly filed, the self-regulatory organization shall remove the proposed rule change, or any amendment, from its website within two business days of notification of disapproval, improper filing, or withdrawal by the SRO of the proposed rule change.

* * * * *

By the Commission.

EMM
Elizabeth M. Murphy
Secretary

Date: January 14, 2011

Commissioner Casey
Commissioner Paredes
Disapproved

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229, 240 and 249

[Release Nos. 33-9178; 34-63768; File No. S7-31-10]

RIN 3235-AK68

SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION AND GOLDEN PARACHUTE COMPENSATION

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to our rules to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to shareholder approval of executive compensation and "golden parachute" compensation arrangements. Section 951 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 by adding Section 14A, which requires companies to conduct a separate shareholder advisory vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K or any successor to Item 402. Section 14A also requires companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation. In addition, Section 14A requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain "golden parachute" compensation arrangements and, in certain circumstances, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.

DATES:

Effective Date: [Insert date 60 days following publication in the Federal Register]

Compliance Date: [Insert date 60 days following publication in the Federal Register], except that issuers must comply with Exchange Act Section 14A(b) and Rule 14a-21(c) and the amendments to Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 1011 of Regulation M-A, Item 11 of Schedule TO, Item 15 of Schedule 13E-3, and Item 8 of Schedule 14D-9 for initial preliminary proxy and information statements, Schedules TO, 13E-3, and 14D-9 and Forms S-4 and F-4 filed on or after April 25, 2011.

Companies that qualify as "smaller reporting companies" (as defined in 17 CFR 240.12b-2) as of January 21, 2011, including newly public companies that qualify as smaller reporting companies after January 21, 2011, will not be subject to Exchange Act Section 14A(a) and Rule 14a-21(a) and (b) until the first annual or other meeting of shareholders at which directors will be elected and for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S-K (17 CFR 229.402) occurring on or after January 21, 2013.

FOR FURTHER INFORMATION CONTACT: Scott Hodgdon, Attorney-Adviser, at (202) 551-3430, Anne Krauskopf, Senior Special Counsel, at (202) 551-3500, or Perry Hindin, Special Counsel, at (202) 551-3440, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are adopting new Rule 14a-21 and amendments to Rules 14a-4,[1] 14a-6,[2] 14a-8[3] and a new Item 24 and amendments to Item 5 of

[1] 17 CFR 240.14a-4.

Schedule 14A[4] and amendments to Item 3 of Schedule 14C[5] under the Securities Exchange Act of 1934 ("Exchange Act").[6] We are also adopting amendments to Item 402[7] of Regulation S-K,[8] Item 1011[9] of Regulation M-A,[10] Item 15 of Schedule 13E-3,[11] Item 8 of Schedule 14D-9,[12] Item 11 of Schedule TO,[13] and amendments to Item 5.07 of Form 8-K.[14]

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[2] 17 CFR 240.14a-6.

[3] 17 CFR 240.14a-8.

[4] 17 CFR 240.14a-101.

[5] 17 CFR 240.14c-101.

[6] 15 U.S.C. 78a et seq.

[7] 17 CFR 229.402.

[8] 17 CFR 229.10 et seq.

[9] 17 CFR 229.1011.

[10] 17 CFR 229.1000 et seq.

[11] 17 CFR 240.13e-100.

[12] 17 CFR 240.14d-101.

[13] 17 CFR 240.14d-100.

[14] 17 CFR 249.308.

c. Final Rule

3. Amendments to Item 402(b) of Regulation S-K
    a. Proposed Amendments
    b. Comments on the Proposed Amendments
    c. Final Rule

B. Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation
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        a. Proposed Rule
        b. Comments on the Proposed Rule
        c. Final Rule
    2. Item 24 of Schedule 14A
        a. Proposed Amendments
        b. Comments on the Proposed Amendments
        c. Final Rule
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        c. Final Rule
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VII. Statutory Authority and Text of the Amendments

I. BACKGROUND AND SUMMARY

On October 18, 2010, we proposed a number of amendments to our rules relating to the shareholder approval of executive compensation and golden parachute compensation.[15] We proposed these rules to implement Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").[16] As discussed in detail below, we have taken into consideration the comments received on the proposed amendments and are adopting several amendments to our rules.[17]

The Act amends the Exchange Act by adding new Section 14A. New Section 14A(a)(1) requires that "[n]ot less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives,"[18] as

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[15] See Release No. 33-9153 (October 18, 2010) [75 FR 66590] (the "Proposing Release").

[16] Pub. L. No. 111-203 (July 21, 2010).

[17] The public comments we received on the Proposing Release are available on our website at http://www.sec.gov/comments/s7-31-10/s73110.shtml. In addition, to facilitate public input on the Act, the Commission provided a series of e-mail links, organized by topic, on its website at http://www.sec.gov/spotlight/regreformcomments.shtml. The public comments we received on Section 951 of the Act are available on our website at http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml.

[18] Exchange Act Section 14A(a)(1). Section 951 of the Act includes the language "or other meeting of the shareholders," which is similar to corresponding language in Section 111(e)(1) of the Emergency Economic Stabilization Act of 2008, or EESA, 12 U.S.C. 5221. As noted in the Proposing Release, we have previously considered this language in connection with companies required to provide a separate shareholder vote on

disclosed pursuant to Item 402 of Regulation S-K, or any successor to Item 402 (a "say-on-pay vote"). The shareholder vote to approve executive compensation required by Section 14A(a)(1) "shall not be binding on the issuer or the board of directors of an issuer."[19]

Section 951 of the Act also adds new Section 14A(a)(2) to the Exchange Act, requiring that, "[n]ot less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether [the say-on-pay vote] will occur every 1, 2, or 3 years."[20] As discussed below, this shareholder vote "shall not be binding on the issuer or the board of directors of an issuer."[21]

In addition, Section 951 of the Act amends the Exchange Act by adding new Section 14A(b)(1), which requires that, in any proxy or consent solicitation material for a meeting of shareholders "at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy or consent solicitation

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executive compensation so long as the company has outstanding obligations under the Troubled Asset Relief Program, or TARP. See Shareholder Approval of Executive Compensation of TARP Recipients, Release No. 34-61335 (Jan. 12, 2010) [75 FR 2789] (hereinafter, the "TARP Adopting Release"). We continue to view this provision to require a separate shareholder vote on executive compensation only with respect to an annual meeting of shareholders for which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting. Similarly, Rules 14a-21(a) and (b) are intended to result in issuers conducting the required advisory votes in connection with the election of directors, the proxy materials for which are required to include disclosure of executive compensation.

[19] Exchange Act Section 14A(c).

[20] Exchange Act Section 14A(a)(2).

[21] Exchange Act Section 14A(c).

material, in a clear and simple form in accordance with regulations to be promulgated by the Commission, any agreements or understandings that such person has with any named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale or other disposition of all or substantially all of the assets of the issuer[...]."[22] These compensation arrangements are often referred to as "golden parachute" compensation. Such disclosure must include the aggregate total of all such compensation that may be paid or become payable to or on behalf of such named executive officer, and the conditions upon which it may be paid or become payable.[23] Under Section 14A(b)(2), "unless such agreements or understandings have been subject to [the periodic shareholder vote described in Section 14A(a)(1)],"[24] a separate shareholder vote to approve such agreements or understandings and compensation as disclosed is also required.[25] As with the say-on-pay vote and the shareholder vote on the frequency of such votes, this shareholder vote "shall not be binding on the issuer or the board of directors of an issuer."[26]

In addition to their non-binding status, none of the shareholder votes required pursuant to Section 14A is to be construed "as overruling a decision by such issuer or board

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[22] Exchange Act Section 14A(b)(1).

[23] Exchange Act Section 14A(b)(1).

[24] Exchange Act Section 14A(b)(2).

[25] Exchange Act Section 14A(b)(2).

[26] Exchange Act Section 14A(c).

of directors."[27] These shareholder votes also do not "create or imply any change to the fiduciary duties of such issuer or board of directors"[28] nor do they "create or imply any additional fiduciary duties for such issuer or board of directors."[29] Further, these votes will not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."[30] Section 14A also provides that "the Commission may, by rule or order, exempt an issuer or class of issuers" from the shareholder advisory votes required by Section 14A.[31] In determining whether to make an exemption, the Commission is directed to take into account, among other considerations, whether the requirements of Section 14A(a) and (b) disproportionately burden small issuers.[32]

Section 14A(a)(3) requires that both the initial shareholder vote on executive compensation and the initial vote on the frequency of votes on executive compensation be included in proxy statements "for the first annual or other meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment" of the

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[27] Exchange Act Section 14A(c)(1).

[28] Exchange Act Section 14A(c)(2).

[29] Exchange Act Section 14A(c)(3).

[30] Exchange Act Section 14A(c)(4). In addition, Exchange Act Section 14A(d) provides that every institutional manager subject to Exchange Act Section 13(f) [15 U.S.C. 78m(f)] shall report at least annually how it voted on any shareholder vote required by Section 951 of the Act, including the shareholder vote on executive compensation, the shareholder vote on the frequency of shareholder votes on executive compensation, and the golden parachute compensation vote, unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission. Amendments to our rules to implement this requirement were proposed in a separate rulemaking. See Reporting of Proxy Votes on Executive Compensation and Other Matters, Release No. 34-63123 (Oct. 18, 2010) [75 FR 66622].

[31] Exchange Act Section 14A(e).

[32] Exchange Act Section 14A(e).

Act.[33] Thus, the statute requires separate resolutions subject to shareholder vote to approve executive compensation and to approve the frequency of say-on-pay votes for proxy statements relating to an issuer's first annual or other meeting of the shareholders occurring on or after January 21, 2011, whether or not the Commission has adopted rules to implement Section 14A(a). Because Section 14A(a) applies to shareholder meetings taking place on or after January 21, 2011, any proxy statement that is required to include executive compensation disclosure pursuant to Item 402 of Regulation S-K, whether in preliminary or definitive form, even if filed prior to this date, for meetings taking place on or after January 21, 2011, must include the separate resolutions for shareholders to approve executive compensation and the frequency of say-on-pay votes required by Section 14A(a) without regard to whether the amendments in this release are in effect by that time.[34]

With respect to the disclosure of golden parachute arrangements in accordance with Commission regulations in merger proxy statements required by Section 14A(b)(1), we note that the statute similarly references a 6-month period beginning on the date of enactment of the Act. However, because the statute requires such disclosure to be "in accordance with regulations to be promulgated by the Commission,"[35] the golden parachute compensation arrangements disclosure under proposed new Item 402(t) and a separate resolution to approve golden parachute compensation arrangements pursuant to Rule 14a-21(c) will not be required for merger proxy statements relating to a meeting of shareholders until the effective date of

[33] Exchange Act Section 14A(a)(3).

[34] See Section II.E below for a discussion of a temporary exemption for smaller reporting companies.

[35] Exchange Act Section 14A(b)(1).

our rules implementing Section 14A(b)(1). The rule amendments we adopt today with respect to new Rule 14a-21(c) and the amendments to the disclosure requirements in Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 1011 of Regulation M-A, Item 11 of Schedule TO, Item 15 of Schedule 13E-3, and Item 8 of Schedule 14D-9, are effective for initial filings on or after April 25, 2011.

We received over 60 comment letters in response to the proposed amendments. In addition, we received over a dozen letters relating to Section 951 of the Act.[36] These letters came from corporations, pension funds, professional associations, trade unions, law firms, consultants, academics, individual investors, and other interested parties. In general, the commentators supported the proposed amendments that would implement Section 951 of the Act. Some commentators, however, opposed some of the proposed amendments and suggested modifications or alternatives to the proposals.

We have reviewed and considered all of the comments that we received relating to the proposed amendments. The adopted rules reflect changes made in response to many of these comments. We discuss our revisions with respect to each proposed rule amendment in more detail throughout this release.

We are adopting Rule 14a-21 to provide a separate shareholder vote to approve executive compensation, to approve the frequency of such votes on executive compensation and to approve golden parachute compensation arrangements in connection with certain extraordinary business transactions. We are also adopting a new Item 24 of Schedule 14A to provide disclosure regarding the effect of the shareholder votes required by Rule 14a-21,

[36] These comment letters were received prior to publication of the Proposing Release. See note 17 above.

such as whether each vote is non-binding. In addition, our amendments to Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 1011 of Regulation M-A, Item 8 of Schedule 14D-9, and Item 15 of Schedule 13E-3 will require additional disclosure regarding golden parachute arrangements in connection with certain extraordinary business transactions, Rule 13e-3[37] going-private transactions and tender offers.

We are also adopting amendments to Item 402 of Regulation S-K to require disclosure of an issuer's consideration of the say-on-pay vote in its Compensation Discussion and Analysis, and to prescribe disclosure about golden parachute compensation arrangements in new Item 402(t). In addition, we are adopting an instruction to Rule 14a-8 to clarify the treatment of shareholder proposals relating to the shareholder advisory votes required by Rule 14a-21. Finally, we are adopting amendments to Form 8-K to facilitate disclosure of the results of the shareholder advisory vote on the frequency of say-on-pay votes, and to require disclosure about whether and how the issuer will implement the results of the shareholder advisory vote on the frequency of say-on-pay votes.

II. DISCUSSION OF THE AMENDMENTS

A. Shareholder Approval of Executive Compensation

1. Rule 14a-21(a)

Proposed Rule 14a-21(a) would require issuers,[38] not less frequently than once every three years, to include in their proxy statements a separate shareholder advisory vote to

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[37] 17 CFR 240.13e-3.

[38] Our rules as adopted apply to issuers who have a class of equity securities registered under Section 12 [15 U.S.C. 78l] of the Exchange Act and are subject to our proxy rules. Foreign private issuers, as defined in Rule 3b-4(c) [17 CFR 240.3b-4(c)], are not required under Section 14A or the rules we are adopting today to conduct a shareholder advisory vote on executive compensation nor a shareholder advisory vote on the frequency of such votes.

approve the compensation of executives. We are adopting the rule substantially as proposed with some changes in response to comments.

a. Proposed Rule

Under our proposed rule, an issuer would be required, not less frequently than once every three years, to provide a separate shareholder advisory vote in proxy statements to approve the compensation of its named executive officers, as defined in Item 402(a)(3)[39] of Regulation S-K. Rule 14a-21(a), as proposed, would specify that the separate shareholder vote on executive compensation is required only when proxies are solicited for an annual or other meeting of security holders for which our rules require the disclosure of executive compensation pursuant to Item 402 of Regulation S-K. Proposed Rule 14a-21(a) would require a separate shareholder vote to approve the compensation of executives for the first annual or other such meeting of shareholders occurring on or after January 21, 2011, the first day after the end of the 6-month period beginning on the date of enactment of the Act.

In accordance with Section 14A(a)(1), shareholders would vote to approve the compensation of the issuer's named executive officers, as such compensation is disclosed pursuant to Item 402[40] of Regulation S-K, including the Compensation Discussion and Analysis ("CD&A"), the compensation tables and other narrative executive compensation disclosures required by Item 402. We also proposed an instruction to Rule 14a-21 to specify that the rule does not change the scaled disclosure requirements for smaller reporting

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[39] 17 CFR 229.402(a)(3).

[40] We proposed that if disclosure of golden parachute compensation arrangements pursuant to proposed Item 402(t) is included in an annual meeting proxy statement, such disclosure would be included in the disclosure subject to the shareholder advisory vote under Rule 14a-21(a). Such disclosure under Item 402(t), however, would not be required to be included in annual meeting proxy statements.

companies and that smaller reporting companies would not be required to provide a CD&A in order to comply with Rule 14a-21.

b. Comments on the Proposed Rule

Commentators were generally supportive of the proposal. Many commentators agreed with the approach, as proposed, not to designate specific language to be used or require issuers to frame the shareholder vote to approve executive compensation in the form of a standard resolution.[41] Some commentators indicated that issuers should have flexibility in drafting the resolution.[42] Commentators noted that flexibility would permit issuers to tailor the resolution to the issuer's individual circumstances.[43] Others stated that we should designate specific language for the resolution[44] or at least establish clear, minimum guidelines,[45] principles-based guidelines,[46] or model language, [47] while other commentators suggested we include language for a resolution in the form of non-exclusive examples[48] or a

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[41] See, e.g., letters from American Federation of State, County and Municipal Employees ("AFSCME"), Center on Executive Compensation ("Center on Exec. Comp."), Compensia ("Compensia"), Davis Polk & Wardwell LLP ("Davis Polk"), the Financial Services Roundtable ("FSR"), Pfizer Inc. ("Pfizer"), Protective Life Corporation ("Protective Life"), and United Brotherhood of Carpenters ("UBC").

[42] See, e.g., letters from Business Roundtable ("Business Roundtable") and Towers Watson ("Towers Watson").

[43] See letter from Business Roundtable.

[44] See, e.g., letters from National Association of Corporate Directors ("NACD"), PGGM Investments ("PGGM"), Public Citizen ("Public Citizen"), and WorldatWork ("WorldatWork").

[45] See, e.g., letters from Boston Common Asset Management ("Boston Common"), First Affirmative Financial Network, LLC ("First Affirmative"), Glass Lewis & Co. ("Glass Lewis"), Social Investment Forum ("Social Investment"), and Walden Asset Management ("Walden").

[46] See, e.g., letters from International Corporate Governance Network ("ICGN") and Teachers Insurance and Annuities Association of America and College Retirement Equities Fund ("TIAA-CREF").

[47] See, e.g., letter from Calvert Group, Ltd. ("Calvert").

[48] See, e.g., letters from Society of Corporate Secretaries and Governance Professionals ("Society of Corp. Sec.") and Sullivan & Cromwell LLP ("Sullivan").

safe harbor.[49] Commentators indicated that it would be helpful to have an example of resolution language that would comply with the rule[50] and that sample language would simplify the drafting process for issuers and promote efficiency.[51]

Many commentators agreed with our proposed approach not to exempt smaller reporting companies from Rule 14a-21(a) and Exchange Act Section 14A(a)(1).[52] Some commentators did suggest that smaller reporting companies should be exempt from the say-on-pay vote[53] or required to conduct a say-on-pay vote on a triennial basis beginning in 2013.[54]

Some commentators suggested that we clarify the relationship between the federally created right and state law voting rights.[55] Most commentators, however, indicated there was no need for the Commission to adopt rules as to which shares are entitled to vote.[56] One commentator asserted that the issue as to which shares are entitled to vote is traditionally a state law matter that we do not need to address in our rulemaking.[57]

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[49] See, e.g., letters from The Boeing Company ("Boeing") and Pearl Meyer & Partners ("PM&P").

[50] See letter from Society of Corp. Sec.

[51] See letter from Sullivan.

[52] See, e.g., letters from California Public Employees Retirement System ("CalPERS"), Council of Institutional Investors ("CII"), Glass Lewis, ICGN, PGGM, and the State Board of Administration of Florida ("SBA of Florida").

[53] See, e.g., letters from NACD and UBC.

[54] See letter from the Committee on Federal Regulation of Securities, Section of Business Law of the American Bar Association ("ABA").

[55] See, e.g., letter from the ABA.

[56] See, e.g., letters from Business Roundtable, FSR, Pfizer, PGGM, and Protective Life.

[57] See letter from Business Roundtable.

c. Final Rule

After considering the comments, we are adopting Rule 14a-21(a) substantially as proposed with some modifications. Under the final rule, issuers will be required, not less frequently than once every three years, to provide a separate shareholder advisory vote in proxy statements to approve the compensation of their named executive officers, as defined in Item 402(a)(3) of Regulation S-K. Rule 14a-21(a) specifies that the separate shareholder vote on executive compensation is required only when proxies are solicited for an annual or other meeting of security holders for which our rules require the disclosure of executive compensation pursuant to Item 402 of Regulation S-K. We have modified the proposal to clarify in the rule that the shareholder vote on executive compensation required by Exchange Act Section 14A(a)(1) and Rule 14a-21(a) is required with respect to an annual meeting of shareholders at which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting.[58] In addition, we have modified the rule to clarify that a say-on-pay vote is required at least once every three calendar years. Commentators expressed the view that as proposed, the rule would have required a say-on-pay vote within three years of the date of the most recent say-on-pay vote, which in some cases could have required a say-on-pay vote more frequently than once every three calendar years.[59]

As adopted, Rule 14a-21(a) requires a separate shareholder vote to approve the compensation of executives for the first annual or other meeting of shareholders occurring on or after January 21, 2011, the first day after the end of the 6-month period beginning on the

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[58] See the discussion in Note 18 above.

[59] See letter from ABA.

date of enactment of the Act. In accordance with Section 14A(a)(1), shareholders would vote to approve the compensation of the issuer's named executive officers, as such compensation is disclosed pursuant to Item 402[60] of Regulation S-K, including the CD&A, the compensation tables and other narrative executive compensation disclosures required by Item 402.[61] We have included an instruction to Rule 14a-21 to specify that Rule 14a-21 does not change the scaled disclosure requirements for smaller reporting companies and that smaller reporting companies will not be required to provide a CD&A in order to comply with Rule 14a-21. We understand that smaller reporting companies may wish to include supplemental disclosure to facilitate shareholder understanding of their compensation arrangements in connection with say-on-pay votes.[62] We do not believe, however, that this possibility supports exempting smaller reporting companies from the say-on-pay votes. As more fully discussed in Section II.E below, in order to ease compliance burdens for smaller reporting companies, we are adopting a two-year temporary exemption before these companies are required to conduct a shareholder advisory vote to approve executive compensation to permit these companies additional time to prepare for the new shareholder advisory votes.

[60] If disclosure of golden parachute compensation arrangements pursuant to Item 402(t) is included in an annual meeting proxy statement, such disclosure would be included in the disclosure subject to the shareholder advisory vote under Rule 14a-21(a). Such disclosure under Item 402(t), however, is not required to be included in all annual meeting proxy statements.

[61] While not required, our rules "would not preclude an issuer from seeking more specific shareholder opinion through separate votes on cash compensation, golden parachute policy, severance or other aspects of compensation." See Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176 at 133 (2010).

[62] See letter from Society of Corp. Sec., which notes that smaller reporting companies may "feel compelled to include CD&A to provide additional disclosure so as to reduce the potential for an unfavorable shareholder vote."

As noted in the Proposing Release, consistent with Section 14A, the compensation of directors, as disclosed pursuant to Item 402(k)[63] or Item 402(r)[64] is not subject to the shareholder advisory vote. In addition, if an issuer includes disclosure pursuant to Item 402(s)[65] of Regulation S-K about the issuer's compensation policies and practices as they relate to risk management and risk-taking incentives, these policies and practices will not be subject to the shareholder advisory vote required by Section 14A(a)(1) as they relate to the issuer's compensation for employees generally. We note, however, that to the extent that risk considerations are a material aspect of the issuer's compensation policies or decisions for named executive officers, the issuer is required to discuss them as part of its CD&A,[66] and therefore such disclosure would be considered by shareholders when voting on executive compensation.

Though we have considered the views of commentators that prescribed language would be helpful, the final rule does not require issuers to use any specific language or form of resolution to be voted on by shareholders. This is consistent with the approach taken by the Commission in adopting Rule 14a-20 to implement the shareholder advisory vote on executive compensation for companies subject to the Emergency Economic Stabilization Act of 2008, or EESA. We believe that issuers should retain flexibility to craft the resolution language. As we noted in the Proposing Release, however, the shareholder advisory vote

[63] 17 CFR 229.402(k).

[64] 17 CFR 229.402(r).

[65] 17 CFR 229.402(s).

[66] See Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68334] at note 38.

must relate to all executive compensation disclosure disclosed pursuant to Item 402 of Regulation S-K. Section 14A(a)(1) of the Exchange Act requires that the shareholder advisory vote must be "to approve the compensation of executives, as disclosed pursuant to [Item 402 of Regulation S-K] or any successor thereto."[67] We have added an instruction to Rule 14a-21(a) to indicate that this language from Section 14A(a)(1) should be included in an issuer's resolution for the say-on-pay vote and to provide a non-exclusive example of a resolution that would satisfy the applicable requirements.[68] A vote to approve a proposal on a different subject matter, such as a vote to approve only compensation policies and procedures, would not satisfy the requirement of Section 14A(a)(1) or final Rule 14a-21(a). We note that issuers are not limited to the required shareholder advisory vote under Rule 14a-21(a) and may solicit shareholder votes on a range of compensation matters to obtain more specific feedback on the issuer's compensation policies and programs.

2. **Item 24 to Schedule 14A**

We proposed a new Item 24 to Schedule 14A, to require disclosure in any proxy statement in which an issuer is providing a separate shareholder vote on executive compensation to briefly explain the general effect of the vote, such as whether the vote is non-binding. We are adopting this amendment to Schedule 14A as proposed with some modifications.

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[67] Exchange Act Section 14A(a)(1).

[68] Instruction to Rule 14a-21(a) provides the following non-exclusive example that would satisfy Rule 14a-21(a): "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion, is hereby APPROVED."

a. Proposed Amendments

Pursuant to proposed new Item 24 of Schedule 14A, issuers would be required to disclose in a proxy statement for an annual meeting (or other meeting of shareholders for which our rules require executive compensation disclosure) that they are providing a separate shareholder vote on executive compensation and to briefly explain the general effect of the vote, such as whether the vote is non-binding.[69] This was similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder vote on executive compensation for companies subject to the EESA.[70]

b. Comments on the Proposed Amendments

Commentators were generally supportive of proposed Item 24 of Schedule 14A. We requested comment regarding whether any additional disclosures should be provided by issuers that would be useful to shareholders. Two commentators indicated that we should amend the proposal to require disclosure of the results of previous votes on executive compensation.[71] Another commentator suggested that we should remove the reference to the "general effect" of the vote as it would lead to boilerplate disclosure and remove the word "whether" from the rule given the non-binding nature of the vote.[72]

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[69] Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We proposed to require additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote. We continue to believe this information should be available to shareholders.

[70] See Item 20 of Schedule 14A; TARP Adopting Release, supra note 18, at 75 FR 2790.

[71] See letters from ICGN and PGGM.

[72] See letter from ABA.

c. Final Rule

After considering the comments, we are adopting Item 24 to Schedule 14A as proposed with some modifications.[73] Though we agree that the disclosure of previous results would be useful to shareholders, these results are required to be disclosed pursuant to Item 5.07 of Form 8-K immediately following the votes. Consequently, we do not believe it is necessary to mandate such disclosure in Item 24 of Schedule 14A. As discussed below, we have modified the proposal to require disclosure of the current frequency of say-on-pay votes and to require disclosure of when the next say-on-pay vote will occur.

Item 24 is consistent with the approach taken by the Commission in Item 20 of Schedule 14A in connection with disclosure requirements about the shareholder advisory vote on executive compensation for companies subject to EESA. Based on our experience with these votes, we believe that such requirements will lead to disclosure of useful information about the nature and effect of the vote for shareholders to consider, such as whether the vote is non-binding. We note that although not required, issuers may choose to provide additional disclosure in their proxy materials.

3. Amendments to Item 402(b) of Regulation S-K

Item 402 requires the disclosure of executive compensation and includes requirements prescribing narrative and tabular disclosure, as well as separate scaled disclosure requirements for smaller reporting companies.[74] Item 402(b)[75] contains the

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[73] See discussion of the modification to the proposed Item 24 relating to the frequency of say-on-pay votes below at Section II.B.2.c.

[74] Item 402 also includes requirements to disclose director compensation (Items 402(k) and 402(r)) and the issuer's compensation policies as they relate to risk management (Item 402(s)).

[75] 17 CFR 229.402(b).

requirement for CD&A, which is intended to be a narrative overview that puts into context the executive compensation disclosure provided elsewhere in response to the requirements of Item 402. The CD&A disclosure requirement is principles-based, in that it identifies the disclosure concept and provides several non-exclusive examples. Under Item 402(b)(1), issuers must explain all material elements of their named executive officers' compensation by addressing mandatory principles-based topics in their CD&A.[76] Item 402(b)(2) of Regulation S-K sets forth certain non-exclusive examples of the kind of information that an issuer should address in its CD&A, depending upon the facts and circumstances.

In connection with our implementation of Section 14A(a)(1), we proposed amendments to require disclosure in CD&A regarding how issuers have considered the results of previous say-on-pay votes required by Section 14A and Rule 14a-20.[77] After reviewing comments on this proposal, we are adopting amendments to Item 402(b)(1) as proposed, with some modifications in response to concerns raised by commentators.

a. Proposed Amendments

We proposed to amend Item 402(b)(1) to add to the mandatory CD&A topics whether, and if so, how an issuer has considered the results of previous shareholder votes on executive compensation required by Section 14A or Rule 14a-20 in determining

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[76] These mandatory principles-based topics require the company to disclose the objectives of the company's compensation programs; what the compensation program is designed to reward; each element of compensation; why the company chooses to pay each element; how the company determines the amount (and, where applicable, the formula) for each element; and how each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements.

[77] 17 CFR 240.14a-20. Pursuant to the EESA, issuers that have received financial assistance under the Troubled Asset Relief Program, or TARP, are required to conduct a separate annual shareholder vote to approve executive compensation during the period in which any obligation arising from the financial assistance provided under the TARP remains outstanding.

compensation policies and decisions and, if so, how that consideration has affected its compensation policies and decisions. We did not propose to add a specific requirement for smaller reporting companies to provide disclosure about how previous votes pursuant to Section 14A or Rule 14a-20 affected compensation policies and decisions because in our view such information would not be as valuable outside the context of a complete CD&A covering the full range of matters required to be addressed by Item 402(b), which smaller reporting companies are not required to provide.

b. Comments on the Proposed Amendments

Comments on the proposal were mixed. Several commentators expressed support for an amendment to Item 402(b)(1) to require that issuers discuss the results of the shareholder vote and its effect, if any, on executive compensation decisions and policies.[78] Many of these commentators agreed with the proposal that discussion of say-on-pay vote results in CD&A should be mandatory,[79] in some cases noting that this would provide shareholders a better understanding of how the board of directors considered the results of shareholder advisory votes[80] and encourage a dialogue between issuers and shareholders on the topic of compensation.[81] Commentators also indicated that a mandatory discussion of the consideration of say-on-pay votes will aid transparency of issuers' disclosures on

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[78] See, e.g., letters from CalPERS, Calvert, CII, Colorado Public Employees' Retirement Association ("COPERA"), ICGN, Meridian Compensation Partners ("Meridian"), PGGM, Pensions Investment Research Consultants ("PIRC"), SBA of Florida, Sullivan, and TIAA-CREF.

[79] See, e.g., letters from CalPERS, Calvert, CII, PGGM, PIRC, SBA of Florida, and TIAA-CREF.

[80] See letter from CalPERS.

[81] See letter from TIAA-CREF.

compensation[82] and will help investors better understand compensation decisions made by issuers.[83]

A number of commentators stated that it would be more appropriate instead to include consideration of say-on-pay votes among the non-exclusive examples of the kind of information that should be addressed in CD&A, only if material given the issuer's individual facts and circumstances[84] because this approach would avoid boilerplate disclosure and require discussion only when material,[85] and that discussion on a mandatory basis may lead to awkward and non-substantive disclosure if the issuer has not made changes to its compensation program in response to the shareholder vote.[86]

Other commentators stated that no amendment to CD&A is required[87] because the Act does not require additional CD&A disclosure and it should not be required by rule,[88] the proposed amendment would add length to CD&A without providing meaningful information to shareholders,[89] and the amendment would deem the consideration of say-on-pay votes material whether such consideration is material or not.[90] Similarly a number of

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[82] See letter from PIRC.

[83] See letter from SBA of Florida.

[84] See, e.g., letters from ABA, Boeing, Business Roundtable, Eaton Corporation ("Eaton"), FSR, PM&P, Sullivan, and UnitedHealth Group ("UnitedHealth").

[85] See, e.g., letter from UnitedHealth.

[86] See letter from PM&P.

[87] See, e.g., letters from Center on Exec. Comp., Compensia, Davis Polk, Pfizer, Society of Corp. Sec., and UBC.

[88] See, e.g., letter from Center on Exec. Comp.

[89] See letter from Davis Polk.

[90] See, e.g., letter from Society of Corp. Sec.

commentators who asserted that amending Item 402(b) is not required also expressed the view that if the Commission does adopt an amendment, such CD&A disclosure should be required only if material under the issuer's individual facts and circumstances.[91]

Commentators also disagreed with respect to which say-on-pay votes should be covered by the CD&A discussion. Some favored only the most recent say-on-pay vote,[92] indicating that mandating discussion of prior votes would result in extraneous discussion[93] and little benefit.[94] Other commentators indicated that prior votes should also be required to be addressed.[95] These commentators noted that such disclosure of prior votes is appropriate given the long-term process of determining compensation[96] and that it would permit investors to evaluate any trends in the results of say-on-pay votes.[97] One commentator stated that if CD&A disclosure with respect to say-on-pay votes is mandatory, it should be limited to the most recent vote, but if not mandatory should not be so limited.[98] Although there was little response to our request for comment regarding whether smaller reporting companies should be required to disclose their consideration of shareholder advisory votes on executive

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[91] See, e.g., letters from Compensia, Davis Polk, and Society of Corp. Sec.

[92] See, e.g., letters from ABA, Boeing, Eaton, FSR, McGuireWoods ("McGuireWoods"), Meridian, NACD, Pfizer, Protective Life, and Sullivan.

[93] See letter from Sullivan.

[94] See letter from McGuireWoods.

[95] See, e.g., letters from Chris Barnard ("Barnard"), Calvert, PGGM, PIRC, PM&P, and SBA of Florida.

[96] See, e.g., letter from PGGM.

[97] See, e.g., letter from SBA of Florida.

[98] See letter from Boeing.

compensation, one commentator stated that our existing disclosure requirements for these companies are sufficient.[99]

c. Final Rule

After considering the comments, we are adopting amendments to the disclosure requirements of Item 402(b)(1) substantially as proposed, with a modification to clarify that this mandatory topic relates to the issuer's consideration of the most recent say-on-pay vote. As discussed below, issuers should address their consideration of the results of earlier say-on-pay votes, to the extent material.

The final rule amends Item 402(b)(1) to require issuers to address in CD&A whether and, if so, how their compensation policies and decisions have taken into account the results of the most recent shareholder advisory vote on executive compensation. Although it is not mandated by Section 951 of the Act, we continue to believe that including this mandatory topic in CD&A will facilitate better investor understanding of issuers' compensation decisions. Because the shareholder advisory vote will apply to all issuers, we view information about how issuers have responded to such votes as more in the nature of a mandatory principles-based topic than an example. The manner in which individual issuers may respond to such votes in determining executive compensation policies and decisions will likely vary depending upon facts and circumstances. We expect that this variation will be reflected in the CD&A disclosures.

Following consideration of the comments received, we have decided to limit the mandatory topic to whether, and if so, how the issuer has considered the results of the most

99 See letter from ICGN.

recent say-on-pay vote in determining compensation policies and decisions, and if so, how that consideration has affected the issuer's executive compensation policies and decisions.[100] This modification reflects that, in making voting and investment decisions, shareholders will benefit from understanding what consideration the issuer has given to the most recent say-on-pay vote. Limiting the mandatory topic to the most recent shareholder vote should also focus the disclosure so there should not be lengthy boilerplate discussions of all previous votes. Although we have added issuer consideration of the most recent say-on-pay vote to the mandatory topics, we believe that, consistent with the principles-based nature of CD&A, issuers should address their consideration of the results of earlier say-on-pay votes to the extent such consideration is material to the compensation policies and decisions discussed.

Because companies with outstanding indebtedness under the TARP will continue to have an annual say-on-pay vote until they repay all such indebtedness, these votes should be addressed by issuers in CD&A as well. To reflect our treatment of companies subject to EESA with outstanding obligations under TARP, we have also modified the amendment to Item 402(b)(1) as adopted to address issuer consideration of the results of the most recent shareholder advisory vote on executive compensation required by Section 14A or Rule 14a-20. This reflects that the vote required pursuant to the EESA and Rule 14a-20 is effectively the same vote that would be required under Section 14A(a)(1).[101]

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[100] Reporting companies are currently required to disclose, pursuant to Item 5.07 of Form 8-K [17 CFR 249.208a], the preliminary results of a shareholder vote within four business days after the end of the meeting at which the vote is held and final voting results within four business days after the final voting results are known. We are adopting amendments to require additional disclosure on Form 8-K regarding the company's determination of the frequency of say-on-pay votes. See Section II.B.5 below.

[101] The treatment of companies subject to EESA with outstanding obligations under TARP is discussed in Section II.C.3 below.

Smaller reporting companies are subject to scaled disclosure requirements in Item 402 of Regulation S-K and are not required to include a CD&A. We are not adding a specific requirement for smaller reporting companies to provide disclosure about how previous votes pursuant to Section 14A affected compensation policies and decisions because we believe such information would not be as valuable outside the context of a complete CD&A covering the full range of matters required to be addressed by Item 402(b). However, we note that pursuant to Item 402(o) of Regulation S-K, [102] smaller reporting companies are required to provide a narrative description of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table. If consideration of prior say-on-pay votes is such a factor for a particular issuer, disclosure would be required pursuant to Item 402(o).

B. Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation

1. Rule 14a-21(b)

We proposed Rule 14a-21(b) pursuant to which issuers would be required, not less frequently than once every six years, to provide a separate shareholder advisory vote in proxy statements to determine the frequency of the shareholder vote on the compensation of executives required by Section 14A(a)(1). We are adopting this amendment substantially as proposed with slight modifications in response to comments.

a. Proposed Rule

Under proposed Rule 14a-21(b), issuers would be required, not less frequently than once every six years, to provide a separate shareholder advisory vote in proxy statements for

[102] 17 CFR 229.402(o).

annual meetings to determine whether the shareholder vote on the compensation of executives required by Section 14A(a)(1) "will occur every 1, 2, or 3 years."[103] As proposed, Rule 14a-21(b) would also clarify that the separate shareholder vote on the frequency of shareholder votes on executive compensation would be required only in a proxy statement for an annual or other meeting of shareholders for which our rules require compensation disclosure. Consistent with Section 14A, issuers would be required to provide the separate shareholder vote on the frequency of the say-on-pay vote for the first annual or other such meeting of shareholders occurring on or after January 21, 2011.

b. Comments on the Proposed Rule

Comments on the proposal were generally favorable. Many commentators agreed that the rule did not need to specify the required language to be used for the shareholder vote on the frequency of shareholder votes to approve executive compensation.[104] Some commentators, however, recommended that the Commission should specify language or provide non-exclusive examples of resolutions so issuers would know how the requirement may be satisfied.[105] A number of commentators also requested that the Commission clarify whether the vote should be presented in the form of a resolution given that shareholders will have a choice among three frequencies or abstaining from the frequency vote.[106] Although some commentators suggested that we specify which shares are entitled to vote in the

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[103] Exchange Act Section 14A(a)(2).

[104] See, e.g., letters from AFSCME, Business Roundtable, FSR, Protective Life, and Towers Watson.

[105] See, e.g., letters from Boeing, Pfizer, PGGM, Society of Corp. Sec., and Sullivan.

[106] See, e.g., letters from ABA, Pfizer, Society of Corp. Sec., and Sullivan.

shareholder vote on the frequency of say-on-pay votes,[107] most commentators indicated there was no need for the Commission to address this question.[108]

We also requested comment regarding whether a new issuer should be permitted to disclose the frequency of its say-on-pay votes in the registration statement for its initial public offering and be exempted from conducting say-on-pay votes and frequency votes at its annual meetings until the annual meeting for the year disclosed in its registration statement. Most commentators indicated that newly public companies should not be exempt from the say-on-pay and frequency votes and should be required to conduct say-on-pay and frequency votes at their first annual shareholders meeting after the initial public offering.[109] However, some commentators expressed support for such an exemption as it would provide these issuers additional time to formulate their compensation policies as a public company before conducting the shareholder votes required by Section 14A.[110]

c. Final Rule

After reviewing and considering the comments, we are adopting Rule 14a-21(b) as proposed with slight modifications to clarify that the frequency vote is required at least once during the six calendar years following the prior frequency vote.[111] Under Rule 14a-21(b), issuers will be required, not less frequently than once every six calendar years, to provide a

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[107] See, e.g., letter from the ABA.

[108] See, e.g., letters from Business Roundtable, FSR, Pfizer, PGGM, and Protective Life.

[109] See, e.g., letters from AFSCME, CII, CalPERS, ICGN, Georg Merkl ("Merkl"), Public Citizen, and RAILPEN Investments and Universities Superannuation Scheme ("RAILPEN & USS").

[110] See, e.g., letters from ABA, Compensia, Davis Polk, NACD, and Sullivan.

[111] As proposed, Rule 14a-21(b) would have required a frequency vote within the six-year period from the date of the most recent frequency vote.

separate shareholder advisory vote in proxy statements for annual meetings to determine whether the shareholder vote on the compensation of executives required by Section 14A(a)(1) "will occur every 1, 2, or 3 years."[112] After considering and reviewing comments on the proposed rule, we do not believe it is necessary to provide a form of resolution for the vote required by Rule 14a-21(b). In response to concerns raised by commentators and discussed below, we are also adopting a temporary exemption under which smaller reporting companies will not be required to conduct a shareholder advisory vote on the frequency of say-on-pay votes until meetings on or after January 21, 2013.[113]

Rule 14a-21(b) will also clarify that the separate shareholder vote on the frequency of shareholder votes on executive compensation will be required only in a proxy statement for an annual or other meeting of shareholders at which directors will be elected and that such vote is required only once every six calendar years. Under Rule 14a-21(b), issuers will be required to provide the separate shareholder vote on the frequency of the say-on-pay vote for the first annual or other such meeting of shareholders occurring on or after January 21, 2011. After reviewing the comment letters, we continue to believe that the say-on-pay vote and the frequency vote should be required of newly public companies in the proxy statement for such company's first annual meeting after the initial public offering. This will give shareholders the opportunity to express a view on these matters while the company is in the process of establishing policies that will apply as a public company and could benefit from understanding its shareholders' point of view.

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[112] Exchange Act Section 14A(a)(2).

[113] See discussion in Section II.E below.

2. Item 24 of Schedule 14A

In order to implement the requirements of Section 14A(a), we proposed new Item 24 to Schedule 14A, to briefly explain the general effect of the frequency vote, such as whether the vote is non-binding. We are adopting this amendment to Schedule 14A as proposed with a modification.

a. Proposed Amendments

In addition to disclosure regarding the vote on executive compensation, we proposed that issuers would be required to disclose in the proxy statement that they are providing a separate shareholder advisory vote on the frequency of the shareholder advisory vote on executive compensation. Proposed Item 24 of Schedule 14A would also require issuers to briefly explain the general effect of this vote, such as whether the vote is non-binding.

b. Comments on the Proposed Amendments

Commentators generally supported proposed Item 24 of Schedule 14A as it relates to the frequency of say-on-pay votes.[114] One commentator expressed the view that the proposed amendment is not needed as it will lead to boilerplate disclosure.[115] Some commentators also suggested that issuers should be required to disclose the current frequency of say-on-pay votes.[116]

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[114] See, e.g., letters from CalPERS, ICGN, PGGM, and Protective Life.

[115] See letter from Society of Corp. Sec.

[116] See, e.g., letters from ICGN and TIAA-CREF.

c. Final Rule

After reviewing and considering the comments, we are adopting Item 24 of Schedule 14A as proposed with a modification. Issuers will be required to disclose in the proxy statement that they are providing a separate shareholder advisory vote on the frequency of say-on-pay votes. Item 24 of Schedule 14A will also require issuers to briefly explain the general effect of this vote, such as whether the vote is non-binding.[117] As noted above, this is similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder advisory vote on executive compensation for companies subject to EESA.[118] Based on our experience with these votes, we believe that such requirements will lead to useful disclosure of information about the nature and effect of the vote for shareholders to consider, such as whether the vote is non-binding.

After reviewing comments, we are also adding a requirement to Item 24 for issuers to provide disclosure of the current frequency of say-on-pay votes and when the next scheduled say-on-pay vote will occur,[119] in their proxy materials. We believe this will provide useful information to shareholders about upcoming say-on-pay and frequency shareholder advisory votes.

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[117] As discussed in Section II.A.2.a, Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We are requiring additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote.

[118] See Section II.A.2.a, above.

[119] Issuers should disclose the current frequency as determined by the board following a shareholder advisory vote. We would not expect disclosure of either the current frequency or when the next scheduled say-on-pay vote will occur in proxy materials for the meeting where an issuer initially conducts the say-on-pay and frequency votes.

3. Amendment to Rule 14a-4

In order to implement the requirements of Section 14A(a)(2), we also proposed amendments to Rule 14a-4. After considering comments, we are adopting the amendments to Rule 14a-4 as proposed, with slight modification.

a. Proposed Amendments

As noted in the Proposing Release, Section 14A(a)(2) requires a shareholder advisory vote on whether say-on-pay votes will occur every 1, 2, or 3 years. Thus, shareholders must be given four choices: whether the shareholder vote on executive compensation will occur every 1, 2, or 3 years, or to abstain from voting on the matter. In our view, Section 14A(a)(2) does not allow for alternative formulations of the shareholder vote, such as proposals that would provide shareholders with two substantive choices (e.g., to hold a separate shareholder vote on executive compensation every year or less frequently), or only one choice (e.g., a company proposal to hold shareholder votes every two years). We noted in the Proposing Release that we would expect that the board of directors will include a recommendation as to how shareholders should vote on the frequency of shareholder votes on executive compensation.[120] However, the issuer must make clear in these circumstances that the proxy card provides for four choices (every 1, 2, or 3 years, or abstain) and that shareholders are not voting to approve or disapprove the issuer's recommendation. Accordingly, we proposed amendments to our proxy rules to reflect the statutory requirement that shareholders must be provided the opportunity to cast an advisory vote on whether the shareholder vote on

[120] See Section II.B.3 of the Proposing Release.

executive compensation required by Section 14A(a)(1) of the Exchange Act will occur every 1, 2, or 3 years, or to abstain from voting on the matter.[121]

Specifically, we proposed amendments to Rule 14a-4 under the Exchange Act, which provides requirements as to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders. Absent amendment, Rule 14a-4 requires the form of proxy to provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter to be acted upon, other than elections to office.[122] We proposed amendments to revise this standard to permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain, for these votes.

b. Comments on the Proposed Amendments

Comments on the proposal were generally favorable. Many commentators expressed support for the proposed approach where shareholders are given four choices on the frequency vote.[123] Some commentators suggested alternative approaches including a vote where shareholders would rank each choice of frequency or vote separately for each of 1, 2, and 3 years,[124] a vote where management would choose 1, 2, or 3 years as the frequency and ask shareholders to approve or disapprove its choice,[125] and a two-step approach whereby

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[121] Because the shareholder vote on the frequency of voting on executive compensation is advisory, we do not believe that it is necessary to prescribe a standard for determining which frequency has been "adopted" by the shareholders.

[122] Rule 14a-4(b)(1).

[123] See, e.g., letters from Calvert, COPERA, ICGN, Meridian, Merkl, PGGM, and Protective Life.

[124] See letter from Keith P. Bishop ("Bishop").

[125] See letter from UBC.

shareholders would first vote whether or not they have a preference as to the frequency of say-on-pay votes and, if they do have a preference, subsequently vote on whether such votes should be conducted every 1, 2, or 3 years.[126]

In addition, we requested comment in the Proposing Release as to whether issuers, brokers, transfer agents, and data processing firms would be able to accommodate the four choices for a single line item on the proxy card. Commentators indicated that they would be ready for the vote with four choices on the proxy card by January 21, 2011.[127] One commentator recommended that we clarify that issuers may vote uninstructed shares in accordance with management's recommendations so long as they follow the requirements of Rule 14a-4,[128] while another suggested that the Commission extend the transition guidance permitting the presentation of three choices for the frequency vote for the entire 2011 proxy season and perhaps require the three-choice approach for all issuers for 2011 to allow for uniformity among different issuers.[129]

c. Final Rule

After considering the comments, we are adopting the rule substantially as proposed with some modifications. Specifically, we are adopting amendments to Rule 14a-4 under the Exchange Act, which provides requirements as to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their

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[126] See letter from Society of Corp. Sec.

[127] See, e.g., letters from Broadridge Financial Solutions, Inc. ("Broadridge") and Proxytrust ("Proxytrust").

[128] See letter from Sullivan.

[129] See letter from ABA. For a discussion of transition matters, see Section II.F below.

shareholders. Under existing Rule 14a-4, the form of proxy is required to provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter to be acted upon, other than elections to office. Absent an amendment, Rule 14a-4 would not permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain. The amendments revise the rule to permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain, for the frequency vote.

In response to comment, we note that issuers may vote uninstructed proxy cards in accordance with management's recommendation for the frequency vote only if the issuer follows the existing requirements of Rule 14a-4 to (1) include a recommendation for the frequency of say-on-pay votes in the proxy statement, (2) permit abstention on the proxy card, and (3) include language regarding how uninstructed shares will be voted in bold on the proxy card.

4. Amendment to Rule 14a-8

In connection with implementing the requirements of Section 14A(a)(2), we also proposed a note to Rule 14a-8(i)(10) relating to shareholder proposals. After considering the comments, we are adopting the amendment to Rule 14a-8 with some modifications.

a. Proposed Amendments

Our proposed amendment to Rule 14a-8 under the Exchange Act would add a note to Rule 14a-8(i)(10) to clarify the status of shareholder proposals that seek an advisory shareholder vote on executive compensation or that relate to the frequency of shareholder votes approving executive compensation. Rule 14a-8 provides eligible shareholders with an opportunity to include a proposal in an issuer's proxy materials for a vote at an annual or special meeting of shareholders. An issuer generally is required to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the rule's 13 substantive bases for exclusion.[130] One of the substantive bases for exclusion, Rule 14a-8(i)(10), provides that an issuer may exclude a shareholder proposal that has already been substantially implemented.

We proposed adding a note to Rule 14a-8(i)(10) to permit the exclusion of a shareholder proposal that would provide a say-on-pay vote or seeks future say-on-pay votes or that relates to the frequency of say-on-pay votes, provided the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote in accordance with Rule 14a-21(b). As noted in Section I above, a "say-on-pay" vote is defined as a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K, or any successor to Item 402.

As proposed, an issuer would be permitted to exclude shareholder proposals that propose a vote on the approval of executive compensation as disclosed pursuant to Item 402 of Regulation S-K or on the frequency of such votes, including those drafted as requests to amend the issuer's governing documents, so long as the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote required by Rule 14a-21(b) and provides a vote on frequency at least as often as required by Section 14A(a)(2).

[130] These substantive bases for exclusion are set forth in Rule 14a-8(i).

b. Comments on the Proposed Amendments

Comments on the proposal were mixed. Many commentators supported the proposed amendment to permit exclusion of shareholder proposals on frequency and say-on-pay,[131] stating that the amendment would eliminate redundancy and reduce administrative burdens and costs.[132] Other commentators disagreed with the general approach,[133] stating that they believe it would be unwise as a matter of public policy and would inappropriately interpret substantial implementation because the note would permit exclusion of proposals requesting a frequency that the issuer has not implemented.[134] Other commentators asserted that an amendment is not required because issuers should be permitted to exclude any shareholder proposals on frequency as long as the issuer complies with Section 14A(a)(2).[135] Some commentators suggested that we should also permit issuers to exclude shareholder proposals on the frequency of say-on-pay votes when they adopt a policy to hold say-on-pay votes more frequently than the frequency that is consistent with the plurality of votes cast in the most recent shareholder vote[136] to prevent issuers being penalized for providing shareholders with more frequent say-on-pay votes.[137] Other commentators felt that issuers should not be required to adopt a particular policy on the frequency of say-on-pay votes in order to be

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[131] See, e.g., letters from ABA, Business Roundtable, Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce ("CCMC"), Eaton, FSR, ICGN, Pfizer, PGGM, and Protective Life.

[132] See, e.g., letter from Business Roundtable.

[133] See, e.g., letters from AFSCME, Calvert, Center on Exec. Comp., CII, Public Citizen, and UBC.

[134] See, e.g., letter from AFSCME.

[135] See letter from UBC.

[136] See, e.g., letters from ABA, Davis Polk, Meridian, Society of Corp. Sec., and Sullivan.

[137] See letter from Sullivan.

permitted to exclude shareholder proposals on executive compensation,[138] noting that an issuer should be permitted to exclude shareholder proposals on frequency so long as the issuer provides a reasonable basis for the frequency chosen to prevent an annual re-visiting of the frequency vote by shareholders.[139]

In addition, some commentators stated that the proposed note to Rule 14a-8(i)(10) should incorporate a majority standard rather than the proposed plurality standard, so that issuers would need to adopt a policy consistent with the majority of votes cast in order to exclude a shareholder proposal as substantially implemented, [140] noting that the majority standard would be consistent with policies that boards should implement actions recommended by majority shareholder vote.[141] Some commentators also recommended that issuers should be permitted to exclude shareholder proposals for votes on executive compensation that are narrower in scope[142] than the say-on-pay vote required under Rule 14a-21(a).[143] These commentators expressed the concern that shareholders could undermine the non-binding nature of the frequency vote through more specific vote proposals.[144]

Finally, some commentators indicated that it would be inappropriate to permit companies to exclude shareholder proposals on frequency if there have been material

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[138] See, e.g., letters from Boeing and Center on Exec. Comp.

[139] See letter from Boeing.

[140] See, e.g., letters from CalPERS, CII, and SBA of Florida.

[141] See letter from CII.

[142] An example would be a shareholder proposal for an advisory vote on the Chief Executive Officer's compensation as disclosed under Item 402 of Regulation S-K.

[143] See, e.g., letters from Business Roundtable, Boeing, CCMC, Davis Polk, Pfizer, and Society of Corp. Sec.

[144] See letter from Boeing.

changes in the company's compensation program since the prior frequency vote[145] because shareholders should be permitted the opportunity to revisit their decision on the frequency vote under such circumstances.[146] Other commentators noted that material changes to an issuer's compensation program should not limit the availability of Rule 14a-8(i)(10) because shareholders will understand that a company's compensation program is dynamic and factor this into their frequency voting decisions.[147] These commentators noted that the difficulty in determining whether changes are material would erode the benefit of the note to Rule 14a-8(i)(10), create uncertainty as to a company's ability to exclude shareholder proposals on frequency,[148] and burden the staff with analyzing materiality on a case-by-case basis.[149]

c. Final Rule

After reviewing the comments, we are adopting the amendment to Rule 14a-8(i)(10) with some modifications.

We continue to believe that under certain conditions, an issuer should be permitted to exclude subsequent shareholder proposals that seek a vote on the same matters as the shareholder advisory votes on say-on-pay and frequency required by Section 14A(a). Consequently, consistent with the proposal, we are adding a note to Rule 14a-8(i)(10) to permit the exclusion of a shareholder proposal that would provide a say-on-pay vote, seeks

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[145] See, e.g., letters from Boston Common, Calvert, First Affirmative, ICGN, PIRC, PGGM, RAILPEN & USS, Social Investment, and Walden.

[146] See letter from RAILPEN & USS.

[147] See, e.g., letters from ABA, Boeing, Frederic W. Cook & Co., Inc. ("Frederic Cook"), McGuireWoods, Pfizer, PM&P, and Protective Life.

[148] See letter from McGuireWoods.

[149] See letter from Frederic Cook.

future say-on-pay votes, or relates to the frequency of say-on-pay votes in certain circumstances; however, in response to comments,[150] we are changing the threshold for exclusion from a plurality to a majority. Specifically, as adopted, the note to Rule 14a-8(i)(10) will permit exclusion of such a shareholder proposal if, in the most recent shareholder vote on frequency of say-on-pay votes, a single frequency (i.e., one, two or three years) received the support of a majority of the votes cast and the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with that choice.[151]

In light of the nature of the vote – with three substantive choices – it is possible that no single choice will receive a majority of votes and that, as a result, there may be issuers that may not be able to exclude subsequent shareholder proposals regarding say-on-pay matters even if they adopt a policy on frequency that is consistent with plurality of votes cast. We also recognize, however, that if no single frequency choice receives the support of a majority of votes cast, the choice preferred by the plurality may not represent the choice preferred by most of the company's shareholders. For example, if 30% of votes support annual voting, 30% support biennial voting, and 40% favor triennial voting, no frequency would have received a majority of votes cast; therefore, it is not clear that implementing the plurality choice would be favored by most of the company's shareholders. In that situation, if the company implemented triennial voting and the note to Rule 14a-8(i)(10) allowed exclusion of shareholder proposals seeking a different frequency, this could prevent

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[150] See, e.g., letters from CalPERS, CII, and SBA of Florida.

[151] For purposes of this analysis, an abstention would not count as a vote cast. We are prescribing this voting standard solely for purposes of determining the scope of the exclusion under the note to Rule 14a-8(i)(10), and not for the purpose of determining whether a particular voting frequency should be considered to have been adopted or approved by shareholder vote as a matter of state law.

shareholders from putting forth proposals that seek to request that the company implement a frequency that would be preferred by a majority of shareholders. After considering commentators' views, we are concerned that this approach would inappropriately restrict shareholder proposals on this topic, particularly in light of Section 14A(c)(4)'s directive that the shareholder advisory votes required by Sections 14A(a) and (b) may not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."

On the other hand, if a majority of votes cast favors a given frequency and the issuer adopts a policy on frequency that is consistent with the choice of the majority of votes, then in our view, as a matter of policy it is appropriate for Rule 14a-8 to provide for exclusion of subsequent shareholder proposals that would provide a say-on-pay vote, seek future say-on-pay votes, or relate to the frequency of say-on-pay votes. We believe that, in these circumstances, additional shareholder proposals on frequency generally would unnecessarily burden the company and its shareholders given the company's adherence to the view favored by a majority of shareholder votes regarding the frequency of say-on-pay votes.[152] As described above, an issuer would not be permitted to exclude such shareholder proposals under the note if no frequency choice received a majority of the votes cast.

[152] We recognize that this approach is different from the traditional "substantially implemented" standard in Rule 14a-8(i)(10) since the frequency sought by a shareholder would be different from the frequency the issuer has implemented. We have revised the note to avoid confusion in that regard. A shareholder proposal seeking a frequency that is the same as that provided by the company would be excludable under the traditional "substantially implemented" standards in Rule 14a-8(i)(10) without regard to the new note, assuming there are no other differences that would lead to a different result.

As a result of this amendment, an issuer will be permitted to exclude shareholder proposals that propose a vote on the frequency of such votes,[153] including those drafted as requests to amend the issuer's governing documents. For example, if in the first vote under Rule 14a-21(b) a majority of votes were cast for a two-year frequency for future shareholder votes on executive compensation, and the issuer adopts a policy to hold the vote every two years, a shareholder proposal seeking a different frequency could be excluded so long as the issuer seeks votes on executive compensation every two years.[154]

We also believe that a shareholder proposal that would provide an advisory vote or seek future advisory votes on executive compensation with substantially the same scope as the say-on-pay vote required by Rule 14a-21(a) – the approval of executive compensation as disclosed pursuant to Item 402 of Regulation S-K – should also be subject to exclusion under Rule 14a-8(i)(10) if the issuer adopts a policy on frequency that is consistent with the majority of votes cast. This is consistent with the proposal, although like additional frequency votes, the note to Rule 14a-8(i)(10) would condition exclusion on the company implementing the frequency favored by a majority of shareholders. In this circumstance, shareholders would be provided the opportunity to provide say-on-pay votes on the frequency preferred by a majority of shareholders when last polled, and we believe additional proposals on the same matter would impose unnecessary burdens on companies and shareholders.

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[153] No-action requests to exclude shareholder proposals that seek shareholder advisory votes on different aspects of executive compensation will be evaluated on a case-by-case basis by the staff.

[154] Issuers seeking to exclude a shareholder proposal under the note to Rule 14a-8(i)(10) are required to follow the same shareholder proposal process with the staff of the Commission as would be required if the issuer intended to rely on any other substantive basis for exclusion under Rule 14a-8.

We are also modifying the note slightly. To avoid confusion, we are removing the requirement that an issuer must provide "a vote on frequency at least as often as required by Section 14A(a)(2)." We believe this language is not necessary as issuers are already required to comply with Section 14A(a)(2) in any event. In addition, we are removing the language "as substantially implemented" from the note to avoid confusion.

5. <u>Amendment to Form 8-K</u>

We also proposed amendments to Form 10-Q and Form 10-K to require additional disclosure regarding the issuer's decision to adopt a policy on the frequency of say-on-pay votes following a shareholder advisory vote on frequency. After considering the comments, we are not adopting amendments to Form 10-Q and Form 10-K. Instead, we are adopting a new Form 8-K Item to require disclosure of the issuer's decision on the frequency of say-on-pay votes.

a. Proposed Amendments

Issuers are currently required to disclose the preliminary results of shareholder votes pursuant to Item 5.07 of Form 8-K within four business days following the day the shareholder meeting ends and final voting results within four business days of when they are known. This item will require issuers to report how shareholders voted in the say-on-pay vote and the frequency of shareholder votes on executive compensation.

We proposed amendments to Form 10-K and Form 10-Q to require additional disclosure regarding the issuer's decision in light of such vote as to how frequently the company will include those say-on-pay votes for the six subsequent years. Our proposed amendments to Item 9B of Form 10-K and new Item 5(c) of Part II of Form 10-Q would have required an issuer to disclose this decision in the Form 10-Q covering the quarterly period during which the shareholder advisory vote occurs, or in the Form 10-K if the shareholder advisory vote occurs during the issuer's fourth quarter. In light of the relevance of this decision to potential shareholder proposals on the topic, we proposed this disclosure to notify shareholders on a timely basis about the issuer's decision on how frequently it will provide the say-on-pay vote to shareholders.

b. Comments on the Proposed Amendments

Comments on the proposal were mixed. A number of commentators supported the amendments as proposed that would require disclosure of an issuer's decision as to the frequency of say-on-pay votes in the Form 10-Q or Form 10-K for the period during which the advisory vote occurs[155] as the requirement would allow shareholders to readily obtain an issuer's decision on the frequency of say-on-pay votes.[156] Some commentators questioned whether the Commission should require such disclosure of an issuer's determination regarding frequency following the results of a shareholder advisory vote at all,[157] given that the shareholder vote on the frequency of say-on-pay votes is only advisory.[158] Other commentators suggested that we should allow issuers additional time to consider the results of the shareholder vote[159] and to contact shareholders for additional feedback,[160] particularly

[155] See, e.g., letters from CalPERS, ICGN, Meridian, PGGM, and SBA of Florida.

[156] See letter from SBA of Florida.

[157] See, e.g., letters from Business Roundtable, Boeing, Center on Exec. Comp., CCMC, FSR, and Society of Corp. Sec.

[158] See, e.g., letter from Society of Corp. Sec.

[159] See, e.g., letters from Compensia, Davis Polk, Eaton, Frederic Cook, PM&P, and Protective Life.

if the shareholders do not express a clear preference on frequency. These commentators recommended that we instead require that disclosure about the issuer's decision be included in a later Form 10-Q or Form 10-K filing,[161] Form 8-K filing,[162] or on the issuer's website.[163] These commentators indicated that a requirement for a later filing would still permit shareholders adequate time to submit a shareholder proposal on the frequency of say-on-pay votes.[164]

Commentators also noted that Item 5.07 of Form 8-K currently requires disclosure of the number of votes cast "for, against or withheld" on matters submitted to a vote of shareholders, but that the item would not permit disclosure of the results of the frequency vote for "1 year, 2 years, 3 years, or abstain."[165] These commentators suggested that we amend Item 5.07 of Form 8-K to facilitate reporting the results of the frequency vote.[166]

c. Final Rule

After reviewing the comments on this issue, we have concluded that disclosure of the issuer's determination regarding frequency of say-on-pay votes should be required, but we are adopting the disclosure requirement through an amendment to Item 5.07 of Form 8-K in lieu of amendments to Form 10-Q and Form 10-K. We have considered the position of

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160 See, e.g., letters from ABA, Boeing, TIAA-CREF, and Time Warner Inc. ("Time Warner").

161 See, e.g., letters from Eaton, Frederic Cook, Compensia, and PM&P.

162 See, e.g., letters from ABA and Davis Polk.

163 See letter from Business Roundtable.

164 See letter from ABA.

165 See, e.g., letter from Davis Polk.

166 See letter from PIRC.

commentators who were concerned that the required timing of disclosure under our proposal would not permit sufficient time for issuers to fully consider the results of the vote, including through board deliberations and consultation with shareholders as described above, before the disclosure of the decision is required.[167] In light of this concern, we are adopting this disclosure requirement as a Form 8-K requirement due at a later date, in lieu of amending Form 10-Q and Form 10-K, to give issuers additional time to make their decisions.

Under our final rule, Item 5.07 of Form 8-K requires an issuer to disclose its decision regarding how frequently it will conduct shareholder advisory votes on executive compensation following each shareholder vote on the frequency of say-on-pay votes. To comply, an issuer will file an amendment to its prior Form 8-K filings under Item 5.07 that disclose the preliminary and final results of the shareholder vote on frequency. This amended Form 8-K will be due no later than 150 calendar days after the date of the end of the annual or other meeting in which the vote required by Rule 14a-21(b) took place, but in no event later than 60 calendar days prior to the deadline for the submission of shareholder proposals under Rule 14a-8 for the subsequent annual meeting, as disclosed in the issuer's proxy materials for the meeting at which the frequency vote occurred.[168] In the amended

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[167] See, e.g., letters from ABA, Boeing, Compensia, Davis Polk, Eaton, Frederic Cook, PM&P, Protective Life, TIAA-CREF, and Time Warner.

[168] Item 5.07 is not among the list of items subject to the safe harbor from liability in Rules 13a-11 [17 CFR 240.13a-11] and 15d-11[17 CFR 240.15d-11] under the Exchange Act. In addition, companies that fail to file a timely report required by Item 5.07 will lose their eligibility to file Form S-3 registration statements. We are not making a change to this as a result of our amendments to Item 5.07. We continue to believe that Item 5.07 does not require management to make rapid materiality and similar judgments within the compressed Form 8-K timeframe. See Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 33-8400 (Mar. 16, 2004) [69 FR 15594] at Section II.E and Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68334] at Section II.E.

Item 5.07 Form 8-K, the issuer must disclose its determination regarding the frequency of say-on-pay votes.[169]

We believe the time period specified for filing the amended Item 5.07 Form 8-K should address commentators' requests that we revise the proposal to allow companies additional time to carefully consider the results of the frequency vote, including through board and committee deliberations and discussions with shareholders, before disclosure of the decision is required.[170] It also should provide enough time for shareholders to consider whether to submit a shareholder proposal on say-on-pay votes or on the frequency of say-on-pay votes once the disclosure is provided.

In addition, in response to comment,[171] we are adopting a technical amendment to Item 5.07(b) of Form 8-K to facilitate reporting of shareholder votes on frequency. Item 5.07 of Form 8-K generally requires an issuer to "state the number of votes cast for, against, or withheld, as well as the number of abstentions and broker non-votes as to each such matter…." The amendments we adopt today will clarify that, with respect to the vote on the frequency of say-on-pay votes, the issuer will be required to disclose the number of votes cast for each of 1 year, 2, years, and 3 years, as well as the number of abstentions.[172]

[169] Item 5.07(d) of Form 8-K.

[170] In this regard, we note the recent guidance provided by the Division of Corporation Finance that Regulation FD [17 CFR 243.100 et. seq.] does not prohibit directors from speaking privately with a shareholder or group of shareholders as described in that guidance. See Regulation FD CDIs, Question 101.11.

[171] See, e.g., letters from Davis Polk and PIRC.

[172] We are adopting a conforming technical change to Instruction 1 to Item 5.07 to carve out Item 5.07(d) from the four-business day period for reporting the event. See Instruction 1 to Item 5.07 of Form 8-K.

6. Effect of Shareholder Vote

Although the language in Section 951 of the Act indicates that the separate resolution subject to shareholder vote is "to determine" the frequency of the shareholder vote on executive compensation, in light of new Section 14A(c) of the Exchange Act, we continue to believe this shareholder vote, and all shareholder votes required by Section 951 of the Act, are intended to be non-binding on the issuer or the issuer's board of directors. New Section 14A(c) states that the shareholder votes referred to in Section 14A(a) and Section 14A(b) (which includes all votes under Section 951 of the Act) "shall not be binding on the issuer or the board of directors of an issuer."[173] Though we received a comment letter asserting that the shareholder vote on frequency is binding,[174] in our view the plain language of Exchange Act Section 14A(c) indicates that this vote is advisory. Accordingly, we are adopting new Item 24 of Schedule 14A to include language to require disclosure regarding the general effect of the shareholder advisory votes, such as whether the vote is non-binding.[175]

C. Issues Relating to Both Shareholder Votes Required by Section 14A(a)

1. Amendments to Rule 14a-6

We proposed amendments to Rule 14a-6 to add the say-on-pay and frequency of say-on-pay votes to the list of items that do not require the filing of proxy materials in preliminary form. After considering comments, we are adopting the proposed amendments to Rule 14a-6, with some modification.

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173 Exchange Act Section 14A(c).

174 See letter from Merkl.

175 Even though each of the shareholder advisory votes required by Section 14A is non-binding pursuant to the rule of construction in Section 14A(c), as we noted in Note 69 of the Proposing Release, we believe these votes could play a role in an issuer's executive compensation decisions.

a. Proposed Amendments

Rule 14a-6(a) generally requires issuers to file proxy statements in preliminary form at least ten calendar days before definitive proxy materials are first sent to shareholders, unless the items included for a shareholder vote in the proxy statement are limited to specified matters. During the time before final proxy materials are filed, our staff has the opportunity to comment on the disclosures and issuers are able to incorporate the staff's comments in their final proxy materials. Absent an amendment to Rule 14a-6(a), a proxy statement that includes a solicitation for either the shareholder vote on the approval of executive compensation or the approval of the frequency of the votes approving executive compensation required by Sections 14A(a)(1) and 14A(a)(2) would need to be filed in preliminary form. Because the shareholder vote on executive compensation and the shareholder vote on the frequency of such shareholder votes are required for all issuers, we view them as similar to the other items specified in Rule 14a-6(a) that do not require a preliminary filing. In the Proposing Release, we noted our view that a preliminary filing requirement for the shareholder votes on executive compensation and the frequency of such votes would impose unnecessary administrative burdens and preparation and processing costs associated with the filing and processing of proxy material that would unlikely be selected for review in preliminary form.[176]

We proposed amendments to Rule 14a-6(a) to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by

[176] See Section II.C.1 of the Proposing Release. See also, Proxy Rules – Amendments to Eliminate Filing Requirements for Certain Preliminary Proxy Material; Amendments With Regard to Rule 14a-8, Shareholder Proposals, Release No. 34-25217 (Dec. 21, 1987) [52 FR 48982].

Section 14A(a) to the list of items that do not trigger a preliminary filing.[177] As proposed, a proxy statement that includes a solicitation with respect to either of these shareholder votes would not trigger a requirement that the issuer file the proxy statement in preliminary form, so long as a preliminary filing would not otherwise be required under Rule 14a-6(a).

b. Comments on the Proposed Amendments

Comments on the proposal were favorable. While one commentator stated that say-on-pay votes and votes on the frequency of say-on-pay votes should trigger the requirement to file in preliminary form to provide the market and investors additional time to consider the executive compensation disclosures,[178] the preponderance of commentators agreed that no preliminary proxy should be required.[179] These commentators noted the similarity in proposals for all issuers and the likelihood that the administrative burdens would outweigh any benefits from a preliminary filing.[180] In addition, one commentator asserted that we should not require a preliminary proxy statement for shareholder advisory votes on the frequency of say-on-pay votes that are not required by Section 14A so that issuers would not be required to file in preliminary form as a result of including a frequency vote in their proxy

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[177] In the recent release relating to the similar shareholder votes for companies subject to EESA with outstanding indebtedness under the TARP program, we received comments regarding whether a preliminary proxy statement should be required for shareholder votes on executive compensation for TARP companies. While some commentators argued that a preliminary proxy statement should be required, other commentators argued persuasively that the burdens of such an approach outweighed the costs. As a result, we decided to eliminate the requirement for a preliminary proxy statement for shareholder votes on executive compensation for TARP companies. See TARP Adopting Release, supra note 18, at 75 FR 2791.

[178] See letter from Brian Foley ("Foley").

[179] See, e.g., letters from Ameriprise Financial ("Ameriprise"), ABA, Business Roundtable, CalPERS, Center on Exec. Comp., Compensia, Davis Polk, FSR, ICGN, Pfizer, PGGM, PM&P, Protective Life, and Society of Corp. Sec.

[180] See, e.g., letter from Compensia.

materials voluntarily.[181] Other commentators suggested that no preliminary proxy statement should be required for any separate shareholder vote on executive compensation,[182] noting that it would be inappropriate to require a preliminary filing for proposals on more narrow aspects of compensation if a preliminary filing is not required for broader proposals.[183]

c. Final Rule

After considering the comments, we are adopting the amendments to Rule 14a-6(a) as proposed, with slight modifications. We are adopting amendments to Rule 14a-6(a) to add any shareholder advisory vote on executive compensation, including shareholder votes to approve executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a), to the list of items that do not trigger a preliminary filing. As adopted, a proxy statement that includes a solicitation with respect to any advisory vote on executive compensation, including a say-on-pay vote or a vote on the frequency of say-on-pay votes, would not trigger a requirement that the issuer file the proxy statement in preliminary form, so long as any other matters to which the solicitation relates include only the other matters specified by Rule 14a-6(a). Finally, in a revision from the proposal, this amendment will also encompass an advisory vote on executive compensation, including a vote on the frequency of say-on-pay votes, that is not required by Section 14A. Upon review of the comments, we are persuaded by commentators' arguments that our preliminary proxy filing requirements should not differentiate between say-on-pay votes simply because, in one

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[181] See letter from Business Roundtable.

[182] See letters from ABA and ICGN.

[183] See letter from ABA.

case, the issuer is required to include the proposal, and, in the other, the issuer chooses to do so.

2. Broker Discretionary Voting

As noted in the Proposing Release,[184] Section 957 of the Act amends Section 6(b) of the Exchange Act[185] to direct the national securities exchanges to change their rules to prohibit broker discretionary voting of uninstructed shares in certain matters, including shareholder votes on executive compensation. The national securities exchanges have made substantial progress in amending their rules regarding broker discretionary voting on executive compensation matters to implement this requirement.[186] Under these amended exchange rules, for issuers with a class of securities listed on a national securities exchange, broker discretionary voting of uninstructed shares is not permitted for a shareholder vote on executive compensation or a shareholder vote on the frequency of the shareholder vote on executive compensation.[187]

3. Relationship to Shareholder Votes on Executive Compensation for TARP Companies

Issuers that have received financial assistance under the Troubled Asset Relief Program, or TARP, are required to conduct a separate annual shareholder vote to approve

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[184] See Section II.C.2 of the Proposing Release.

[185] 15 U.S.C. 78f(b).

[186] See, e.g., Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change to Amend NYSE Rule 452 and Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting on Executive Compensation Matters, Release No. 34-62874, SR-NYSE-2010-59 (Sept. 9, 2010); Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Prohibit Members from Voting Uninstructed Shares on Certain Matters, Release No. 34-62992, SR-NASDAQ-2010-114 (Sept. 24, 2010).

[187] Broker discretionary voting in connection with merger or acquisition transactions also is not permitted under rules of the national securities exchanges. See, e.g., NYSE Rule 452.

executive compensation during the period in which any obligation arising from the financial assistance provided under the TARP remains outstanding.[188]

Because the vote required to approve executive compensation pursuant to the Emergency Economic Stabilization Act of 2008, or EESA, is effectively the same vote that would be required under Section 14A(a)(1), as we indicated in the Proposing Release,[189] we believe that a shareholder vote to approve executive compensation under Rule 14a-20 for issuers with outstanding indebtedness under the TARP would satisfy Rule 14a-21(a). Consequently, we noted in the Proposing Release that we would not require an issuer that conducts an annual shareholder advisory vote to approve executive compensation pursuant to EESA to conduct a separate shareholder advisory vote on executive compensation under Section 14A(a)(1) until that issuer has repaid all indebtedness under the TARP. Such an issuer would be required to include a separate shareholder advisory vote on executive compensation pursuant to Section 14A(a)(1) and Rule 14a-21(a) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP. Commentators on this issue generally expressed support for our proposed approach to companies with outstanding indebtedness under TARP,[190] and we have determined to implement this approach under the rules as adopted.

Even though issuers with outstanding indebtedness under the TARP have a separate statutory requirement to provide an annual shareholder vote on executive compensation so

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[188] Section 111(e) of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. 5221. See also Rule 14a-20.

[189] See Section II.C.3 of the Proposing Release.

[190] See, e.g., letters from ABA, CalPERS, COPERA, Davis Polk, FSR, PGGM, and RAILPEN & USS.

long as they are indebted under the TARP, absent exemptive relief these issuers would be required, pursuant to Section 14A(a)(2) of the Exchange Act, to provide a separate shareholder advisory vote on the frequency of shareholder votes on executive compensation for the first annual or other such meeting of shareholders on or after January 21, 2011. In our view, however, because such issuers have a requirement to conduct an annual shareholder advisory vote on executive compensation so long as they are indebted under the TARP, a shareholder advisory vote on the frequency of such votes while the issuer remains subject to a requirement to conduct such votes on an annual basis would not serve a useful purpose. We expressed these views in the Proposing Release[191] and, as noted above, commentators supported our views on this point.

We have considered, therefore, whether issuers with outstanding indebtedness under the TARP should be subject to the requirements of Section 14A(a)(2) of the Exchange Act. We do not believe it is necessary or appropriate in the public interest or consistent with the protection of investors to require an issuer to conduct a shareholder advisory vote on the frequency of the shareholder advisory vote on executive compensation when the issuer already is required to conduct advisory votes on executive compensation annually regardless of the outcome of such frequency vote. Because Section 14A(a)(2) would burden TARP issuers and their shareholders with an additional vote while providing little benefit to either the issuer or its shareholders, we continue to believe an exemption by rule is appropriate, pursuant to both the exemptive authority granted by Section 14A(e) of the Exchange Act[192]

[191] See Section II.C.3 of the Proposing Release.

[192] Exchange Act Section 14A(e) provides that "the Commission may, by rule or order, exempt an issuer or class of issuers from the requirement" under Sections 14A(a) or 14A(b). Section 14A(e) further provides that

and the Commission's general exemptive authority pursuant to Section 36(a)(1) of the Exchange Act.[193] As a result, Rule 14a-21(b), as we are adopting it, exempts an issuer with outstanding indebtedness under the TARP from the requirements of Rule 14a-21(b) and Section 14A(a)(2) until the issuer has repaid all outstanding indebtedness under the TARP. Similar to the approach for shareholder advisory votes under Rule 14a-21(a), such an issuer would be required to include a separate shareholder advisory vote on the frequency of shareholder advisory votes on executive compensation pursuant to Section 14A(a)(2) and Rule 14a-21(b) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP.

D. Disclosure of Golden Parachute Arrangements and Shareholder Approval of Golden Parachute Arrangements

1. General

Section 14A(b)(1) of the Exchange Act requires all persons making a proxy or consent solicitation seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of an issuer's assets to provide disclosure, in accordance with rules we promulgate, of any agreements or understandings that the soliciting person has with its named executive officers (or that it has with the named

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"in determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirements under [Section 14A(a) and 14A(b)] disproportionately burdens small issuers." In adopting this exemption, the Commission considered whether the requirements of Section 14A(a) and (b) as applied to TARP recipients to conduct a shareholder advisory vote on the frequency of say-on-pay votes could disproportionately burden small issuers. As described further in Section II.E below, we have also considered whether the provision as a whole disproportionately burdens small issuers. We note, in addition, that to the extent a TARP recipient is a small issuer, it will be subject to the exemption.

[193] 15 U.S.C. 78 mm(a)(1). Exchange Act Section 36(a)(1) provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

executive officers of the acquiring issuer) concerning compensation that is based on or otherwise relates to the merger transaction. In addition, Section 14A(b)(1) requires disclosure of any agreements or understandings that an acquiring issuer has with its named executive officers and that it has with the named executive officers of the target company in transactions in which the acquiring issuer is making a proxy or consent solicitation seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of an issuer's assets. Section 14A(b)(1) of the Exchange Act requires the disclosure to be in a "clear and simple form in accordance with regulations to be promulgated by the Commission" and to include "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer."[194]

Under existing Commission rules, a target issuer soliciting shareholder approval of a merger is required to describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of any person who has been an executive officer or director since the beginning of the last fiscal year in any matter to be acted upon.[195] In response to this requirement, target issuers often include disclosure in their proxy statements about compensation arrangements that may be payable to a target issuer's executive officers and directors in connection with the transaction. In addition, under our existing rules, issuers are required to include in annual reports and annual meeting proxy statements detailed information in accordance with Item 402(j) of Regulation S-K about payments that may be

[194] Exchange Act Section 14A(b)(1).

[195] Item 5 of Schedule 14A.

made to named executive officers upon termination of employment or in connection with a change in control.[196] The Item 402(j) disclosure is provided based on year-end information and various assumptions, and generally does not reflect any actual termination or termination event.[197]

2. Item 402(t) of Regulation S-K

We proposed Item 402(t) of Regulation S-K to require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats. This disclosure will be required in merger proxies and other disclosure documents for similar transactions as described in Section II.D.3 below. After considering the comments on this proposal, we are adopting Item 402(t) as proposed, with some modifications.

a. Proposed Amendments

We proposed Item 402(t) of Regulation S-K to require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats. We based our proposals on Section 14A(b)(1)'s requirement that disclosure of the golden parachute compensation in any proxy or consent solicitation to approve an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all assets be "in a clear and simple form in accordance with regulations to be promulgated by the Commission" and

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196 See Item 402(j) of Regulation S-K [17 CFR 229.402(j)], Item 8 of Schedule 14A, and Item 11 of Form 10-K. Item 402(j) disclosure is required in both Annual Reports on Form 10-K and in annual meeting proxy statements, though such disclosure is typically provided in annual meeting proxy statements and incorporated into the Form 10-K by reference pursuant to General Instruction G(3) of Form 10-K. References to "annual meeting proxy statements" in this context are meant to encompass both locations for the disclosure.

197 See Instruction 1 to Item 402(j), which requires quantitative disclosure applying the assumptions that the triggering event took place on the last business day of the issuer's last completed fiscal year, and the price per share of the issuer's securities is the closing market price as of that date. Where a triggering event has actually occurred for a named executive officer who was no longer serving as a named executive officer of the issuer at the end of the last completed fiscal year, Instruction 4 to Item 402(j) requires Item 402(j) disclosure for that named executive officer only for that triggering event.

include "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer."[198]

Consistent with Section 14A(b)(1) of the Exchange Act, agreements or understandings between a target issuer conducting a solicitation and its named executive officers would be subject to disclosure under proposed Item 402(t). In addition, because golden parachute compensation arrangements also may involve agreements or understandings between the acquiring issuer and the named executive officers of the target issuer, we proposed that Item 402(t) require disclosure of this compensation in addition to the disclosure mandated by Section 14A(b)(1). Specifically, to cover the full scope of potential golden parachute compensation applicable to the transaction, we proposed that Item 402(t) require disclosure of all golden parachute compensation relating to the merger among the target and acquiring issuers and the named executive officers of each.[199]

We did not propose to amend the requirements for golden parachutes disclosure in annual meeting proxy statements, although, under our proposal companies would be permitted to provide disclosure in annual meeting proxies in accordance with the new requirement.[200]

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[198] Exchange Act Section 14A(b)(1).

[199] However, because any agreements between a soliciting target company's named executive officers and the acquiring company are beyond the scope of the disclosure required by Section 14A(b)(1), we did not propose to subject such agreements to the Rule 14a-21(c) shareholder advisory vote required by Section 14A(b)(2) and Rule 14a-21(c). See discussion of Rule 14a-21(c) in Section II.D.4 below.

[200] See Sections II.D.2 and II.D.4 below.

b. Comments on the Proposed Amendments

Comments on the proposal were generally favorable. We requested comment on a number of aspects of proposed Item 402(t), which we describe in more detail below.

i. General Comments on the Proposed Item 402(t) Table

We proposed that the Item 402(t) table would present quantitative disclosure of the individual elements of compensation that a named executive officer would receive that are based on or otherwise relate to the merger, acquisition, or similar transaction, and the total for each named executive officer.

Many commentators agreed that Item 402(t) as proposed would elicit disclosure of all elements of golden parachute compensation "in a clear and simple form" as required by Section 14A(b)(1).[201] In addition, some commentators suggested that Item 402(t) should be clarified to require disclosure of only compensation triggered by the subject transaction so that issuers are not required to disclose any golden parachute compensation that would not be triggered by the subject transaction.[202]

ii. Comments on the Elements of Compensation and Presentation of the Proposed Item 402(t) Table

As proposed, Item 402(t) would not have any de minimis exceptions for compensation below a certain dollar threshold and would not require disclosure of previously vested equity and pension benefits. Some commentators urged that Item 402(t) should have

[201] See, e.g., letters from Davis Polk, PGGM, and WorldatWork.

[202] See, e.g., letters from Davis Polk, Society of Corp. Sec., and Wachtell.

de minimis exceptions, like Item 402(j),[203] because, in their view, the exclusion of such immaterial amounts would not be inconsistent with Section 14A(b)(1)'s requirement to disclose the total amount of golden parachute compensation.[204] In addition, some commentators asserted that we should amend Item 402(j) rather than propose a new Item 402(t).[205]

Most commentators agreed with the proposed approach to omit previously vested equity and pension benefits from the table,[206] as including such amounts in the table could lead to confusion by overstating the total compensation.[207] Other commentators, however, recommended that such compensation be disclosed in the table[208] to make the compensation disclosure more comprehensive.[209]

A number of commentators also requested various other changes to the proposed table. Some commentators argued that issuers should have more flexibility in drafting the table to fit their individual circumstances,[210] or that issuers should be permitted to differentiate between cash severance compensation and cash amounts for outstanding awards

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203 See, e.g., letters from Compensia, Davis Polk, McGuireWoods, PM&P, and Sullivan.

204 See letter from Compensia.

205 See, e.g., letters from Business Roundtable and Meridian.

206 See, e.g., letters from ABA, Center on Exec. Comp., Davis Polk, FSR, ICGN, NACD, Pfizer, PM&P, Protective Life, and WorldatWork.

207 See letter from ABA.

208 See, e.g., letters from Barnard, Glass Lewis, PGGM, and Senator Levin.

209 See, e.g., letter from Glass Lewis.

210 See letter from ABA.

that have been accelerated.[211] With respect to employment agreements, most commentators supported our proposed approach to exclude disclosure of employment agreements from the Item 402(t) table,[212] though some commentators argued that such employment agreements should be quantified and included in the tabular disclosure to provide more comprehensive disclosure.[213] A number of commentators supported the footnote identification of amounts of "single-trigger" and "double-trigger"[214] compensation elements,[215] with some commentators recommending that the disclosure be included in the main text rather than in footnotes if an issuer believes it would be useful to the presentation.[216] One commentator, however, indicated that identification of single-trigger and double-trigger elements should not be required as it believed this disclosure would not be useful to investors.[217]

We also requested comment with respect to the appropriate measurement for issuer stock price for tabular disclosure in proxy statements for mergers or similar transactions. A number of commentators agreed with our proposed approach to calculate such amounts based on the issuer's share price as of the latest practicable date,[218] though many other

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211 See letter from Towers Watson.

212 See, e.g., letters from ABA, Center on Exec. Comp., Compensia, Davis Polk, Frederic Cook, FSR, Hermes, and PGGM.

213 See, e.g., letters from Glass Lewis, NACD, and PIRC.

214 A "double-trigger" arrangement requires that the executive's employment be terminated without cause or that the executive resign for good reason within a limited period of time after the change-in-control to trigger payment. A "single-trigger" arrangement does not require such a termination or resignation after the change-in-control to trigger payment.

215 See, e.g., letters from CalPERS, CII, FSR, Hermes, ICGN, and PGGM.

216 See, e.g., letters from ABA and NACD.

217 See letter from Protective Life.

218 See, e.g., letters from ABA, Center on Exec. Comp., and ICGN.

commentators suggested that the share price contemplated by the deal should be used, if available,[219] with an alternative to use the average closing price over the first five business days following public announcement of the transaction.[220] One commentator expressed a concern that the share price as of the latest practicable date could lead to potential gaming of the price by issuers.[221]

iii. Comments on Individuals Subject to Item 402(t) Disclosure

Some commentators indicated that requiring disclosure under Item 402(t) of a broader group of individuals than is required by Exchange Act Section 14A(b)(1) would be potentially confusing to investors[222] as such disclosure goes beyond the requirements of Section 14A and could lead to as many as three separate tables.[223] Different commentators supported disclosure of the broader group of individuals[224] in order to provide the full picture of compensation being received in connection with the transaction.[225]

Most commentators supported the proposal that issuers would not be required to include Item 402(t) information with respect to individuals who would have been among the most highly compensated executive officers but for the fact that they were not serving as an

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[219] See, e.g., letters from Davis Polk, PM&P, and Sullivan.

[220] See letter from PGGM.

[221] See letter from PGGM.

[222] See, e.g., letters from Center on Exec. Comp., Davis Polk, FSR, NACD, Pfizer, PGGM, Protective Life, Towers Watson, Wachtell, Lipton, Rosen & Katz ("Wachtell"), and WorldatWork.

[223] See letter from Davis Polk.

[224] See, e.g., letters from CalPERS, ICGN, PIRC, and Senator Carl Levin ("Senator Levin").

[225] See letter from PIRC.

executive officer at the end of the last completed fiscal year.[226] One commentator, however, argued that issuers should be permitted to include disclosure of the compensation of such individuals to conform to the presentation of compensation in prior filings and that we should clarify that the named executive officers subject to Item 402(t) is determined in the same manner as under Item 5.02(e) of Form 8-K.[227]

iv. Comments on Item 402(t) Disclosure in Annual Meeting Proxy Statements

In the Proposing Release, we did not propose requiring Item 402(t) disclosure in annual meeting proxy statements. Most commentators agreed that the proposed Item 402(t) narrative and tabular disclosure should not be required in annual meeting proxy statements[228] given the costs and burdens this would impose on issuers.[229] However, other commentators recommended that such disclosure should be required in annual meeting proxy statements,[230] noting that such information plays a key part in shareholder evaluation of an issuer's compensation program.[231]

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[226] See, e.g., letters from Davis Polk, ICGN, PGGM, and PM&P.

[227] See letter from ABA.

[228] See, e.g., letters from ABA, Center for Exec. Comp., Compensia, Davis Polk, Frederic Cook, FSR, Hermes Equity Ownership Services ("Hermes"), ICGN, McGuireWoods, PGGM, PM&P, and WorldatWork.

[229] See, e.g., letter from Frederic Cook.

[230] See, e.g., letters from AFSCME, Protective Life, and Public Citizen.

[231] See letter from AFSCME.

c. Final Rule

After considering comments, we are adopting Item 402(t) of Regulation S-K as proposed, with some modifications, to require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats.

i. Item 402(t) Table and Narrative Requirements

We are adopting the following new table, as proposed:

Golden Parachute Compensation

Name (a)	Cash ($) (b)	Equity ($) (c)	Pension/ NQDC ($) (d)	Perquisites/ Benefits ($) (e)	Tax Reimbursement ($) (f)	Other ($) (g)	Total ($) (h)
PEO							
PFO							
A							
B							
C							

The table presents quantitative disclosure of the individual elements of compensation that an executive would receive that are based on or otherwise relate to the merger, acquisition, or similar transaction, and the total for each named executive officer.[232] As proposed and adopted, elements that will be separately quantified and included in the total will be any cash severance payment (e.g., base salary, bonus, and pro-rata non-equity incentive plan[233] compensation payments) (column (b)); the dollar value of accelerated stock awards, in-the-money option awards for which vesting would be accelerated, and payments

[232] Item 402(t)(2) of Regulation S-K.

[233] As defined in Item 402(a)(6)(iii) of Regulation S-K.

in cancellation of stock and option awards (column (c)); pension and nonqualified deferred compensation benefit enhancements (column (d)); perquisites and other personal benefits and health and welfare benefits (column (e)); and tax reimbursements (e.g., Internal Revenue Code Section 280G tax gross-ups) (column (f)). Consistent with the proposal, we are adopting an "Other" column of the table for any additional elements of compensation not specifically includable in the other columns of the table (column (g)). This column, like the columns for the other elements, will require footnote identification of each separate form of compensation reported. The final column in the table requires disclosure, for each named executive officer, of the aggregate total of all such compensation (column (h)).[234] We are adopting the table as proposed, with a requirement for separate footnote identification of amounts attributable to "single-trigger" arrangements and amounts attributable to "double-trigger" arrangements, so that shareholders can readily discern these amounts.

As proposed and adopted, the tabular disclosure required by Item 402(t) requires quantification with respect to any agreements or understandings, whether written or unwritten, between each named executive officer and the acquiring company or the target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets. The table will quantify cash severance, equity awards that are accelerated or cashed out, pension and nonqualified deferred compensation

[234] Exchange Act Section 14A(b)(1) requires disclosure of "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer."

enhancements, perquisites, and tax reimbursements. In addition, the table requires disclosure and quantification of the value of any other compensation related to the transaction.[235]

However, as adopted, Item 402(t) will require tabular and narrative disclosure in a proxy statement soliciting shareholder approval of a merger or similar transaction or a filing made with respect to a similar transaction only of compensation that is based on or otherwise relates to the subject transaction.[236] We agree with commentators that it would not be useful to shareholders to require disclosure of amounts that would not be paid or payable in connection with the transaction subject to shareholder approval.

To implement the statutory mandate to disclose the conditions upon which the compensation may be paid or become payable, as proposed and adopted, Item 402(t)[237] requires issuers to describe any material conditions or obligations applicable to the receipt of payment, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, their duration, and provisions regarding waiver or breach.[238] We are also adopting a requirement, as proposed, to provide a description of the specific circumstances that would trigger payment,[239] whether the payments would or could be lump

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[235] Consistent with our proposals, we have adopted Instruction 3 to Item 402(t)(2) to provide, like Instruction 1 to Item 402(j), that in the event uncertainties exist as to the provision of payments and benefits, or the amounts involved, the issuer is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimate in its disclosure. Unlike Item 402(j), Item 402(t) does not permit the disclosure of an estimated range of payments.

[236] Instruction 1 to Item 402(t)(2).

[237] Item 402(t)(3) of Regulation S-K.

[238] Item 402(t)(3)(iii) of Regulation S-K.

[239] Item 402(t)(3)(i) of Regulation S-K.

sum, or annual, and their duration, and by whom the payments would be provided,[240] and any material factors regarding each agreement.[241] These narrative items are modeled on the narrative disclosure required with respect to termination and change-in-control agreements.[242]

ii. Elements of Compensation and Presentation of Item 402(t) Table

In response to commentators' requests for greater flexibility to facilitate clear presentation, we note that under our final rule issuers are permitted to add additional named executive officers, and additional columns or rows to the tabular disclosure, such as to disclose cash severance separately from other cash compensation or to distinguish "single-trigger" and "double-trigger" arrangements, so long as such disclosure is not misleading.

As noted in the Proposing Release,[243] we considered whether making the disclosure requirements in Item 402(j) applicable to transactions enumerated in Section 14A(b)(1), rather than adopting a new disclosure item for purposes of Section 14A(b)(1), would be an appropriate approach to satisfy the requirements of the Act. However, certain elements required by Section 14A(b)(1) are not included in Item 402(j). Specifically, Item 402(j) does not require disclosure about arrangements that do not discriminate in scope, terms or operation in favor of executive officers and that are available generally to all salaried

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[240] Item 402(t)(3)(ii) of Regulation S-K.

[241] Item 402(t)(3) of Regulation S-K. Such material factors would include, for example, provisions regarding modifications of outstanding options to extend the vesting period or the post-termination exercise period, or to lower the exercise price.

[242] Item 402(j) of Regulation S-K.

[243] See Section II.D.2 of the Proposing Release.

employees,[244] permits exclusion of de minimis perquisites and other personal benefits,[245] and does not require presentation of an aggregate total of all compensation that is based on or otherwise relates to a transaction.[246]

Despite the views of some commentators, we continue to believe that Item 402(t) should not permit exclusion of de minimis perquisites and other personal benefits because exclusion of these amounts would be inconsistent with Section 14A(b)(1), which requires disclosure of "the aggregate total of all such compensation that may [...] be paid or become payable [...]." Moreover, we continue to believe that the Section 14A(b)(1) requirement to disclose the information "in a clear and simple form" is best satisfied through the use of tabular disclosure, which Item 402(j) does not require.

Item 402(t), like Item 402(j),[247] does not require separate disclosure or quantification with respect to compensation disclosed in the Pension Benefits Table and Nonqualified Deferred Compensation Table. Item 402(t), as proposed and adopted, also does not require disclosure or quantification of previously vested equity awards because these award amounts are vested without regard to the transaction. We agree with the views expressed by some commentators that previously vested equity awards are not compensation "that is based on or otherwise relates to" the transaction. Similarly, after reviewing the comments, we continue

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[244] Instruction 5 to Item 402(j).

[245] See Instruction 2 to Item 402(j), which permits exclusion of perquisites and other personal benefits or property if the aggregate amount of such compensation will be less than $10,000.

[246] As proposed, we are adopting conforming changes to Item 402(a)(6)(ii) [17 CFR 229.402(a)(6)(ii)] and Item 402(m)(5)(ii) [17 CFR 229.402(m)(5)(ii)] of Regulation S-K to clarify that information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation , in favor of executive officers or directors of the company and that are generally available to all salaried employees must be included in disclosure pursuant to proposed Item 402(t).

[247] See Instruction 3 to Item 402(j).

to believe that we should not require tabular disclosure and quantification of compensation from bona fide post-transaction employment agreements to be entered into in connection with the merger or acquisition transaction. We agree with the views expressed by many commentators that future employment arrangements are not compensation "that is based on or otherwise relates to" the transaction.[248]

Under the final rule, where Item 402(t) disclosure is included in an annual meeting proxy statement,[249] the price per share amount will be calculated based on the closing market price per share of the issuer's securities on the last business day of the issuer's last completed fiscal year, as proposed,[250] consistent with quantification standards used in Item 402(j). However, in response to comments, we have modified how the issuer stock price will be measured for calculating dollar amounts for the tabular disclosure required by Item 402(t) in connection with a transactional filing. In a proxy statement soliciting shareholder approval of a merger or similar transaction or a filing made with respect to a similar transaction, Item 402(t)'s tabular quantification of dollar amounts based on issuer stock price will be based on the consideration per share, if such value is a fixed dollar amount, or otherwise on the average closing price per share over the first five business days following the first public announcement of the transaction.[251]

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[248] Information regarding such future employment agreements is subject to disclosure pursuant to Item 5(a) and Item 5(b)(xii) of Schedule 14A to the extent that such agreements constitute a "substantial interest" in the matter to be acted upon.

[249] A company may choose to include the disclosure in the annual meeting proxy statement in order for the Section 14A(a)(1) shareholder vote to satisfy the exception from the merger proxy separate vote. See Section II.D.4 below.

[250] Instruction 2 to Item 402(t)(2).

[251] Instruction 1 to Item 402(t)(2).

iii. Individuals Subject to Item 402(t) Disclosure

We continue to believe that Item 402(t) disclosure should cover a broader group of individuals than is required by Section 14A(b). Because compensation arrangements may involve agreements or understandings between the acquiring issuer and the named executive officers of the target issuer, Item 402(t), as proposed and adopted, requires disclosure of the full scope of golden parachute compensation applicable to the transaction. We agree with commentators and continue to believe that shareholders may find disclosure about these arrangements that are not otherwise required to be disclosed by Section 14A(b) informative to their voting decisions.

As both proposed and adopted, we have included an instruction providing that Item 402(t) disclosure need not be provided for persons who are named executive officers because they would have been among the most highly compensated executive officers but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year.[252] However, in response to comments, we are clarifying that where Item 402(t) disclosure is provided in a proxy statement soliciting shareholder approval of a merger or similar transaction or a filing made with respect to a similar transaction, this instruction will be applied with respect to the named executive officers for whom disclosure was required in the issuer's most recent filing requiring Summary Compensation Table disclosure.[253]

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[252] Instruction 1 to Item 402(t), which requires Item 402(t) disclosure for individuals covered by Items 402(a)(3)(i), (ii) and (iii), and for smaller reporting companies, the individuals covered by Items 402(m)(2)(i) and (ii). Item 402(t) disclosure will not be required for individuals for whom Item 402(t) disclosure otherwise is required by Item 402(a)(3)(iv), and for smaller reporting companies, by Item 402(l)(2)(iii).

[253] Instruction 1 to Item 402(t)(2) and Instruction 2 to Item 1011(b). This is similar to the approach used in Instruction 4 to Item 5.02 of Form 8-K.

iv. Item 402(t) Disclosure in Annual Meeting Proxy Statements

We are not requiring Item 402(t) disclosure in annual meeting proxy statements. We agree with the views expressed by most commentators that the proposed Item 402(t) narrative and tabular disclosure should not be required in annual meeting proxy statements given the costs and burdens this would impose on issuers. We believe that the requirements of Item 402(j) provide sufficient information to shareholders in that context, and note that issuers may also include disclosure pursuant to Item 402(t) voluntarily if they believe it would permit shareholders to gain a better understanding of their compensation programs.

An issuer seeking to satisfy the exception from the separate merger proxy shareholder vote under Section 14A(b)(2) and Rule 14a-21(c) by including Item 402(t) disclosure in an annual meeting proxy statement soliciting the shareholder vote required by Section 14A(a)(1) and Rule 14a-21(a)[254] will be able to satisfy Item 402(j) disclosure requirements with respect to a change-in-control of the issuer by providing the disclosure required by Item 402(t).[255] The issuer must still include in an annual meeting proxy statement disclosure in accordance with Item 402(j) about payments that may be made to named executive officers upon termination of employment.

3. Amendments to Schedule 14A, Schedule 14C, Schedule 14D-9, Schedule 13E-3, Schedule TO, and Item 1011 of Regulation M-A

We proposed amendments to require that the disclosure set forth in Item 402(t) of Regulation S-K be included in merger proxies as well as filings for other transactions not

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[254] This exception and the comments we received on the exception are discussed in Section II.D.4 below.

[255] We note also that one example of material information to be addressed in CD&A is the basis for selecting particular termination or change-in-control events as triggering payment (e.g., the rationale for providing a single trigger for payment in the event of a change-in-control). See Item 402(b)(2)(xi) of Regulation S-K.

referenced in the Act. After considering the comments received, we are adopting the amendments to Schedule 14A, Schedule 14C, Schedule 14D-9, Schedule 13E-3, and Item 1011 of Regulation M-A as proposed with slight modifications to Item 1011 of Regulation M-A. We are also adopting an amendment to Schedule TO to clarify that the Item 402(t) disclosure is not required in third-party bidders' tender offer statements, so long as the transactions are not also Rule 13e-3 going-private transactions.

a. Proposed Amendments

We proposed amendments to Items 5(a) and (b) of Schedule 14A under the Exchange Act, as well as conforming changes to Item 3 of Schedule 14C, Item 1011(b) of Regulation M-A, Item 15 of Schedule 13E-3 and Item 8 of Schedule 14D-9. These proposals were intended to implement the disclosure requirements in Section 14A(b)(1) as well as to extend the new disclosure requirements to similar transactions by requiring that the disclosure set forth in Item 402(t) of Regulation S-K be included in any proxy or consent solicitation material seeking shareholder approval of an acquisition, merger, consolidation, or proposed sale or other distribution of all or substantially all the assets of the issuer. Our proposals would require such disclosure not only in a proxy or consent solicitation relating to such a transaction, as required by the Act, but also in the following:

- information statements filed pursuant to Regulation 14C;
- proxy or consent solicitations that do not contain merger proposals but require disclosure of information under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A;

- registration statements on Forms S-4 and F-4 containing disclosure relating to mergers and similar transactions;
- going private transactions on Schedule 13E-3; and
- third-party tender offers on Schedule TO and Schedule 14D-9 solicitation/recommendation statements.

We also proposed amendments to Item 1011(b) of Regulation M-A that would require the bidder[256] in a third-party tender offer to provide information in its Schedule TO about a target's golden parachute arrangements only to the extent the bidder has made a reasonable inquiry about the golden parachute arrangements and has knowledge of such arrangements. In addition, we proposed exceptions to both the disclosure requirement under Item 1011(b) for both bidders and targets in third-party tender offers and filing persons in Rule 13e-3 going-private transactions where the target or subject company is a foreign private issuer, and to the disclosure obligation under Item 402(t) with respect to agreements and understandings with senior management of foreign private issuers where the target or acquirer is a foreign private issuer.

b. Comments on the Proposed Amendments

Comments on the proposal were generally favorable. A number of commentators expressed support for our proposed approach to require disclosure of golden parachute arrangements in connection with other transaction not specifically referenced in the Act.[257] One commentator objected that the proposal goes beyond the scope of the statute by

[256] "Bidder" is defined in Rule 14d-1(g)(2) [17 CFR 240.14d-1(g)(2)].

[257] See, e.g., letters from ICGN and PGGM.

requiring disclosure of golden parachute compensation in connection with tender and exchange offers.[258] One commentator also questioned whether such disclosure should be required in third-party tender offers, given the difficulty bidders may face in obtaining accurate information regarding a target company's golden parachute arrangements.[259] Commentators also supported excluding foreign private issuers from Item 402(t) disclosure requirements for bidders and target companies in third-party tender offers and filing persons in Rule 13e-3 going-private transactions.[260]

c. **Final Rule**

After considering the comments, we are adopting the amendments to Schedule 14A, Schedule 14C, Schedule 14D-9, Schedule 13E-3, and Item 1011 of Regulation M-A as proposed, with slight modifications to Item 1011 of Regulation M-A. We are also adopting an amendment to Schedule TO to provide that bidders in third-party tender offers are not required to provide the disclosure required by Item 1011(b) of Regulation M-A.

Issuers could structure transactions in a manner that avoids implicating Section 14(a) of the Exchange Act (e.g., tender offers and certain Rule 13e-3 going-private transactions), while still effectively seeking the consent of shareholders with respect to their investment decision (e.g., whether or not to tender their shares or approve a going-private transaction, in instances where such going-private transactions are not subject to Regulation 14A). For these reasons, we continue to believe that requiring Item 402(t) disclosure in all such

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[258] See letter from Wachtell.

[259] See letter from ABA.

[260] See, e.g., letters from ABA, ICGN, and PGGM.

transactions furthers the purposes of Section 14A(b) of the Exchange Act and would minimize the regulatory disparity that might otherwise result from treating such transactions differently. Thus, we are adopting amendments that would require the Item 402(t) disclosure in various transactions, whether a merger, acquisition, a Rule 13e-3 going-private transaction or a tender offer.[261]

In addition, we note that acquiring companies may solicit proxies to approve the issuance of shares or a reverse stock split in order to conduct a merger transaction, and that such proxy statements are required to include disclosure of information required under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A. Thus, we are also adopting amendments that would require the Item 402(t) disclosure in those proxy statements that are required to include disclosure of information required under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A.[262] The shareholder advisory vote required by Section 14A(b)(2), however, will not be extended to transactions beyond those specified in that section.

We have revised the final rule in response to comments to provide that bidders in third-party tender offers will not be required to comply with Item 1011(b), which calls for Item 402(t) disclosure. We are persuaded that bidders may face difficulties in obtaining the

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[261] As adopted, companies filing solicitation/recommendation statements on Schedule 14D-9 in connection with third-party tender offers will be obligated to provide this additional disclosure. See Item 8 of Schedule 14D-9. However, as explained below, bidders filing offer statements on Schedule TO will not have a similar obligation. See Item 11 of Schedule TO.

[262] See Item 5(a)(5) and Item 5(b)(3) of Schedule 14A, which will require acquiring companies to include the Item 402(t) disclosure with respect to each named executive officer of both the acquiring issuer and the target issuer.

information necessary to provide such disclosure[263] and that it is not necessary to require a bidder to provide this information since the target companies will be required to provide the Item 402(t) golden parachute compensation disclosure in Schedule 14D-9 filed by the tenth business day from the date the tender offers are first published, sent or given to security holders.[264] We believe this revision to the proposal will alleviate a potential burden that bidders in third-party tender offers may encounter while still accomplishing our goal of minimizing the regulatory disparity that might otherwise result from treating third-party tender offers differently than other transactions described in this section by retaining the disclosure requirement in Schedule 14D-9. However, we did not adopt a similar revision to the proposed changes to Schedule 13E-3; therefore, the disclosure of golden parachute arrangements will be required in third-party tender offers that are also Rule 13e-3 going-private transactions.[265] In light of the revision to the proposal, we are not adopting the instruction to Item 1011(b) of Regulation M-A that would have allowed bidders to provide the disclosure only to the extent the information was known after making a reasonable inquiry. Therefore, Item 1011(b), as adopted, does not include the proposed instruction.

In addition, we are adopting as proposed an exception to the disclosure requirement under Item 1011(b) for targets in third-party tender offers and filing persons in Rule 13e-3 going-private transactions where the target or subject company is a foreign private issuer. Consistent with the proposal, we are also adopting an exception to the disclosure obligation

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263 See letter from ABA.

264 We are adopting an amendment to Schedule TO to avoid imposing on bidders the obligation to provide such disclosure. See Item 11 of Schedule TO.

265 See Item 15 of Schedule 13E-3.

under Item 402(t) with respect to agreements and understandings with senior management of foreign private issuers where the target or acquirer is a foreign private issuer.[266] We agree with commentators and believe such accommodations are appropriate in light of our long-standing accommodation to foreign private issuers regarding compensation disclosure.[267]

4. Rule 14a-21(c)

Section 14A(b)(2) generally requires a separate shareholder advisory vote on golden parachute compensation arrangements required to be disclosed under Section 14A(b)(1) in connection with mergers and similar transactions. A separate shareholder advisory vote would not be required on golden parachute compensation if disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior advisory vote of shareholders under Section 14A(a)(1) of the Exchange Act.

We proposed Rule 14a-21(c) to implement these requirements. We are adopting this rule substantially as proposed with some minor changes in response to comments.

a. Proposed Rule

Proposed Rule 14a-21(c) would require issuers to conduct a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, consistent with Section 14A(b)(2). This shareholder advisory vote would be required only with respect to the golden parachute agreements or understandings required to be disclosed by Section 14A(b)(1), as disclosed pursuant to proposed Item 402(t) of

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[266] Instruction 2 to Item 402(t).

[267] See, e.g., Item 402(a)(1) of Regulation S-K, and Items 6.B and 6.E.2 of Form 20-F [17 CFR 249.220f].

Regulation S-K. We proposed Rule 14a-21(c) to require a shareholder advisory vote only on the golden parachute compensation agreements or understandings for which Section 14A(b)(1) requires disclosure and Section 14A(b)(2) requires a shareholder vote. Consistent with Section 14A(b)(2), as proposed, issuers would not be required to include in the merger proxy a separate shareholder vote on golden parachute compensation disclosed in accordance with Item 402(t) of Regulation S-K if Item 402(t) disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior vote of shareholders under Section 14A(a)(1) of the Exchange Act and Rule 14a-21(a).

b. Comments on the Proposed Amendments

Comments on the proposal were generally positive. As noted above, some commentators indicated that requiring disclosure under Item 402(t) of a broader group of individuals than would be covered by the Rule 14a-21(c) shareholder advisory vote would be potentially confusing to investors[268] as such disclosure goes beyond the requirements of Section 14A and could lead to as many as three separate tables.[269]

Most commentators agreed with our proposed approach that if golden parachute arrangements were modified or amended subsequent to being subject to the annual shareholder vote under Rule 14a-21(a), a separate shareholder vote in the merger proxy should be required to cover only the changes to such arrangements, [270] given that full

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268 See, e.g., letters from Center on Exec. Comp., Davis Polk, FSR, NACD, Pfizer, PGGM, Protective Life, Towers Watson, Wachtell, Lipton, Rosen & Katz ("Wachtell"), and WorldatWork.

269 See letter from Davis Polk.

270 See, e.g., letters from ABA, Frederic Cook, McGuireWoods, NACD, PGGM, Protective Life, and WorldatWork.

disclosure of the full set of arrangements will also be provided.[271] Some commentators, however, believed that in this circumstance the subsequent vote should cover the entire set of golden parachute arrangements, not just the changes, so that shareholders have the opportunity to vote on the full complement of compensation that would be payable.[272]

In addition, some commentators recommended that certain changes to golden parachute arrangements that were altered or amended subsequent to being subject to the shareholder advisory vote under Rule 14a-21(a) should be exempt from a separate shareholder advisory vote in a merger proxy. In their view, there should be an exemption for certain routine, non-substantive changes, such as where the same compensation arrangements apply to new named executive officers who were not included in the prior disclosure that was subject to the shareholder vote,[273] subsequent grants in the ordinary course of additional awards subject to the same acceleration terms that applied to awards covered by a previous vote,[274] routine changes in salary subsequent to the prior vote,[275] and changes that result in a reduction in compensation value.[276] Other commentators stated that there should be no exceptions and that a new golden parachute vote should be required if there have been any

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[271] See, e.g., letter from ABA.

[272] See, e.g., letter from CII.

[273] See, e.g., letters from McGuireWoods, PM&P, Protective Life, Steve Quinlivan ("Quinlivan"), and Sullivan.

[274] See, e.g., letters from Business Roundtable, Compensia, FSR, McGuireWoods, PM&P, Protective Life, Sullivan, and Wachtell.

[275] See letter from McGuireWoods.

[276] See, e.g., letters from Frederic Cook, Meridian, and Protective Life.

changes since the arrangements were subject to the Rule 14a-21(a) shareholder advisory vote.[277]

c. Final Rule

After considering the comments, we are adopting Rule 14a-21(c) as proposed, with some modifications. Consistent with the proposal, our rule does not require issuers to use any specific language or form of resolution to be voted on by shareholders. In addition, we note that, as provided in Section 14A(c), this shareholder vote will not be binding on the issuer or its board of directors.

i. Scope of Rule 14a-21(c) Shareholder Advisory Vote

Under Rule 14a-21(c), issuers will be required to provide a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, consistent with Section 14A(b)(2). However, issuers are not required to provide a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve other proposals, such as an increase in authorized shares or a reverse stock split, which may be necessary for the issuer to effectuate a transaction. A vote under Rule 14a-21(c) is required only if the shareholders are voting to approve the transaction and the transaction and golden parachute arrangements come within those covered by Section 14A(b). Consistent with the proposal, this advisory vote will be required only with respect to the golden parachute agreements or understandings required to be disclosed by Section 14A(b)(1), as disclosed pursuant to proposed Item 402(t) of Regulation S-K.

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[277] See, e.g., letters from Glass Lewis and PGGM.

Section 14A(b)(1) requires disclosure of any agreements or understandings between the soliciting person and any named executive officer of the issuer or any named executive officers of the acquiring issuer, if the soliciting person is not the acquiring issuer. When a target issuer conducts a proxy or consent solicitation to approve a merger or similar transaction, golden parachute compensation agreements or understandings between the acquiring issuer and the named executive officers of the target issuer are not within the scope of disclosure required by Section 14A(b)(1), and thus a shareholder vote to approve arrangements between the soliciting target issuer's named executive officers and the acquiring issuer is not required by Exchange Act Section 14A(b)(2). Consequently, consistent with the proposal, Rule 14a-21(c) as adopted requires a shareholder advisory vote only on the golden parachute compensation agreements or understandings for which Section 14A(b)(1) requires disclosure and Section 14A(b)(2) requires a shareholder vote. As described in Section II.D.2.c.iii above, however, disclosure of all golden parachute arrangements will be required, even though a vote on the arrangements will not be required.

ii. <u>Exceptions to Rule 14a-21(c) Shareholder Advisory Vote</u>

Consistent with Section 14A(b)(2) and our proposal, issuers will not be required to include in the merger proxy a separate shareholder vote on the golden parachute compensation disclosed under Item 402(t) of Regulation S-K if Item 402(t) disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior vote of shareholders under Section 14A(a)(1) of the Exchange Act and Rule 14a-21(a). In this regard, we note that Section 14A(b)(2) requires only that the golden parachute arrangements have been subject to a prior shareholder vote under Section 14A(a)(1); such arrangements need not have been approved by shareholders.

For issuers to take advantage of this exception, however, the executive compensation disclosure subject to the prior shareholder vote must have included Item 402(t) disclosure of the same golden parachute arrangements. Even if the annual meeting proxy statement provided some disclosure with respect to golden parachute arrangements,[278] the annual meeting proxy statement must include the disclosure required by Item 402(t) in order for the annual meeting shareholder vote under Section 14A(a)(1) and Rule 14a-21(a) to satisfy the exception from the merger proxy separate shareholder vote under Section 14A(b)(2) and Rule 14a-21(c). Consequently, we would expect that some issuers may voluntarily include Item 402(t) disclosure with their other executive compensation disclosure in annual meeting proxy statements soliciting the shareholder vote required by Section 14A(a)(1) and Rule 14a-21(a) so that this exception would be available to the issuer for a potential subsequent merger or acquisition transaction. We also expect that some issuers may choose to include the new disclosure for other reasons, such as investor interest in the information.

The exception will be available only to the extent the same golden parachute arrangements previously subject to an annual meeting shareholder vote remain in effect, and the terms of those arrangements have not been modified subsequent to the Section 14A(a)(1) shareholder vote. As proposed and adopted, if the disclosure pursuant to Item 402(t) has been updated to change only the value of the items in the Golden Parachute Compensation Table to reflect price movements in the issuer's securities, no new shareholder advisory vote

[278] See CD&A and Item 402(j) of Regulation S-K, and for smaller reporting companies see Item 402(q)(2) of Regulation S-K for the disclosure requirements applicable to annual meeting proxy statements.

under Section 14A(b)(1) will be required. New golden parachute arrangements, and any revisions to golden parachute arrangements that were subject to a prior Section 14A(a)(1) shareholder vote will be subject to the separate merger proxy shareholder vote requirement of Section 14A(b)(2) and Rule 14a-21(c).[279]

Additionally, we agree with certain commentators[280] that changes that result only in a reduction in value of the total compensation payable should not require a new shareholder vote. If the shareholders have had an opportunity to vote on a more highly valued compensation package, then we do not believe issuers should be required to provide a separate vote on a change that results only in a compensation package that has been reduced in value.

We believe that the other examples of changes cited by commentators, including changes in compensation because of a new named executive officer, additional grants of equity compensation in the ordinary course, and increases in salary, are significant changes to the golden parachute compensation disclosure and, consistent with Section 14A(b)(2), should be subject to a shareholder vote. Because a shareholder vote would already have been obtained on portions of the arrangements, however, only the new arrangements and revised terms of the arrangements previously subject to a Section 14A(a)(1) shareholder vote will be subject to the merger proxy separate shareholder vote under Section 14A(b)(2) and Rule 14a-21(c).

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[279] For example, we would view any change that would result in an IRC Section 280G tax gross-up becoming payable as a change in terms triggering such a separate vote, even if such tax gross-up becomes payable only because of an increase in the issuer's share price.

[280] See, e.g., letters from Frederic Cook, Meridian, and Protective Life.

Consistent with the proposal, issuers providing for a shareholder vote on new arrangements or revised terms will need to provide two separate tables under Item 402(t) of Regulation S-K in merger proxy statements.[281] One table will disclose all golden parachute compensation, including both arrangements and amounts previously disclosed and subject to a say-on-pay vote under Section 14A(a)(1) and Rule 14a-21(a) and the new arrangements or revised terms. The second table will disclose only the new arrangements or revised terms subject to the vote, so that shareholders can clearly see what is subject to the shareholder vote under Section 14A(b)(2) and Rule 14a-21(c). Similarly, in cases where Item 402(t) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, issuers will need to clarify whether these agreements are included in the shareholder advisory vote by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by Section 14A(b)(2) and Rule 14a-21(c), if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.[282]

E. Treatment of Smaller Reporting Companies

Section 951 of the Act establishes a new Section 14A(e) of the Exchange Act, which provides that we may, by rule or order, exempt an issuer or class of issuers from the requirements of Section 14A(a) and (b). In determining whether to make an exemption under this subsection, we are directed to take into account, among other considerations,

[281] See Instruction 6 to Item 402(t)(2) of Regulation S-K.

[282] Instruction 7 to Item 402(t)(2). As discussed above, such agreements are not required to be subject to the Rule 14a-21(c) shareholder advisory vote, but issuers may voluntarily subject them to such a vote.

whether the requirements of Sections 14A(a) and 14A(b) disproportionately burden small issuers.

In the Proposing Release, we did not propose to exempt small issuers or smaller reporting companies[283] from the requirements of Sections 14A(a) and 14A(b). Comments on this issue were mixed. Many commentators agreed that the requirements of Section 14A should be applied to all issuers and that there should be no exemptions for smaller reporting companies, [284] while a number of other commentators asserted that smaller reporting companies should be exempt from the requirements of Exchange Act Section 14A and our proposed rules.[285] Among those opposed to applying the requirements to smaller reporting companies, in addition to stating that these requirements would be a burden to smaller reporting companies,[286] some commentators asserted that smaller reporting companies may feel compelled to include additional disclosure beyond the scaled requirements otherwise applicable to smaller reporting companies, including a CD&A, because of such votes, [287] which would impose significant burdens on these issuers. One commentator urged that, if we do not exempt smaller reporting companies, we should at least delay implementation of the proposed rules for smaller reporting companies so that smaller companies would have the

[283] "Smaller reporting company" is defined in Rule 12b-2 under the Exchange Act.

[284] See, e.g., letters from AFSCME, Boston Common, CalPERS, Calvert, CII, First Affirmative, Glass Lewis, ICGN, Merkl, PGGM, Public Citizen, RAILPEN & USS, SBA of Florida, Senator Levin, Social Investment, and Walden.

[285] See, e.g., letters from American Bankers Association ("Am. Bankers"), Independent Community Bankers of America ("ICBA"), NACD, Society of Corp. Sec., and Virginia Bankers Association ("VBA").

[286] See, e.g., letters from ABA, Am. Bankers, and VBA.

[287] See, e.g., letters from ABA and Society of Corp. Sec.

opportunity to observe how larger companies conduct the vote and respond to the disclosure requirements.[288]

After reviewing and considering these comments, we are adopting a temporary exemption for smaller reporting companies so that these issuers will not be required to conduct either a shareholder advisory vote on executive compensation or a shareholder advisory vote on the frequency of say-on-pay votes until the first annual or other meeting of shareholders occurring on or after January 21, 2013.[289] We do not believe that smaller reporting companies should be permanently exempt from the say-on-pay vote, frequency of say-on-pay votes and golden parachute disclosure and vote because we believe investors have the same interest in voting on the compensation of smaller reporting companies and in clear and simple disclosure of golden parachute compensation in connection with mergers and similar transactions as they have for other issuers. However, after reviewing comments on the potential burdens on smaller reporting companies, we believe it is appropriate to provide additional time before smaller reporting companies are required to conduct the shareholder advisory votes on executive compensation and the frequency of say-on-pay votes.

We believe that a delayed effective date for the say-on-pay and frequency votes for smaller reporting companies should allow those companies to observe how the rules operate for other companies and should allow them to better prepare for implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate

[288] See letter from ABA.

[289] Rules 14a-21(a) and (b).

the implementation of the adopted rules by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them. We believe a temporary exemption by rule is appropriate, under the exemptive authority granted by Section 14A(e) of the Exchange Act[290] and also under the Commission's general exemptive authority pursuant to Section 36(a)(1) of the Exchange Act, in the public interest and consistent with the protection of investors.[291]

This temporary exemption for smaller reporting companies does not apply to the requirements of Section 14A(b)(2) and Rule 14a-21(c) to provide a shareholder advisory vote on golden parachute compensation in connection with mergers or other extraordinary transactions. We view the temporary exemption as a transition matter that will facilitate eventual compliance with the regular, periodic say-on-pay vote requirement by smaller reporting companies. We do not believe similar considerations support an exemption for the shareholder advisory vote on golden parachute arrangements in light of the extraordinary nature of the transactions involved.

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[290] Exchange Act Section 14A(e) provides that "the Commission may, by rule or order, exempt an issuer or class of issuers from the requirement" under Sections 14A(a) or 14A(b). Section 14A(e) further provides that "in determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirements under [Section 14A(a) and 14A(b)] disproportionately burdens small issuers." In considering whether to provide an exemption, the Commission considered whether the requirements of Section 14A(a) and (b) as applied to smaller reporting companies to conduct a shareholder advisory vote on executive compensation and a shareholder advisory vote on the frequency of say-on-pay votes could disproportionately burden small issuers.

[291] 15 U.S.C. 78 mm(a)(1). Exchange Act Section 36(a)(1) provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

We have also crafted our amendments to minimize the costs for smaller reporting companies, while providing shareholders the opportunity to express their views on the companies' compensation arrangements. For example, once they fully apply to smaller reporting companies, our amendments will provide shareholders of those companies the same voting rights with respect to executive compensation as apply to shareholders of other companies subject to the proxy rules. We do not believe that Section 14A and our final rules, especially given the temporary exemption, would unduly burden smaller reporting companies. For example, our final rule does not alter the existing scaled disclosure requirements set forth in Item 402 of Regulation S-K for smaller reporting companies, which recognize that the compensation arrangements of smaller reporting companies typically are less complex than those of other public companies.[292] Under the rules we adopt today, we do not alter the provision in our rules that smaller reporting companies are not required to provide a CD&A. Therefore, the amendment to Item 402(b) of Regulation S-K will not apply to smaller reporting companies, as such companies are not required to provide a CD&A.

Our amendments will, however, require quantification of golden parachute arrangements in merger proxies. Smaller reporting companies are not required to provide this quantification under current Item 402(q) in annual meeting proxy statements, and are not required to do so under our new rules unless they seek to qualify for the exception for a shareholder advisory vote on golden parachute compensation in a later merger transaction.

[292] See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158] (hereinafter, the "2006 Executive Compensation Release") at Section II.D.1. The scaled compensation disclosure requirements for smaller reporting companies are set forth in Item 402(l) [17 CFR 229.402(l)] through (r) [17 CFR 229.402(r)] of Regulation S-K.

Even though our rules impose additional disclosure requirements relating to the shareholder advisory votes required by Section 14A, we do not believe our rules will impose a significant additional cost or disproportionate burden upon smaller reporting companies. As noted above, smaller reporting companies tend to have less complex compensation arrangements[293] so the additional disclosures should not add significantly to their disclosure burden. As a result, we do not believe the rules we adopt today place a disproportionate burden on smaller reporting companies.

F. Transition Matters

As noted above in Section I, Section 14A(a)(3) requires that both the initial shareholder vote on executive compensation and the initial vote on the frequency of votes on executive compensation be included in proxy statements relating to an issuer's first annual or other meeting of the shareholders occurring on or after January 21, 2011. Because Section 14A(a) applies to shareholder meetings taking place on or after January 21, 2011, any proxy statements, whether in preliminary or definitive form, even if filed prior to this date, for meetings taking place on or after January 21, 2011, must include the separate resolutions for shareholders to approve executive compensation and the frequency of say-on-pay votes required by Section 14A(a) without regard to whether our rules to implement Section 14A(a) have become effective by that time. To facilitate compliance with the new statute, we addressed certain first year transition issues in the Proposing Release. We are now extending those transition positions as described below.

[293] See 2006 Executive Compensation Release, supra note 292, at Section II.D.1.

Before effectiveness of the amendment to Rule 14a-6(a) adopted in this release, Rule 14a-6 will continue to require the filing of a preliminary proxy statement at least ten days before the proxy is sent or mailed to shareholders unless the meeting relates only to the matters specified by Rule 14a-6(a). Until the rules we are adopting to implement Exchange Act Section 14A become effective, we will not object if issuers do not file proxy material in preliminary form if the only matters that would require a filing in preliminary form are the say-on-pay vote and frequency of say-on-pay vote required by Section 14A(a).

Before the amendment to Rule 14a-4 adopted in this release becomes effective, Rule 14a-4 provides that persons solicited are to be afforded the choice between approval or disapproval of, or abstention with respect to, each matter to be voted on, other than elections of directors. Until effectiveness of the amendment to Rule 14a-4 adopted in this release, we will not object if the form of proxy for a shareholder vote on the frequency of say-on-pay votes provides means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, or abstain. In addition, we understand that, although some commentators indicated they are prepared for the four-choice frequency vote, the systems of other proxy service providers are currently set up to register at most three votes – for, against, or abstain – and these providers may have short-term difficulty in programming their systems to enable shareholders to vote among four choices. As a result, because the preparedness of these providers may vary significantly on a firm-by-firm basis, for any proxy materials filed for meetings to be held on or before December 31, 2011, we will not object if the form of proxy for a shareholder vote on the frequency of say-on-pay votes provides means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, and there is no discretionary authority to vote proxies on the frequency of say-on-pay votes matter in the event the person solicited does not select a choice among 1, 2 or 3 years.[294]

Issuers with outstanding indebtedness under the TARP are already required to conduct an annual shareholder advisory vote on executive compensation until the issuer has repaid all outstanding indebtedness under the TARP. Because such issuers are subject to an annual requirement to provide a say-on-pay vote, a requirement to provide a vote on the frequency of such votes would impose unnecessary burdens on issuers and shareholders, and our final rules provide an exemption from such requirement. Until the rules we are adopting to implement Exchange Act Section 14A become effective, we will not object if an issuer with outstanding indebtedness under the TARP does not include a resolution for a shareholder advisory vote on the frequency of say-on-pay votes in its proxy statement for its annual meeting, provided it fully complies with its say-on-pay voting obligations under EESA Section 111(e).

Finally, as we discussed above, we are adopting a temporary exemption for smaller reporting companies to defer application of the requirements of Section 14A(a)(1) and (a)(2) and Rule 14a-21(a) and (b) to conduct shareholder advisory votes on executive compensation and the frequency of such votes. Until the rules we are adopting to implement Exchange Act Section 14A become effective, we will not object if a smaller reporting company does not include a resolution for a shareholder advisory vote on say-on-pay or the frequency of say-on-pay votes in its proxy statement for its annual meeting. As with other issuers, smaller

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[294] See Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Release No. 34-16356 (Nov. 21, 1979) [44 FR 68770].

reporting companies are required to conduct the shareholder advisory vote on golden parachute compensation upon effectiveness of Rule 14a-21(c).

III. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the final amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[295] We published a notice requesting comment on the collection of information requirements in the proposing release for the rule amendments, and we submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[296] The title for the collection of information is:

(1) "Regulation 14A and Schedule 14A" (OMB Control No. 3235-0059);

(2) "Regulation 14C and Schedule 14C" (OMB Control No. 3235-0057);

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

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

(5) "Regulation S-K" (OMB Control No. 3235-0071);[297]

(6) "Schedule 14D-9" (OMB Control No. 3235-0102);

(7) "Schedule 13E-3" (OMB Control No. 3235-0007);

(8) "Schedule TO" (OMB Control No. 3235-0515);

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[295] 44 U.S.C. 3501 et seq.

[296] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[297] The paperwork burden from Regulation S-K is imposed through the forms that are subject to the disclosures in Regulation S-K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulation S-K to be a total of one hour.

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

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

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

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

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

The regulations, schedules, and forms were adopted under the Securities Act and the Exchange Act, except for Form N-2, which we adopted pursuant to the Securities Act and the Investment Company Act. The regulations, forms, and schedules set forth the disclosure requirements for periodic reports, current reports, registration statements and proxy and information statements filed by companies to help shareholders make informed voting decisions. The hours and costs associated with preparing, filing and sending the form or schedule constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

B. Summary of the Final Rules

As discussed in more detail above, we are adopting new Rule 14a-21 under the Exchange Act and new Item 24 of Schedule 14A. Rule 14a-21 will implement the requirements of Section 14A of the Exchange Act to provide separate shareholder advisory votes on executive compensation, the frequency of shareholder votes on executive compensation, and, in connection with merger and similar transactions, golden parachute compensation arrangements. New Item 24 of Schedule 14A will require disclosure in proxy statements with respect to each of these shareholder votes. New Rule 14a-21 and new Item

24 of Schedule 14A will increase existing disclosure burdens for proxy statements by requiring:

- New disclosure about the requirement to provide separate shareholder votes on executive compensation, the frequency of shareholder votes on executive compensation and golden parachute compensation arrangements in connection with merger transactions; and
- New disclosure of the general effect of the shareholder advisory votes, such as whether such votes are non-binding.

As discussed in more detail above, we are also adopting amendments to Item 402(b) of Regulation S-K. The amendments to Item 402(b) of Regulation S-K may increase existing disclosure burdens for proxy statements by requiring:

- New disclosure of whether, and if so, how the issuer has considered the results of the most recent shareholder vote on executive compensation required by Section 14A of the Exchange Act in determining compensation policies and decisions, and, if so, how that consideration has affected the issuer's compensation decisions and policies.

As discussed in more detail above, we are also adopting new Item 402(t) of Regulation S-K and amendments to Item 1011(b) of Regulation M-A, Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 15 of Schedule 13E-3, Item 11 of Schedule TO, and Item 8 of Schedule 14D-9. These amendments, other than the amendment to Schedule TO, will increase existing disclosure burdens for proxy statements, registration statements on Form S-

4 and F-4, solicitation/recommendation statements on Schedule 14D-9, and going-private schedules by requiring:

- New tabular and narrative disclosure of understandings and agreements of named executive officers with acquiring and target companies in connection with merger, acquisition, Rule 13e-3 going-private transactions, and tender offers,[298] and disclosure of the aggregate total of all compensation that may be paid or become payable to each named executive officer.

As discussed in more detail above, we are adopting amendments to Form 8-K. The amendments to Form 8-K will increase existing disclosure burdens for current reports on Form 8-K by requiring:

- New disclosure of the issuer's decision of how frequently to provide a separate shareholder vote on executive compensation in light of a shareholder advisory vote on the frequency of shareholder votes on executive compensation conducted pursuant to Section 14A(a)(2) of the Exchange Act.

Together, new Rule 14a-21 and new Item 24 of Schedule 14A and the amendments to Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 402 of Regulation S-K, Item 1011 of Regulation M-A, Item 15 of Schedule 13E-3, Item 11 of Schedule TO, and Item 8 of Schedule 14D-9 will implement and supplement the requirements under Section 14A of the Exchange Act and also will provide additional meaningful disclosure regarding golden parachute arrangements and issuers' consideration of the shareholder votes and the effect of

[298] Companies filing solicitation/recommendation statements on Schedule 14D-9 in connection with third-party tender offers will be obligated to provide this additional disclosure. However, bidders filing tender offer statements on Schedule TO will not have a similar obligation.

such votes on issuers' compensation policies and decisions. We believe these changes will result in more meaningful disclosure for investors making voting or investment decisions.

We are adopting an amendment to Rule 14a-4, which relates to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders in connection with the advisory vote on frequency. We are also adopting an amendment to Rule 14a-6 to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a), as well as any shareholder advisory vote on executive compensation, to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are adopting an amendment to Rule 14a-8, adding a note to Rule 14a-8(i)(10) to clarify the status of shareholder proposals relating to the approval of executive compensation or the frequency of shareholder votes approving executive compensation. Finally, we are adopting conforming amendments to Item 402(a) and Item 402(m) of Regulation S-K, clarifying that the disclosure required by proposed Item 402(t) includes information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees. Pursuant to these conforming amendments, issuers may continue to omit such information in connection with disclosure required by other portions of Item 402 of Regulation S-K. The amendments to Rule 14a-4, Rule 14a-6, Rule 14a-8 under the Exchange Act and Item 402(a) and Item 402(m) of Regulation S-K will not increase any existing disclosure burden. We believe these amendments will merely clarify existing and new statutory requirements or reduce burdens otherwise arising from our proposals. As a result, these amendments will not affect any existing disclosure burden.

Compliance with the proposed amendments by affected U.S. issuers will be mandatory. Responses to the information collections will not be kept confidential and there would be no mandatory retention period for the information disclosed.

C. Summary of Comment Letters and Revisions to Proposals

In the Proposing Release, we requested comment on the PRA analysis. We did not receive any comments that addressed our overall burden estimates for the proposed amendments, though our analysis was cited by one commentator who discussed our cost-benefit analysis.[299]

We have made few substantive modifications to the proposed amendments. We have adopted an amendment to Form 8-K to require the disclosure we had proposed to require in Form 10-Q or Form 10-K. Therefore, we have adjusted our estimates to reflect no changes to Forms 10-Q and 10-K and to estimate the increased burdens for Form 8-K.

We have also revised our amendments with respect to Schedule TO to eliminate the proposed requirement for bidders in third-party tender offers to provide Item 402(t) disclosure. We have adjusted our estimates to reflect no changes to Schedule TO, as any increased burden will be reflected in Schedule 13E-3 because Item 402(t) disclosure will be required in any tender offer that is also a Rule 13e-3 going-private transaction.

[299] See letter from CCMC.

D. Revisions to PRA Reporting and Cost Burden Estimates

We anticipate that the disclosure amendments will increase the burdens and costs for companies that would be subject to the proposed amendments. New Section 14A of the Exchange Act, as created by Section 951 of the Act, has already increased the burdens and costs for issuers by requiring separate shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation. Section 14A also requires additional disclosure of golden parachute arrangements in proxy solicitations to approve merger transactions and a separate shareholder vote to approve such arrangements in certain circumstances. Our amendments address the Act's requirements in the context of disclosure under the federal proxy rules, Regulation S-K and related forms and schedules, thereby creating only an incremental increase in the burdens and costs for such issuers. The amendments specify how issuers are to comply with Section 14A of the Exchange Act and require new disclosure with respect to comparable transactions.

For purposes of the PRA, in the Proposing Release we estimated the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under our proposals to be approximately 25,192 hours of company personnel time and a cost of approximately $8,141,200 for the services of outside professionals. These estimates included the time and the cost of data gathering systems and disclosure controls and procedures, the time and cost of preparing and reviewing disclosure by in-house and outside counsel and executive officers, and the time and cost of filing documents and retaining records. In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations, the nature and complexity of their golden parachute compensation arrangements, and the nature of their operations. We believe that some companies will experience costs in excess of this average in the first year of compliance with proposals and some companies may experience less than the average costs. As discussed above, as a result of changes to our proposed rules, we are slightly reducing the total PRA burden and cost estimates that we originally submitted to the OMB in connection with the proposed amendments. We estimate the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under our rule amendments to be approximately 24,942 hours of company personnel time and a cost of approximately $7,841,200 for the services of outside professionals.

We derived our new burden hour and cost estimates by estimating the average number of hours it would take an issuer to prepare and review the proposed disclosure requirements. These estimates represent the average burden for all companies, both large and small. Our estimates have been adjusted to reflect the fact that some of the amendments will be required in some but not all of the above listed documents depending upon the circumstances, and would not apply to all companies.

With respect to reporting companies, the disclosure required by new Item 402(t) of Regulation S-K will be required in merger proxy and information statements, Forms S-4 and F-4, Schedule 13E-3 and certain solicitation/recommendation statements. The disclosure required by new Item 402(t) may also be included in annual meeting proxy statements on a voluntary basis.

The disclosure required by our amendments to Item 402(b) of Regulation S-K will be required in proxy and information statements as well as Forms 10, 10-K, S-1, S-4, S-11, and N-2. The proposed amendments to CD&A will not be applicable to smaller reporting companies because under current CD&A reporting requirements these companies are not required to provide CD&A in their Commission filings. Based on the number of proxy filings that were received in the 2009 fiscal year, we estimate that approximately 1,200 domestic companies are smaller reporting companies that have a public float of less than $75 million.

In the Proposing Release, we based our annual burden estimates on other assumptions. We have made some small adjustments to these estimates to reflect the revisions we made to the amendments. First, we continue to assume that the burden hours of the amendments will be comparable to the burden hours related to similar disclosure requirements under current reporting requirements, such as the disclosure required by Item 402(j). Second, we continue to assume that substantially all of the burdens associated with the amendments to Rule 14a-21 and Item 24 will be associated with Schedule 14A as this will be the primary disclosure document in which these items will be prepared and presented. In the case of our proposed amendments to Item 402(b) and Item 402(t) of Regulation S-K, we continue to assume that the burdens associated with the amendments will be associated with various disclosure documents as these items will be included in a number of forms and statements. We have noted an additional 1 hour for the amendments to Form 8-K, and we are no longer proposing any amendments that would alter the disclosure burden of Form 10-Q and Form 10-K.

For each reporting company, we estimate that the amendments will impose on average the following incremental burden hours:

- 2 hours for the amendments to CD&A
- 1 hour for the amendments to Item 24 of Schedule 14A
- 1 hour for the amendments to Form 8-K
- 20 hours for new Item 402(t) of Regulation S-K

1. Annual Meeting Proxy Statements

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for annual meeting proxy statements under the amendments will be approximately 1 hour per form for companies that are smaller reporting companies, and 3 hours per form for companies that are non-accelerated filers (and not smaller reporting companies), accelerated filers, or large accelerated filers.[300] The estimated burden is smaller for smaller reporting companies as such issuers are not required to include a CD&A.

2. Exchange Act Current Reports

For purposes of the PRA, we estimate the annual incremental paperwork burden for Form 8-K under the amendments will be approximately 1 hour per form. Our estimates below also account for the fact that each issuer will only be required to include additional disclosure in one amended Form 8-K each year the issuer conducts a shareholder advisory vote on frequency.

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[300] Our estimate for annual proxy statements is based upon an estimated burden over a six-year period during which the shareholder advisory votes required by Section 14A(a) would not occur annually. We used a six-year period because issuers will conduct at least two shareholder advisory votes on executive compensation and at least one shareholder advisory vote on the frequency of such votes in this time period. We then estimated an average annual burden based on the average burden over the six-year period.

3. Securities Act Registration Statements and Exchange Act Registration Statements

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for Securities Act and Exchange Act registration statements under the amendments is approximately 2 hours per form, which represents the additional burden associated with our amendments to CD&A.[301] In making our estimates, we note that the additional burdens in CD&A only apply to issuers who have conducted a prior shareholder advisory vote and would not apply, for example, to issuers making an initial filing on Form S-1 or Form S-11.

4. Merger Proxies, Tender Offer Documents and Schedule 13E-3

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for merger proxy statements, and registration statements on Form S-4 and F-4 to be 21 hours per form, as these forms will be required to include additional disclosures under Item 24 of Schedule 14A and Item 402(t) of Regulation S-K. We estimate the annual incremental paperwork burden for merger information statements, and tender offer solicitation/recommendation statements and Schedules 13E-3 to be 20 hours per form, as these forms will be required to include Item 402(t) disclosure but will not be required to include additional disclosure under Item 24 of Schedule 14A.

The tables below illustrate the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments for current reports; proxy and information statements; Form 10; registration statements on Forms S-1, S-4, F-4, S-11,

[301] We have assumed that the annual incremental paperwork burden under the proposed amendments to Item 402(b) of Regulation S-K would be included in the annual meeting proxy statement.

and N-2; and Regulation S-K.[302] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review the proposed disclosure requirements. For the Exchange Act report on Form 8-K, and the proxy statements we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. For registration statements on Forms S-1, S-4, F-4, S-11, and N-2, and the Exchange Act registration statement on Form 10, we estimate that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. There is no change to the estimated burden of the collections of information under Regulation S-K because the burdens that this regulation imposes are reflected in our revised estimated for the forms. 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.

Table 1. Incremental Paperwork Burden under the amendments for current reports; proxy and information statements:

	Number of Responses[303] (A)	Incremental Burden Hours/Form (B)	Total Incremental Burden Hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% Professional (E)=(C)*0.25	Professional Costs (F)=(E)*$400
8-K[304]	7,212	1	7,212	5,409	1,803	$721,200

[302] Figures in both tables have been rounded to the nearest whole number.

[303] The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2009 calendar year, adjusted to reflect the estimated number of forms and schedules that would be required to include additional disclosure under our rules as proposed. As explained below in notes 304 through 306, we have reduced the number of estimated filings to reflect that the additional disclosure requirements will only apply to a smaller number of the forms filed.

Form 10[305]	9	2	18	4	14	$5,600
DEF 14A[306]	7,212					
Accel. Filers	6,112	3	18,336	13,752	4,584	$1,833,600
SRC Filers	1,100	1	1,100	825	275	$110,000
DEF 14C	582					
Accel. Filers	482	2	964	723	241	$96,400
SRC Filers	100	0	0	0	0	$0
Reg. S-K	N/A	N/A	N/A	N/A	N/A	N/A
Total			27,630	20,713		$2,766,800

Table 2. Incremental Paperwork Burden under the amendments for registration statements, merger proxy and information statements, tender offer documents and Schedules 13E-3:

	Number of Responses[307] (A)	Incremental Burden Hours/Form (B)	Total Incremental Burden Hours (C)=(A)*(B)	25% Company (D)=(C)*0.25	75% Professional (E)=(C)*0.75	Professional Costs (F)=(E)*$400
Form S-1[308]	485	2	970	243	727	$290,800

[304] We calculated the burden hours for Form 8-K based on the number of proxy statements filed with the Commission during the 2009 calendar year. We assumed that there would be an aggregate equal number of Forms 8-K to disclose the issuer's plans with respect to the frequency vote as the number of proxy statements.

[305] The burden allocation for Form 10 uses a 25% internal to 75% outside professional allocation. We have reduced the number of estimated Form 10 filings to reflect that approximately 95% of these forms would not require additional disclosure, as new disclosure required under Item 402 will only relate to issuers in spin-off transactions that are disclosing compensation of public parent companies that have conducted a prior shareholder vote on executive compensation.

[306] The estimates for Schedule 14A and Schedule 14C are separated to reflect our estimate of the burden hours and costs related to the proposed amendments to CD&A which will be applicable to companies that are large accelerated filers, accelerated filers, and non-accelerated filers (that are not smaller reporting companies), but will not be applicable to smaller reporting companies.

[307] The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2009 calendar year, adjusted to reflect the estimated number of forms and schedules that would be required to include additional disclosure under our rules as proposed. As explained below in notes 308 through 311, we have reduced the number of estimated filings to reflect that the additional disclosure requirements will only apply to a smaller number of the forms filed.

[308] We have reduced the number of estimated Form S-1 and Form S-11 filings to reflect that approximately 60% of these forms will not require additional disclosure, as new disclosure required under Item 402 will only relate to issuers who are already public companies and have conducted a prior shareholder vote on executive compensation.

Form S-11	22	2	44	11	33	$13,200
Form S-4[309]	499	21	10,479	2,620	7,859	$3,143,600
Form F-4	27	21	567	142	425	$170,000
DEFM 14A	137	21	2,877	719	2,158	$863,200
DEFM 14C[310]	14	20	280	70	210	$84,000
Schedule 14D-9	77	20	1,540	385	1,155	$462,000
Schedule 13E-3	5	20	100	25	75	$30,000
Form N-2[311]	29	2	58	14	44	$17,600
Reg. S-K	N/A	N/A	N/A	N/A	N/A	N/A
Total			16,915	4,229		$5,074,400

IV. COST-BENEFIT ANALYSIS

A. Introduction

We are adopting amendments to implement and supplement the provisions of the Dodd-Frank Act relating to shareholder approval of executive compensation and disclosure and shareholder approval of golden parachute compensation arrangements. Section 951 of the Dodd-Frank Act amends the Exchange Act by adding new Section 14A. New Section 14A(a)(1) requires companies to conduct a separate shareholder advisory vote to approve the compensation of executives. Section 14A(a)(2) requires companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation. In addition, Section 14A(b) requires companies

[309] We have reduced the number of estimated Form S-4 and Form F-4 filings to reflect an approximate 75% of these forms which will not relate to mergers or similar transactions but will be other transactions (e.g., holding company formations and financings) to which the amended rules will not apply.

[310] We have reduced the number of estimated DEFM14C filings to reflect an approximate 15% of these forms, which will not relate to merger transactions but will involve dissolutions and similar transactions.

[311] We have reduced the number of estimated Form N-2 filings to reflect that 29 filings were made by business development companies during calendar year 2009, because only business development companies will be subject to the amended disclosure required under Item 402 on Form N-2.

soliciting votes to approve merger or acquisition transactions to provide disclosure of certain "golden parachute" compensation arrangements and, when such arrangements have not been included in the shareholder advisory vote on executive compensation, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.[312]

We are adopting new Rule 14a-21 to implement Section 14A(a)(1) by providing separate shareholder advisory votes to approve executive compensation, to approve the frequency of such votes on executive compensation, and to approve golden parachute compensation arrangements at shareholder meetings at which shareholders are asked to approve merger transactions. In addition to the votes required by Section 14A, we are also adopting a new Item 24 of Schedule 14A to elicit disclosure, similar to our approach with respect to TARP companies providing shareholder advisory votes on executive compensation, regarding the effect of the shareholder votes required by Rule 14a-21, including whether the votes are non-binding.

New Item 402(t) of Regulation S-K implements and supplements the statutory requirement in Section 14A(b)(1) to promulgate rules for the clear and simple disclosure of golden parachute compensation arrangements that the soliciting person has with its named executive officers (if the acquiring issuer is not the soliciting person) or that it has with the named executive officers of the acquiring issuer that relate to the merger transaction. In addition, Item 402(t), will supplement the requirements of Section 14A(b)(1) by requiring disclosure of golden parachute compensation arrangements between the acquiring company

[312] According to the Dodd-Frank Wall Street Reform and Consumer Protection Act Conference Report at page 872, Section 951 is "designed to address shareholder rights and executive compensation practices."

and the named executive officers of the target company if the target company is the soliciting person.

Our amendments to Item 5 of Schedule 14A and Item 3 of Schedule 14C will require disclosure regarding golden parachute compensation arrangements in accordance with Section 14A(b)(1) of the Exchange Act. We are also adopting amendments to require that additional disclosure regarding golden parachute compensation arrangements be included in connection with other transactions. We are adopting amendments to Regulation M-A, Schedule 14D-9, and Schedule 13E-3 that will require additional disclosure regarding golden parachute compensation arrangements in connection with Rule 13e-3 going-private transactions and tender offers.[313]

We are also adopting amendments to Item 402 of Regulation S-K to require additional Compensation Discussion and Analysis disclosure about the issuer's response to the shareholder vote on executive compensation and to provide additional disclosure about golden parachute compensation arrangements. We are also adopting amendments to Form 8-K to require disclosure regarding the issuer's action as a result of the shareholder advisory vote on the frequency of shareholder votes on executive compensation.

We are adopting an amendment to Rule 14a-4, which relates to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders in connection with the advisory vote on frequency. We are also adopting an amendment to Rule 14a-6 to add the shareholder votes on executive

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[313] Companies filing solicitation/recommendation statements on Schedule 14D-9 in connection with third-party tender offers will be obligated to provide this additional disclosure. However, bidders filing tender offer statements on Schedule TO will not have a similar obligation.

compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a), as well as any shareholder advisory vote on executive compensation, to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are adopting an amendment to Rule 14a-8, adding a note to Rule 14a-8(i)(10) to clarify the status of shareholder proposals relating to the approval of executive compensation or the frequency of shareholder votes approving executive compensation.

The rules we are adopting, which implement the relevant provisions of the Dodd-Frank Act, will directly affect most public companies as well as potential private acquirers. Our amended rules implement the shareholder advisory vote requirements of Section 14A, promulgate rules for additional disclosure in accordance with Section 14A(b)(1), and provide for additional disclosure, not required by Section 14A, relating to the shareholder advisory votes. In addition, our amended rules expand the required disclosure of Section 14A(b)(1) to require disclosure of arrangements between additional parties, namely agreements between the acquiring company and named executive officers of the target company, and require disclosure with respect to additional transactions, including certain tender offers and Rule 13e-3 going-private transactions. As discussed below, the enhanced disclosure required by our amended rules regarding the shareholder approval of executive compensation and companies' responses to shareholder votes will provide shareholders and investors with timely information about such votes that is consistent with the information required to be provided under the Act and that enhance the operation of our rules pursuant to the Act. The enhanced disclosure regarding golden parachute compensation will provide a more complete picture of the compensation to shareholders as they consider voting and investment decisions relating to mergers and similar transactions.

We are sensitive to the costs and benefits imposed by the rule and form amendments we are adopting. The discussion below focuses on the costs and benefits of the amendments made by the Commission to implement the Act within its permitted discretion, rather than the costs and benefits of the Act itself.

B. Comments on the Cost-Benefit Analysis

In the Proposing Release, we requested qualitative and quantitative feedback on the nature of the benefits and costs described and any benefits and costs we may have overlooked. We received one comment letter relating to the cost-benefit analysis in the Proposing Release.[314] The commentator asserted that we had underestimated the costs and burdens involved because we did not take into account the following additional categories of costs: costs associated with proxy advisory firms and the potential for companies to retain additional consulting services relating to their compensation decisions and say-on-pay votes, additional costs associated with submitting no-action letter requests under Rule 14a-8, and increased costs due to increased demand for proxy solicitation and other shareholder communications services.[315]

C. Benefits

The amended rules we are adopting today are intended to implement and supplement the requirements of Section 14A of the Exchange Act as set forth in Section 951 of the Dodd-

[314] See letter from CCMC.

[315] See letter from CCMC. See also Section IV.D below for additional discussion.

Frank Act. Our amended rules not only implement the shareholder advisory votes required by Section 14A, but also require additional disclosure addressing whether, and if so, how issuers have considered these required shareholder advisory votes, and if so, how such votes have affected the companies' compensation policies and decisions.

We believe the enhanced disclosures about the results of the shareholder advisory vote on the frequency of the approval of executive compensation will provide timely information to shareholders about the issuer's plans for future shareholder advisory votes. The enhanced disclosure and amendments to the CD&A requirements in Item 402(b) of Regulation S-K about whether, and if so, how an issuer has considered the results of a shareholder vote to approve executive compensation and, if so, how that consideration has affected its compensation policies and decisions will benefit shareholders and other market participants by providing potentially useful information for voting and investment decisions.

Our amended rules will also specify how the shareholder advisory votes required by Section 14A(a) relate to existing shareholder advisory votes required for issuers with outstanding indebtedness under TARP. In our view, because of the similarity of the separate annual say-on-pay vote requirements, a company with indebtedness under TARP need only provide one annual shareholder advisory vote. As we have discussed above, we have indicated that the annual shareholder advisory vote under EESA would fulfill the requirements for the shareholder vote pursuant to Section 14A(a)(1) and Rule 14a-21(a). We believe this benefits such companies by reducing confusion and burdens of the two requirements by specifying that two separate annual shareholder votes are not required. In addition, because issuers with indebtedness under TARP must conduct an annual shareholder advisory vote on executive compensation, we have adopted an exemption from the frequency vote required by Section 14A(a)(2) and Rule 14a-21(b) until the issuer repays all indebtedness under TARP. We believe this benefits such issuers and their shareholders by avoiding the cost and confusion of conducting a vote on the frequency of a shareholder advisory vote when the frequency of such a vote is mandated by another requirement.

After reviewing the comments we have received, we are also adopting a temporary exemption for smaller reporting companies that will delay the implementation of the shareholder advisory votes on say-on-pay and frequency required by Section 14A(a) and Rule 14a-21(a) and (b) for a two-year period. We believe that a delayed effective date for the say-on-pay and frequency votes will benefit smaller reporting companies by allowing these companies to observe how the rules operate for other companies by preparing them for implementation of the rules. We believe that delayed implementation for these companies will also allow us to evaluate the implementation of the adopted rules by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rule becomes applicable to them.

In these amended rules, we also provide guidance for issuers and shareholders regarding the interaction of the shareholder advisory votes required by Section 14A and shareholder proposals under Rule 14a-8 by adding a note to Rule 14a-8(i)(10). The note we are adopting will reduce potential confusion among shareholders and issuers with respect to what may be excluded under our rules in light of the new requirements under Section 14A, while preserving the ability of shareholders to make proposals relating to executive compensation.

New Item 402(t) of Regulation S-K will require narrative and tabular disclosure of golden parachute compensation arrangements in the clear and simple form required by Section 14A(b)(1) of the Exchange Act. Because Section 14A(b)(1) requires that disclosure not only be in a clear and simple form, but also that it include an aggregate total of all golden parachute compensation for each named executive officer, we have adopted Item 402(t) to require that such disclosure appear in a table. The tabular format is designed to provide investors with clear disclosure about golden parachute compensation that is comparable across different issuers and transactions and make the information more accessible. In addition to the tabular disclosure, we are also adopting amendments to require narrative disclosure to provide additional context and disclosure not suitable to the tabular format. Our approach is similar to the existing approach to executive compensation disclosure in Item 402 of Regulation S-K and provides a focused manner in which to present and quantify golden parachute compensation. Narrative disclosure supplements the tables by providing additional context and discussion of the numbers presented in the table. We believe that the combination of narrative and tabular disclosure will provide the clearest picture of the full scope of golden parachute compensation in the clear and simple format required by Section 14A(b)(1).

Because Section 14A(b)(1)'s disclosure requirements are limited to agreements or understandings between the person conducting the solicitation and any named executive officers of the issuer or any named executive officers of the acquiring issuer if the person conducting the solicitation is not the acquiring issuer, we have formulated Item 402(t) to require disclosure, in addition to the disclosure mandated by Section 14A(b)(1), of agreements or understandings between the acquiring company and the named executive officers of the target company. Item 402(t) requires disclosure of all golden parachute compensation relating to the merger among the target and acquiring companies and the named executive officers of each in order to cover the full scope of golden parachute compensation applicable to the transaction. By providing disclosure of the full scope of golden parachute compensation, we believe issuers will provide more detailed, comprehensive, and useful information to shareholders to consider when making their voting or investment decisions.

Likewise, additional disclosure on golden parachute compensation, without regard to whether the transaction is structured as a merger, a tender offer,[316] or a Rule 13e-3 going-private transaction that is not subject to Regulation 14A, will benefit shareholders and other market participants by allowing them to timely and more accurately assess the transaction and evaluate with greater acuity the golden parachute compensation that named executive officers could expect to receive and the related potential interests such officers might have in pursuing and/or supporting a change in control transaction. While our existing disclosure requirements include much of this disclosure, the specificity and narrative and tabular format of Item 402(t) will allow for a clear presentation of the full scope of the information. Furthermore, by standardizing disclosure of golden parachute compensation arrangements across different transaction structures, our amended rules will enable shareholders to

[316] Companies filing solicitation/recommendation statements on Schedule 14D-9 in connection with third-party tender offers will be obligated to provide this additional disclosure. However, bidders filing tender offer statements on Schedule TO will not have a similar obligation.

compare more easily such compensation among various types of change in control transactions and structures. In addition, our amended rules will also enable the shareholders of the acquirer to timely and more accurately assess the cost of the acquisition transaction in proxy statements for which additional disclosure is required pursuant to Note A of Schedule 14A where acquirer shareholders do not vote on the merger transaction but vote to approve another proposal such as the issuance of shares or a stock split.

We have adopted such disclosure requirements in both tabular and narrative formats, with disclosure of aggregate total compensation, in accordance with the requirement of Section 14A(b)(1) that such disclosure be in a clear and simple form. To the extent investors expect to see information about all of the economic benefits that may accrue to an executive in one location of the proxy statement (including golden parachute arrangements and other compensation, such as future employment contracts), the benefit of this disclosure may be limited since the information about other executive compensation that may be disclosed in proxy materials does not need to be included in tabular format pursuant to Item 402(t) of Regulation S-K.

Our amended rules will also benefit issuers by specifying how they must comply with the requirements of Exchange Act Section 14A in the context of the federal proxy rules. The amended rules will eliminate uncertainty that may exist among issuers and other market participants, if we did not propose any rules, regarding what is necessary under the Commission's proxy rules when conducting a shareholder vote required under Exchange Act Section 14A. The amended rules specify how the statutory requirements operate in connection with the federal proxy rules and accordingly, we believe the amended rules promote better compliance with the requirements of Exchange Act Section 14A and reduce the amount of management time and financial resources necessary to ensure that issuers comply with their obligations under both Exchange Act Section 14A and the federal proxy rules. This will benefit issuers, their shareholders and other market participants.

D. Costs

We recognize that the amendments we are adopting will impose new disclosure requirements on companies and are likely to result in costs related to information collection.[317] The amendments we are adopting that require the disclosure of executive compensation in a tabular format are likely to result in certain costs. We expect these costs, however, to be limited since much of the compensation required to be disclosed under our amended rules is currently required to be disclosed in narrative format in the existing disclosure regime.

Our analysis of the costs of the amendments we are adopting today relates to the incremental direct and indirect costs arising from the requirements in our rule amendments. The analysis below does not reflect any additional direct or indirect costs arising from new Exchange Act Section 14A, including the shareholder advisory votes on say-on-pay, frequency, and golden parachute compensation, and any likely additional costs which would

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[317] We estimate the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under both Exchange Act Section 14A and our rule amendments to be approximately 24,942 hours of company personnel time and a cost of approximately $7,841,200 for the services of outside professionals. As noted above in the Comments on the Cost-Benefit Analysis section, we received one comment letter relating to the cost-benefit analysis that asserted that the PRA numbers cited in the Proposing Release underestimated the costs and burdens involved. See letter from CCMC. We acknowledge that the PRA estimates do not reflect the full magnitude of the economic costs involved, but are estimates of the collection of information burden and cost for the limited purpose of the PRA. In addition to costs arising from our rule amendments, the PRA estimates include collection of information-related costs arising from new Exchange Act Section 14A.

be incurred because of these votes. As noted above, one commentator asserted that we had underestimated the costs and burdens involved because we did not take into account the following additional categories of costs: costs associated with proxy advisory firms and the potential for companies to retain additional consulting services relating to their compensation decisions and say-on-pay votes, additional costs associated with submitting no-action letter requests under Rule 14a-8, and increased costs due to increased demand for proxy solicitation and other shareholder communications services.[318] We do not believe the additional costs described by the commentator will arise as a result of our amendments today as these items relate to increased costs resulting from the requirements of Section 14A, including the say-on-pay vote, the frequency vote, and the shareholder advisory vote on golden parachute compensation. With respect to costs associated with submitting no-action letter requests and Rule 14a-8, we note that Section 14A(c)(4) specifically provides that the Section 14A shareholder advisory votes may not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."[319] Although our new rules include a note advising of one circumstance when a shareholder proposal may be excluded, the rules do not impose any new obligations with respect to Rule 14a-8.

We are adopting new Item 402(t) to implement the requirement of Section 14A(b)(1) of the Exchange Act that we promulgate rules for disclosure of golden parachute compensation arrangements in a clear and simple form, which we believe is best provided in

[318] See letter from CCMC.

[319] Exchange Act Section 14A(c)(4).

both narrative and tabular format. In addition to the required disclosure under Section 14A(b)(1), we are also expanding the disclosure to cover agreements between the acquiring company and the named executive officers of a target company in a merger or similar transaction. Though this additional disclosure will result in certain additional costs for issuers preparing a merger proxy, we believe that the additional disclosure is appropriate in order to provide shareholders information about the full scope of golden parachute compensation applicable to the transaction. If the disclosure provided by the issuer is not presented in a clear manner, the disclosure of golden parachute compensation for both target and acquirer executives in target and acquirer proxy statements may be confusing to investors. In addition, because parties often have to rely on each other for the other side's information, this reliance may add to the costs of mergers that are ultimately born by shareholders. There may also be certain indirect costs to issuers and shareholders as a result of our rule amendments, as the additional disclosure of golden parachute compensation may result in increased transactional expenses in the form of additional advisers and consultants, increased time to prepare disclosure documents, and increased time and expense to negotiate compensation arrangements.

Furthermore, companies engaging in or subject to a Rule 13e-3 going-private transaction and companies preparing solicitation/recommendation statements given their status as targets in third-party tender offers may face increased costs because of the required disclosure of golden parachute compensation arrangements, including the required table and aggregate totals. In addition, companies soliciting proxies or consents for transactions for which additional disclosure is required pursuant to Note A of Schedule 14A may face increased costs as well due to the additional disclosure requirements of Item 5 of Schedule 14A. We have adopted these disclosure requirements that go beyond the requirements of Section 14A(b)(1) because we believe the rules will reduce the regulatory disparity that might otherwise result from treating such transactions differently from mergers. In response to commentators, however, we have eliminated the proposed requirement for bidders in third-party tender offers to provide Item 402(t) disclosure. We believe this change is appropriate given that target companies that are the subject of third-party tender offers will provide the 402(t) disclosure in their Schedules 14D-9 within ten days after the commencement of the offers. We also believe this change addresses the concern expressed by one of the commentators that third-party bidders, particularly in non-negotiated transactions, may not have access to reliable information about the golden parachute arrangements between target companies and their named executive officers. By retaining the disclosure requirement in Schedule 14D-9, we are still able to minimize the regulatory disparity that might otherwise result from treating third-party tender offers differently than other transactions.

As noted above, there may also be additional indirect costs relating to such increased disclosure, as well as costs associated with obtaining compensation information from the other parties involved in a transaction in order to fulfill the issuer's disclosure obligations.

The expanded Compensation Discussion and Analysis disclosure may also result in costs associated with drafting disclosure that addresses whether, and if so, how the results of a shareholder vote on executive compensation were considered in determining the issuer's compensation policies and decisions and any resultant effect on those compensation policies and decisions. Similarly, the revisions to the current reporting requirements on Form 8-K may result in costs associated with assessing the results of a shareholder vote on the frequency of shareholder votes to approve executive compensation and drafting the additional disclosure regarding the company's plans to conduct votes in the future. Some of these costs could include the cost of hiring additional advisors, such as attorneys, to assist in the analysis and drafting.

We believe that these costs will not be unduly burdensome given that much of the disclosure is covered by our pre-existing disclosure requirements, even though we are adopting rules that require that such disclosure be included in both narrative and tabular format. The amendments we adopt exceed the pre-existing narrative requirements, as we are adopting tabular disclosure with an aggregate total and no de minimis threshold for perquisites. We expect that there will be incremental costs associated with drafting the additional disclosure, but that much of the information would be readily obtainable by the parties given existing disclosure requirements and as part of the due diligence process prior to drafting the transaction documents.

In addition to the direct costs associated with the required disclosure, the amended rules might create additional indirect costs for private companies that may be engaged in takeovers of public companies. We do not expect, however, the specific and detailed disclosure and the shareholder advisory vote regarding golden parachutes to diminish the number of takeover transactions.

The note to Rule 14a-8(i)(10) we are adopting may also impose certain costs on shareholders as it would permit issuers to exclude certain shareholder proposals that would otherwise not be excludable under our rules. In addition, our rule amendments may impose certain indirect costs on shareholders who might pursue alternative means to communicate their positions regarding the frequency of say-on-pay votes. We do not believe that the rules we are adopting today would impose any additional direct or indirect costs on issuers because of shareholder proposals. Any such costs would result from the shareholder advisory votes required by Section 14A.

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[320] also 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, Section 2(b)[321] of the Securities Act and Section 3(f)[322] 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.

The amendments we are adopting will implement the Section 14A requirement for shareholder advisory votes to approve executive compensation, the frequency of such votes, and golden parachute compensation arrangements in connection with merger and similar transactions. We also adopting certain additional disclosure requirements to provide

[320] 15 U.S.C. 78w(a)(2).

[321] 15 U.S.C. 77b(b).

[322] 15 U.S.C. 78c(f).

investors with additional information about these required votes and to apply the required disclosure from Section 14A(b)(1) to certain other agreements and transaction structures. We do not believe that the additional disclosure we are adopting will impose a burden on competition.

The amendments we are adopting will not only implement the requirements of Section 14A of the Exchange Act, but will also help ensure that shareholders receive disclosure regarding the required votes, the nature of an issuer's responsibilities to hold the votes under Section 14A, and the issuer's consideration of the results of the votes and the effect of such consideration on the issuer's compensation policies and decisions. The amendments will also enhance the transparency of a company's compensation policies. As discussed in greater detail above, we believe these benefits will be achieved without imposing any significant additional burdens on issuers. As a result, the amendments we are adopting should improve the ability of investors to make informed voting and investment decisions, and, therefore lead to increased efficiency and competitiveness of the U.S. capital markets.

We believe the amendments we are adopting will also benefit issuers and their shareholders by specifying in a clear and concise fashion how issuers must comply with the Dodd-Frank Act requirements, in the context of the federal proxy rules and our disclosure rules. By specifying how issuers must comply with the shareholder advisory votes and enhanced disclosure requirements from Section 14A, our rules will allow for more consistent disclosure from all entities and clearer disclosure for shareholders. By reducing uncertainty and promoting efficient presentation of information, our rules will permit issuers to more efficiently plan and draft disclosure documents, including annual meeting proxy statements, merger proxies, and tender offer and going-private documents.

Our rules will also provide additional time before smaller reporting companies are required to conduct the shareholder advisory votes on executive compensation and the frequency of say-on-pay votes. We believe that a delayed effective date for smaller reporting companies should allow those companies to observe how the rules operate for other companies and will increase efficiency by allowing them to better prepare for implementation of the rules. We also believe that delayed implementation for these companies will allow us to evaluate the implementation of the adopted rules by larger companies and provide us with the additional opportunity to consider whether adjustments to the rule would be appropriate for smaller reporting companies before the rules become applicable to them.

Our rules will require enhanced disclosure of golden parachute compensation arrangements in merger and similar transactions, regardless of how such transactions are structured. We believe the uniformity of our disclosure requirements across different types of transactions will help competition as issuers will be able to structure such transactions as they see fit, without the additional disclosure required by Section 14A(b) weighing in favor of a particular transaction structure. Though our amended rules will create additional, incremental disclosure burdens, we believe that the rules we are amending will enhance capital formation by allowing for clearer disclosure, more informed voting decisions by investors, and consistency across different types of transactions.

VI. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Final Regulatory Flexibility Analysis (FRFA) has been prepared in accordance with the Regulatory Flexibility Act.[323] This FRFA relates to revisions to the rules under the Exchange Act regarding the proxy solicitation process and related executive compensation disclosures.

A. Reasons for, and Objectives of, the Proposed Action

The rule amendments are designed to implement the requirements of Section 951 of the Dodd-Frank Act, enhance the disclosure relating to the shareholder advisory votes required by Exchange Act Section 14A, and specify how our proxy rules will apply to such votes. Specifically, we are adopting amendments to the proxy rules to require shareholder advisory votes to approve executive compensation, to approve the frequency of shareholder votes to approve executive compensation, and to approve golden parachute compensation arrangements in connection with merger transactions. The amendments also require enhanced disclosure regarding an issuer's consideration of these votes and the impact of such consideration on an issuer's compensation policies and decisions.

B. Legal Basis

We are adopting the amendments pursuant to Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act of 1933, as amended, and Sections 13, 14(a), 14A, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

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[323] 5 U.S.C. 601.

C. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed amendments, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed amendments. We did not receive comments specifically addressing the IRFA. However, several commentators addressed aspects of the proposed rule amendments that could potentially affect small entities. In particular, some commentators believed that smaller companies should be exempted from all or part of the amendments.[324] Although we are not adopting a complete exemption from the amendments, we have made revisions to the amendments to phase-in the requirements for a shareholder advisory vote on executive compensation and a shareholder advisory vote on the frequency of say-on-pay votes for two full years to give smaller reporting companies more time to prepare for implementation of the rules and so that they can observe how larger companies conduct the votes. Smaller reporting companies will be required to conduct shareholder advisory votes on golden parachute compensation as required by Rule 14a-21(c) without a two-year delay.

D. Small Entities Subject to the Final Amendments

The amendments will affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[325] The Commission's rules define "small business" and

[324] See, e.g., letters from Am. Bankers, ICBA, NACD, Society of Corp. Sec., and VBA.

[325] 5 U.S.C. 601(6).

"small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157[326] and Exchange Act Rule 0-10(a)[327] define a company, other than an investment company, to be a "small business" or "small organization" if it has total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,210 companies, other than investment companies, that may be considered small entities. The proposed amendments would affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act. An investment company, including a business development company,[328] is considered to be a "small business" 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.[329] We believe that certain of the amendments would affect small entities that are business development companies that have a class of securities registered under Section 12 of the Exchange Act. We estimate that there are approximately 31 business development companies that may be considered small entities.

E. Reporting, Recordkeeping, and other Compliance Requirements

The disclosure amendments are designed to enhance the disclosure regarding the shareholder advisory votes required by Section 14A of the Exchange Act and provide additional disclosure about golden parachute compensation arrangements. These amendments would require small entities to provide:

[326] 17 CFR 230.157.

[327] 17 CFR 240.0-10(a).

[328] Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act [15 U.S.C. 80a-2(a)(48)].

[329] 17 CFR 270.0-10(a)

- Disclosure of the shareholder advisory votes required by Section 14A and the effects of such votes, including whether they are non-binding;
- Disclosure of golden parachute arrangements described by Section 14A(b)(1) of the Exchange Act in merger proxies, and additional disclosure not required by Section 14A(b)(1) in connection with tender offers and going private transactions; and
- Disclosure of the issuer's decision in light of the shareholder vote on the frequency of shareholder votes to approve executive compensation required by Section 14A(a)(2) of the Exchange Act as to how frequently the issuer will include a shareholder vote on the compensation of executives.

F. Duplicative, Overlapping, or Conflicting Federal Rules

We believe the amendments would not duplicate, overlap, or conflict with other federal rules.

G. 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. In connection with the 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.

Currently, small entities that are smaller reporting companies under Exchange Act Rule 12b-12 are subject to some different compliance or reporting requirements under Regulation S-K and the amendments will not affect these requirements.[330] Under Regulation S-K, smaller reporting companies are permitted to provide abbreviated compensation disclosure with respect to the principal executive officer and two most highly compensated executive officers for the last two completed fiscal years. Specifically, smaller reporting companies may provide the executive compensation disclosure specified in Items 402(l) through (r) of Regulation S-K, rather than the corresponding disclosure specified in Items 402(a) through (k) of Regulation S-K. Items 402(l) through (r) do not require smaller reporting companies to provide CD&A. Other than the amendments to CD&A, the remaining disclosure requirements apply to smaller reporting companies to the same extent as larger issuers, following the two-year phase-in period for say-on-pay votes and votes on the frequency of say-on-pay votes.

As noted above, the amendments to CD&A do not apply to smaller reporting companies. We are not expanding the existing scaled disclosure requirements under Item 402 of Regulation S-K, or establishing additional different compliance requirements or an exemption from coverage of the proposed amendments for smaller reporting companies. The amendments will provide investors with enhanced disclosure regarding the shareholder votes required by Section 14A of the Exchange Act and the issuers' consideration of the votes.

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[330] Rule 12b-2 excludes business development companies from the definition of "smaller reporting companies."

We are adopting amendments to Item 5 of Schedule 14A, as well as other forms and schedules, to implement and supplement the requirement of Section 14A(b)(1) to provide disclosure of golden parachute compensation arrangements in a clear and simple form. Under the amendments, all companies will be subject to the same golden parachute disclosure requirements. As amended, Schedule 14A will require the disclosure pursuant to Item 402(t) of Regulation S-K with respect to golden parachute compensation arrangements for merger proxies. Though much of the disclosure required by our amendment to Item 5 of Schedule 14A is currently required for all issuers, regardless of size, under our amended rules such disclosure will be required to be included in a tabular format pursuant to Item 402(t) of Regulation S-K, which will include an aggregate total and specific quantification of various compensation elements. All companies, regardless of size, will also be subject to these additional disclosure requirements in connection with other transactions not required by Section 14A(b)(1), including certain tender offers and Rule 13e-3 going-private transactions.

In addition, our amendments will require clear and straightforward disclosure of issuer's responses to shareholder advisory votes, and of golden parachute compensation arrangements in connection with mergers and similar transactions. We have used design rather than performance standards in connection with the amendments because, based on our past experience, we believe the amendments will be more useful to investors if there are specific disclosure requirements. The amendments are intended to result in more comprehensive and clear disclosure. In addition, the specific disclosure requirements in the amendments will promote consistent and comparable disclosure among all companies.

VII. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS

The amendments described in this release are being adopted under the authority set forth in Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act of 1933, as amended, and Sections 13, 14(a), 14A, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

List of Subjects

17 CFR Parts 229, 240 and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENTS

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229 - STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K

1. The authority citation for part 229 is revised to read 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, 78n-1, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 229.402 by:

   a. revising the last sentence of paragraph (a)(6)(ii);

   b. removing "and" at the end of paragraph (b)(1)(v);

c. removing the period and adding in its place "; and" at the end of paragraph (b)(1)(vi);

d. adding paragraph (b)(1)(vii);

e. revising the last sentence of paragraph (m)(5)(ii); and

f. adding paragraph (t).

The revisions read as follows:

§ 229.402 (Item 402) Executive compensation.

(a) * * *

(6) * * *

(ii) * * * Except with respect to the disclosure required by paragraph (t) of this Item, registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

* * * * *

(b) * * *

(1) * * *

(vii) Whether and, if so, how the registrant has considered the results of the most recent shareholder advisory vote on executive compensation required by section 14A of the Exchange Act (15 U.S.C. 78n-1) or §240.14a-20 of this chapter in determining compensation policies and decisions and, if so, how that consideration has affected the registrant's executive compensation decisions and policies.

* * * * *

(m) * * *

(5) * * *

(ii) * * * Except with respect to disclosure required by paragraph (t) of this Item, smaller reporting companies may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the smaller reporting company and that are available generally to all salaried employees.

* * * * *

(t) Golden Parachute Compensation. (1) In connection with any proxy or consent solicitation material providing the disclosure required by section 14A(b)(1) of the Exchange Act (15 U.S.C. 78n-1(b)(1)) or any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§240.14a-101) pursuant to Note A of Schedule 14A, with respect to each named executive officer of the acquiring company and the target company, provide the information specified in paragraphs (t)(2) and (3) of this section regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the acquiring company or target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the issuer, as follows:

Golden Parachute Compensation

Name (a)	Cash ($) (b)	Equity ($) (c)	Pension/ NQDC ($) (d)	Perquisites/ Benefits ($) (e)	Tax Reim burse ment ($) (f)	Other ($) (g)	Total ($) (h)
PEO							
PFO							
A							
B							
C							

(2) The table shall include, for each named executive officer:

(i) The name of the named executive officer (column (a));

(ii) The aggregate dollar value of any cash severance payments, including but not limited to payments of base salary, bonus, and pro-rated non-equity incentive compensation plan payments (column (b));

(iii) The aggregate dollar value of :

(A) Stock awards for which vesting would be accelerated;

(B) In-the-money option awards for which vesting would be accelerated; and

(C) Payments in cancellation of stock and option awards (column (c));

(iv) The aggregate dollar value of pension and nonqualified deferred compensation benefit enhancements (column (d));

(v) The aggregate dollar value of perquisites and other personal benefits or property, and health care and welfare benefits (column (e));

(vi) The aggregate dollar value of any tax reimbursements (column (f));

(vii) The aggregate dollar value of any other compensation that is based on or otherwise relates to the transaction not properly reported in columns (b) through (f) (column (g)); and

(viii) The aggregate dollar value of the sum of all amounts reported in columns (b) through (g) (column (h)).

Instructions to Item 402(t)(2).

1. If this disclosure is included in a proxy or consent solicitation seeking approval of an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of the registrant, or in a proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§240.14a-101) pursuant to Note A of Schedule 14A, the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date, and that the price per share of the registrant's securities shall be determined as follows: if the shareholders are to receive a fixed dollar amount, the price per share shall be that fixed dollar amount, and if such value is not a fixed dollar amount, the price per share shall be the average closing market price of the registrant's securities over the first five business days following the first public announcement of the transaction. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options. Include only compensation that is based on or otherwise relates to the subject transaction. Apply Instruction 1 to Item 402(t) with respect to those executive officers for whom disclosure was required in the issuer's most recent filing with the

Commission under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et.seq.) that required disclosure pursuant to Item 402(c).

2. If this disclosure is included in a proxy solicitation for the annual meeting at which directors are elected for purposes of subjecting the disclosed agreements or understandings to a shareholder vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n-1(a)(1)), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the last business day of the registrant's last completed fiscal year, and the price per share of the registrant's securities is the closing market price as of that date. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options.

3. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimates in its disclosure. In such event, the disclosure would require forward-looking information as appropriate.

4. For each of columns (b) through (g), include a footnote quantifying each separate form of compensation included in the aggregate total reported. Include the value of all perquisites and other personal benefits or property. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 4 to Item 402(c)(2)(ix) of this section. For purposes of quantifying health care benefits, the registrant must use the assumptions used for financial reporting purposes under generally accepted accounting principles.

5. For each of columns (b) through (h), include a footnote quantifying the amount payable attributable to a double-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is conditioned upon the executive officer's termination without cause or resignation for good reason within a limited time period following the change-in-control), specifying the time-frame in which such termination or resignation must occur in order for the amount to become payable, and the amount payable attributable to a single-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is not conditioned upon such a termination or resignation of the executive officer).

6. A registrant conducting a shareholder advisory vote pursuant to §240.14a-21(c) of this chapter to cover new arrangements and understandings, and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote pursuant to §240.14a-21(a) of this chapter, shall provide two separate tables. One table shall disclose all golden parachute compensation, including both the arrangements and amounts previously disclosed and subject to a shareholder advisory vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n-1(a)(1)) and §240.14a-21(a) of this chapter and the new arrangements and understandings and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote. The second table shall disclose only the new arrangements and/or revised terms subject to the separate shareholder vote under section 14A(b)(2) of the Exchange Act and §240.14a-21(c) of this chapter.

7. In cases where this Item 402(t)(2) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, the registrant shall clarify whether these agreements are included in the separate shareholder

advisory vote pursuant to §240.14a-21(c) of this chapter by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by section 14A(b)(2) of the Exchange Act (15 U.S.C. 78n-1(b)(2)) and §240.14a-21(c) of this chapter, if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each such contract, agreement, plan or arrangement and the payments quantified in the tabular disclosure required by this paragraph. Such factors shall include, but not be limited to a description of:

(i) The specific circumstances that would trigger payment(s);

(ii) Whether the payments would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided; and

(iii) Any material conditions or obligations applicable to the receipt of payment or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver or breach of such agreements.

Instructions to Item 402(t).

1. A registrant that does not qualify as a "smaller reporting company," as defined by §229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of this section. A registrant that qualifies as a "smaller reporting company," as defined by §229.10(f)(1) of this

chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(m)(2)(i) and (ii) of this section.

2. The obligation to provide the information in this Item 402(t) shall not apply to agreements and understandings described in paragraph (t)(1) of this section with senior management of foreign private issuers, as defined in §240.3b-4 of this chapter.

3. Amend § 229.1011 by redesignating paragraph (b) as paragraph (c) and adding new paragraph (b):

The addition reads as follows:

§ 229.1011 (Item 1011) Additional information.

* * * * *

(b) Furnish the information required by Item 402(t)(2) and (3) of this part (§229.402(t)(2) and (3)) and in the tabular format set forth in Item 402(t)(1) of this part (§229.402(t)(1)) with respect to each named executive officer

(1) Of the subject company in a Rule 13e-3 transaction; or

(2) Of the issuer whose securities are the subject of a third-party tender offer, regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the subject company, issuer, bidder, or the acquiring company, as applicable, concerning any type of compensation, whether present, deferred or contingent, that is based upon or otherwise relates to the Rule 13e-3 transaction or third-party tender offer.

Instructions to Item 1011(b)

1. The obligation to provide the information in paragraph (b) of this section shall not apply where the issuer whose securities are the subject of the Rule 13e-3 transaction or tender offer is a foreign private issuer, as defined in §240.3b-4 of this chapter.

2. For purposes of Instruction 1 to Item 402(t)(2) of this part: If the disclosure is included in a Schedule 13E-3 (§240.13e-100 of this chapter) or Schedule 14D-9 (§240.14d-101 of this chapter), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date and that the price per share of the securities of the subject company in a Rule 13e-3 transaction, or of the issuer whose securities are the subject of the third-party tender offer, shall be determined as follows: if the shareholders are to receive a fixed dollar amount, the price per share shall be that fixed dollar amount, and if such value is not a fixed dollar amount, the price per share shall be the average closing market price of such securities over the first five business days following the first public announcement of the transaction. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options. Include only compensation that is based on or otherwise relates to the subject transaction. Apply Instruction 1 to Item 402(t) with respect to those executive officers for whom disclosure was required in the most recent filing by the subject company in a Rule 13e-3 transaction or by the issuer whose securities are the subject of a third-party tender offer, with the Commission under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et.seq.) that required disclosure pursuant to Item 402(c).

* * * * *

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

4. The authority citation for Part 240 is revised to read 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, 78n-1, 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., 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

5. Amend §240.13e-100 by revising Item 15.

The revisions read as follows:

§240.13e-100 Schedule 13E-3, Transaction statement under section 13(e) of the Securities Exchange Act of 1934 and Rule 13e-3 (§240.13e-3) thereunder.

* * * * *

Item 15. Additional Information.

Furnish the information required by Item 1011(b) and (c) of Regulation M-A (§229.1011(b) and (c) of this chapter).

* * * * *

6. Amend §240.14a-4 by:

a. adding the phrase "and votes to determine the frequency of shareholder votes on executive compensation pursuant to §240.14a-21(b) of this chapter" at the end of the first sentence of paragraph (b)(1);

b. adding paragraph (b)(3).

The addition reads as follows:

§240.14a-4 Requirements as to proxy.

* * * * *

(b) * * *

(3) A form of proxy which provides for a shareholder vote on the frequency of shareholder votes to approve the compensation of executives required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1(a)(2)) shall provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, or abstain.

7. Amend §240.14a-6 by:

a. revising paragraph (a)(7); and

b. adding the phrase "to paragraph (a)" following the words "Note 1", "Note 2", "Note 3" and "Note 4".

The revision reads as follows:

§240.14a-6 Filing requirements.

(a) * * *

(7) A vote to approve the compensation of executives as required pursuant to section 14A(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1(a)(1)) and §240.14a-21(a) of this chapter, or pursuant to section 111(e)(1) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(e)(1)) and §240.14a-20 of this chapter, a vote to determine the frequency of shareholder votes to approve the compensation of executives as

required pursuant to Section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1(a)(2)) and §240.14a-21(b) of this chapter, or any other shareholder advisory vote on executive compensation.

8. Amend §240.14a-8 by adding Note to paragraph (i)(10) to read as follows:

§240.14a-8 Shareholder proposals.

* * * * *

(i) * * *

(10) * * *

Note to paragraph (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by §240.14a-21(b) of this chapter a single year (i.e., one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by §240.14a-21(b) of this chapter.

9. Add §240.14a-21 to read as follows:

§240.14a-21 Shareholder approval of executive compensation, frequency of votes for approval of executive compensation and shareholder approval of golden parachute compensation.

(a) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders at which directors will be elected and for which the rules of the

Commission require executive compensation disclosure pursuant to Item 402 of Regulation S-K (§229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011, or for the first annual or other meeting of shareholders on or after January 21, 2013 if the registrant is a smaller reporting company, and thereafter no later than the annual or other meeting of shareholders held in the third calendar year after the immediately preceding vote under this subsection, include a separate resolution subject to shareholder advisory vote to approve the compensation of its named executive officers, as disclosed pursuant to Item 402 of Regulation S-K.

Instruction to §240.14a-21(a):

The registrant's resolution shall indicate that the shareholder advisory vote under this subsection is to approve the compensation of the registrant's named executive officers as disclosed pursuant to Item 402 of Regulation S-K (§229.402 of this chapter). The following is a non-exclusive example of a resolution that would satisfy the requirements of this subsection: "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion is hereby APPROVED."

(b) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders at which directors will be elected and for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S-K (§229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011, or for the first annual or other meeting of shareholders on or after January 21, 2013 if the registrant is a smaller reporting company, and thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding vote under this subsection, include a separate resolution subject to shareholder advisory vote as to whether the shareholder vote required by paragraph (a) of this section should occur every 1, 2 or 3 years. Registrants required to provide a separate shareholder vote pursuant to §240.14a-20 of this chapter shall include the separate resolution required by this section for the first annual or other meeting of shareholders after the registrant has repaid all obligations arising from financial assistance provided under the TARP, as defined in section 3(8) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5202(8)), and thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding vote under this subsection.

(c) If a solicitation is made by a registrant for a meeting of shareholders at which shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all the assets of the registrant, the registrant shall include a separate resolution subject to shareholder advisory vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S-K (§229.402(t) of this chapter), unless such agreements or understandings have been subject to a shareholder advisory vote under paragraph (a) of this section. Consistent with section 14A(b) of the Exchange Act (15 U.S.C. 78n-1(b)), any agreements or understandings between an acquiring company and the named executive officers of the registrant, where the registrant is not the acquiring company, are not required to be subject to the separate shareholder advisory vote under this paragraph.

Instructions to §240.14a-21:

1. Disclosure relating to the compensation of directors required by Item 402(k) (§229.402(k) of this chapter) and Item 402(r) of Regulation S-K (§229.402(r) of this chapter) is not subject to the shareholder vote required by paragraph (a) of this section. If a registrant includes disclosure pursuant to Item 402(s) of Regulation S-K (§229.402(s) of this chapter) about the registrant's compensation policies and practices as they relate to risk management and risk-taking incentives, these policies and practices would not be subject to the shareholder vote required by paragraph (a) of this section. To the extent that risk considerations are a material aspect of the registrant's compensation policies or decisions for named executive officers, the registrant is required to discuss them as part of its Compensation Discussion and Analysis under §229.402(b) of this chapter, and therefore such disclosure would be considered by shareholders when voting on executive compensation.

2. If a registrant includes disclosure of golden parachute compensation arrangements pursuant to Item 402(t) (§229.402(t) of this chapter) in an annual meeting proxy statement, such disclosure would be subject to the shareholder advisory vote required by paragraph (a) of this section.

3. Registrants that are smaller reporting companies entitled to provide scaled disclosure in accordance with Item 402(l) of Regulation S-K (§229.402(l) of this chapter) are not required to include a Compensation Discussion and Analysis in their proxy statements in order to comply with this section. For smaller reporting companies, the vote required by

paragraph (a) of this section must be to approve the compensation of the named executive officers as disclosed pursuant to Item 402(m) through (q) of Regulation S-K (§229.402(m) through (q) of this chapter).

10. Amend §240.14a-101 by:

a. removing the dash that appears before paragraph (a) of Item 5 and adding in its place an open parenthesis;

b. adding paragraph (a)(5) of Item 5;

c. adding the phrase "to paragraph (a)" following the word "Instruction" that follows new paragraph (a)(5) of Item 5;

d. adding paragraph (b)(3) of Item 5;

e. adding the phrase "to paragraph (b)" following the word "Instruction" that follows new paragraph (b)(3) of Item 5;

f. adding Item 24.

The additions read as follows:

§240.14a-101 Schedule 14A. Information required in proxy statement.

SCHEDULE 14A INFORMATION

* * * * *

Item 5. Interest of Certain Persons in Matters to Be Acted Upon.

(a) * * *

(5) If the solicitation is made on behalf of the registrant, furnish the information required by Item 402(t) of Regulation S-K (§229.402(t) of this chapter).

* * * * *

(b) * * *

(3) If the solicitation is made on behalf of the registrant, furnish the information required by Item 402(t) of Regulation S-K (§229.402(t) of this chapter).

* * * * *

Item 24. Shareholder Approval of Executive Compensation. Registrants required to provide any of the separate shareholder votes pursuant to §240.14a-21 of this chapter shall disclose that they are providing each such vote as required pursuant to section 14A of the Securities Exchange Act (15 U.S.C. 78n-1), briefly explain the general effect of each vote, such as whether each such vote is non-binding, and, when applicable, disclose the current frequency of shareholder advisory votes on executive compensation required by Rule 14a-21(a) and when the next such shareholder advisory vote will occur.

* * * * *

11. Amend §240.14c-101 by adding paragraph (c) of Item 3.

The addition reads as follows:

§240.14c-101 Schedule 14C. Information required in information statement.

SCHEDULE 14C INFORMATION

* * * * *

Item 3. * * *

(c) Furnish the information required by Item 402(t) of Regulation S-K (§229.402(t) of this chapter).

12. Amend §240.14d-100 by revising Item 11 to read as follows:

§240.14d-100 Tender offer statement pursuant to section 14(d)(1) of the Securities Exchange Act of 1934.

* * * * *

Item 11. Additional Information.

Furnish the information required by Item 1011(a) and (c) of Regulation M-A (§229.1011 of this chapter).

* * * * *

13. Amend §240.14d-101 by revising Item 8 to add the words "and (c)" after "Item 1011(b)".

PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934

14. The authority citation for part 249 continues to read as follows:

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

* * * * *

15. Amend Form 8-K (referenced in §249.308), Item 5.07, by revising paragraph (b), adding paragraph (d), and revising Instruction 1 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 5.07. Submission of Matters to a Vote of Security Holders.

* * * * *

(b) If the meeting involved the election of directors, the name of each director elected at the meeting, as well as a brief description of each other matter voted upon at the meeting; and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office. For the vote on the frequency of shareholder advisory votes on executive compensation required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1) and §240.14a-21(b), state the number of votes cast for each of 1 year, 2 years, and 3 years, as well as the number of abstentions.

* * * * *

(d) No later than one hundred fifty calendar days after the end of the annual or other meeting of shareholders at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1), but in no event later than sixty calendar days prior to the deadline for submission of shareholder proposals under §240.14a-8, as disclosed in the registrant's most recent proxy statement for an annual or other meeting of shareholders relating to the election of directors at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1(a)(2)), by amendment to the most recent Form 8-K filed pursuant to (b) of this Item, disclose the company's decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives in its proxy materials until the next required vote on the frequency of shareholder votes on the compensation of executives.

* * * * *

Instruction 1 to Item 5.07. The four business day period for reporting the event under this Item 5.07, other than with respect to Item 5.07(d), shall begin to run on the day on which the meeting ended. ***

* * * * *

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Date: January 25, 2011

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-63776; File No. 0-49764)

Notice and Opportunity for Hearing: SinoFresh Healthcare, Inc.

January 26, 2011

Notice is hereby given that on November 1, 2010, SinoFresh Healthcare, Inc. (Applicant) filed with the Securities and Exchange Commission a Form 15 certification (Certification) pursuant to Section 12(g) of the Securities Exchange Act of 1934 (Exchange Act) for termination of the registration of the Applicant's common shares (no par value) under Section 12(g) of the Exchange Act. The Certification is available via the Edgar database on the Commission's website at www.sec.gov or at the offices of the Commission in the 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.

Pursuant to Rule 12g-4 of the Exchange Act, termination of the registration of a class of securities under Section 12(g) of the Exchange Act shall take place 90 days, or such shorter period as the Commission may determine, after the Applicant certifies to the Commission on Form 15 that the class of securities is held of record by less than 300 persons or less than 500 persons where the total assets of the issuer have not exceeded $10 million on the last day of each of the Applicant's most recent three fiscal years. The Applicant's Certification declares that the Applicant has approximately 692 holders of record as of October 29, 2010. Based on the fact that the Applicant's Certification does not comply with the record holder requirements of Rule 12g-4 of the Exchange Act, the Applicant's request for termination should be denied.

Notice is further given that any interested person not later than [INSERT DATE 15 DAYS FROM PUBLICATION IN FEDERAL REGISTER] may submit to the Commission in writing views on any substantial facts bearing on the certification or the utility of a hearing thereon. Submissions should state briefly the nature of the interest of the person submitting such information or requesting a hearing, the reason for such request, and the issues of facts and law raised by the certification which he desires to contest. Submissions may be made by any of the following methods:

Electronic Submissions:

Send an e-mail to rule-comments@sec.gov. Please include File Number 0-49764 on the subject line.

Paper Submissions:

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

All submissions should refer to File Number 0-49764. To help us process and review submissions more efficiently, please use only one method. The Commission will post all submissions on the Commission's Internet website (http://www.sec.gov/rules/other.shtml). Submissions 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 submissions received will be posted without change; we do not edit personal identifying information. You should submit only information that you wish to make available publicly.

Persons who request a hearing or submit views as to whether a hearing should be ordered will receive any notices and orders issued in this matter, including the date of any hearing ordered and any postponement thereof.

If a request for a hearing or other submissions are not received, the Commission may, at any time after [INSERT DATE 15 DAYS FROM PUBLICATION IN FEDERAL REGISTER], issue an order denying termination of Applicant's registration. If the Commission receives information through submission which shows that the Applicant has met the requirements for filing a Form 15 certification, the Commission may issue either a notice of effectiveness or set this matter down for a hearing. Termination of registration shall be deferred pending final determination on the question of denial.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

January 27, 2011

IN THE MATTER OF	
Clean Energy and Power, Inc.,	**ORDER OF SUSPENSION OF TRADING**
File No.	

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Clean Energy and Power, Inc. ("Clean Energy") because it has not filed any periodic reports since the period ended September 30, 2007. Clean Energy is quoted on the Pink Sheets operated by OTC Markets Group Inc. under the ticker symbol KEPI.

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, and any equity securities of any entity purporting to succeed to this issuer.

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, and any equity securities of any entity purporting to succeed to this issuer, is suspended for the period from 9:30 a.m. EST on January 27, 2011, through 11:59 p.m. EST on February 9, 2011.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63783 / January 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14205

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

I.

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

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Clean Energy and Power, Inc. (CIK No. 0001100748) is a Nevada corporation currently located in Warwick, Rhode Island. Clean Energy has a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Clean Energy is delinquent in its periodic filings with the Commission, having not filed any periodic reports since its predecessor 5G Wireless Communications, Inc., filed a Form 10-QSB for the period ended September 30, 2007, which reported a net loss of $1,927,555 for the prior three months. Its securities are quoted on the Pink Sheets operated by OTC Markets Group Inc. ("Pink Sheets") under the symbol "KEPI."

3. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports. Specifically, Rule 13a-1 requires issuers to file annual reports (Form 10-K), and Rule 13a-13 requires issuers to file quarterly reports (Form 10-Q).

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

III.

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

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

B. Whether it is necessary or appropriate for the protection of investors to suspend for a period not exceeding twelve months, or revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

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

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

If Respondent fails to file the directed Answer, or fails to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate name of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Attachment

Appendix 1

Chart of Delinquent Filings for Clean Energy and Power, Inc.

Form Type	Period Ended	Due Date	Months Delinquent (as of 11/24/2010)
10-K	12/31/07	03/31/08	31
10-Q	03/31/08	05/15/08	30
10-Q	06/30/08	08/14/08	27
10-Q	09/30/08	11/14/08	24
10-K	12/31/08	03/31/09	19
10-Q	03/31/09	05/15/09	18
10-Q	06/30/09	08/14/09	15
10-Q	09/30/09	11/14/09	12
10-K	12/31/09	03/31/10	7
10-Q	03/31/10	05/15/10	6
10-Q	06/30/10	08/14/10	3
10-Q	09/30/10	11/14/10	<1

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038-AD03

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

Release No. IA-3145; File No. S7-05-11

RIN 3235-AK92

Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF

AGENCIES: Commodity Futures Trading Commission and Securities and Exchange Commission.

ACTION: Joint proposed rules.

SUMMARY: The Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (collectively, "we" or the "Commissions") are proposing new rules under the Commodity Exchange Act and the Investment Advisers Act of 1940 to implement provisions of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed SEC rule would require investment advisers registered with the SEC that advise one or more private funds to file Form PF with the SEC. The proposed CFTC rule would require commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") registered with the CFTC to satisfy certain proposed CFTC filing requirements by filing Form PF with the SEC, but only if those CPOs and CTAs are also registered with the SEC as investment advisers and advise one or more private funds. The information contained in Form PF is designed, among other things, to assist the Financial Stability Oversight Council in its assessment

of systemic risk in the U.S. financial system. These advisers would file these reports electronically, on a confidential basis.

DATES: Comments should be received on or before [insert date 60 days after publication in Federal Register], 2011.

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

CFTC:

- Agency website, via its Comments Online process: http://comments.cftc.gov. Follow the instructions for submitting comments through the website.
- Mail: David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

"Form PF" must be in the subject field of comments submitted via email, and clearly indicated on written submissions. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in 17 CFR 145.9.

The CFTC reserves the right, but shall have no obligation, to review, prescreen, filter, redact, refuse, or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, including, but not limited to, obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act, 5 U.S.C. 552, et seq ("FOIA").

SEC:

Electronic comments:

- Use the SEC'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 S7-05-11 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 S7-05-11. 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 SEC will post all comments on the SEC's website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the SEC's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of

10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: CFTC: Daniel S. Konar II, Attorney-Advisor, Telephone: (202) 418-5405, E-mail: dkonar@cftc.gov, Amanda L. Olear, Special Counsel, Telephone: (202) 418-5283, E-mail: aolear@cftc.gov, or Kevin P. Walek, Assistant Director, Telephone: (202) 418-5405, E-mail: kwalek@cftc.gov, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581; **SEC:** David P. Bartels, Attorney-Adviser, Sarah G. ten Siethoff, Senior Special Counsel, or David A. Vaughan, Attorney Fellow, at (202) 551-6787 or IArules@sec.gov, Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The CFTC is requesting public comment on proposed rule 4.27(d) [17 CFR 4.27(d)] under the Commodity Exchange Act ("CEA") [1] and proposed Form PF. The SEC is requesting public comment on proposed rule 204(b)-1 [17 CFR 275.204(b)-1] and proposed Form PF [17 CFR 279.9] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] ("Advisers Act").[2]

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1 7 U.S.C. 1a.

2 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to Advisers Act rule 204(b)-1, or any paragraph of this rule, we are referring to 17 CFR 275.204(b)-1 of the Code of Federal Regulations in which this rule would be published. In addition, in this Release, when we refer to the "Advisers Act," we refer to the Advisers Act as in effect on July 21, 2011.

I. BACKGROUND

A. The Dodd-Frank Act

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[3] While the Dodd-Frank Act provides for wide-ranging reform of financial regulation, one stated focus of this legislation is to "promote the financial stability of the United States" by, among other measures, establishing better monitoring of emerging risks using a system-wide perspective.[4] To further this goal, Title I of the Dodd-Frank Act establishes the Financial Stability Oversight Council ("FSOC"), which is comprised of the leaders of various financial regulators (including the Commissions' Chairmen) and other participants.[5] The Dodd-Frank Act directs FSOC to monitor emerging risks to U.S. financial stability and to require that the Board of Governors of the Federal Reserve System ("FRB") supervise designated nonbank financial companies that may pose risks to U.S. financial stability in the event of their material financial distress or failure or because of their activities.[6] In addition, the Dodd-Frank Act directs FSOC to recommend to the FRB heightened prudential standards for designated nonbank financial companies.[7]

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[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[4] *See* S. CONF. REP. NO. 111-176, at 2-3 (2010) ("Senate Committee Report").

[5] Section 111 of the Dodd-Frank Act provides that the voting members of FSOC will be the Secretary of the Treasury, the Chairman of the FRB, the Comptroller of the Currency, the Director of the Bureau of Consumer Financial Protection, the Chairman of the SEC, the Chairperson of the Federal Deposit Insurance Corporation, the Chairperson of the CFTC, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board and an independent member appointed by the President having insurance expertise. FSOC will also have five nonvoting members, which are the Director of the Office of Financial Research, the Director of the Federal Insurance Office, a state insurance commissioner, a state banking supervisor and a state securities commissioner.

[6] Section 112 of the Dodd-Frank Act.

[7] *Id.*

The Dodd-Frank Act anticipates that FSOC will be supported in these responsibilities by various regulatory agencies, including the Commissions. To that end, the Dodd-Frank Act amends certain statutes, including the Advisers Act, to authorize or direct certain federal agencies to support FSOC. Title IV of the Dodd-Frank Act amends the Advisers Act to generally require that advisers to hedge funds and other private funds[8] register with the SEC.[9] Congress required this registration in part because it believed that "information regarding [the] size, strategies and positions [of large private funds] could be crucial to regulatory attempts to deal with a future crisis."[10] To that end,

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8 Section 202(a)(29) of the Advisers Act defines the term "private fund" as "an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3) ("Investment Company Act"), but for section 3(c)(1) or 3(c)(7) of that Act." Section 3(c)(1) of the Investment Company Act provides an exclusion from the definition of "investment company" for any "issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities." Section 3(c)(7) of the Investment Company Act provides an exclusion from the definition of "investment company" for any "issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities." The term "qualified purchaser" is defined in section 2(a)(51) of the Investment Company Act.

9 The Dodd-Frank Act requires such private fund adviser registration by amending section 203(b)(3) of the Advisers Act to repeal the exemption from registration for any adviser that during the course of the preceding 12 months had fewer than 15 clients and neither held itself out to the public as an investment adviser nor advised any registered investment company or business development company. *See* section 403 of the Dodd-Frank Act. *See also infra* note 11 for the definition of "private fund adviser." There are exemptions from the registration requirement, including exemptions for advisers to venture capital funds and advisers to private funds with less than $150 million in assets under management in the United States. There also is an exemption for "foreign private advisers," which are investment advisers with no place of business in the United States, fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser, and less than $25 million in assets under management from such clients and investors. *See* sections 402, 407 and 408 of the Dodd-Frank Act. *See also Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*, Investment Advisers Act Release No. IA-3111 (Nov. 19, 2010), 75 FR 77,190 (Dec. 10, 2010) ("Private Fund Exemption Release"); *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. IA-3110 (Nov. 19, 2010), 75 FR 77,052 (Dec. 10, 2010) ("Implementing Release"). References in this Release to Form ADV or terms defined in Form ADV or its glossary are to the form and glossary as they are proposed to be amended in the Implementing Release.

10 *See* Senate Committee Report, *supra* note 4, at 38.

Section 404 of the Dodd-Frank Act, which amends section 204(b) of the Advisers Act, directs the SEC to require private fund advisers[11] to maintain records and file reports containing such information as the SEC deems necessary and appropriate in the public interest and for investor protection or for the assessment of systemic risk by FSOC.[12] The records and reports must include a description of certain information about private funds, such as the amount of assets under management, use of leverage, counterparty credit risk exposure, and trading and investment positions for each private fund advised by the adviser.[13] The SEC must issue jointly with the CFTC, after consultation with FSOC, rules establishing the form and content of any such reports required to be filed with respect to private fund advisers also registered with the CFTC.[14]

This joint proposal is designed to fulfill this statutory mandate. Under proposed Advisers Act rule 204(b)-1, private fund advisers would be required to file Form PF with the SEC. Private fund advisers that also are registered as CPOs or CTAs with the CFTC would file Form PF to satisfy certain CFTC systemic risk reporting requirements.[15]

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11 Throughout this Release, we use the term "private fund adviser" to mean any investment adviser that (i) is registered or required to register with the SEC (including any investment adviser that is also registered or required to register with the CFTC as a CPO or CTA) and (ii) advises one or more private funds. We are not proposing that advisers solely to venture capital funds or advisers to private funds that in the aggregate have less than $150 million in assets under management in the United States ("exempt reporting advisers") be required to file Form PF.

12 While Advisers Act section 204(b)(1) could be read in isolation to imply that the SEC requiring private fund systemic risk reporting is discretionary, other amendments to the Advisers Act made by the Dodd-Frank Act (such as Advisers Act section 204(b)(5) and 211(e) suggest that Congress intended such rulemaking to be mandatory. *See also* Senate Committee Report, *supra* note 4, at 39 ("this title requires private fund advisers…to disclose information regarding their investment positions and strategies.").

13 *See* section 404 of the Dodd-Frank Act.

14 *See* section 406 of the Dodd-Frank Act.

15 For these private fund advisers, filing Form PF through the Form PF filing system would be a filing with both the SEC and CFTC. Irrespective of their filing a Form PF with the SEC, all private fund advisers that are also registered as CPOs and CTAs with the CFTC would be required to file Schedule A of proposed Form CPO-PQR (for CPOs) or Schedule A of proposed

Information collected about private funds on Form PF, together with information the SEC collects on Form ADV and the information the CFTC separately has proposed CPOs file on Form CPO-PQR and CTAs file on Form CTA-PR, will provide FSOC and the Commissions with important information about the basic operations and strategies of private funds and will be important in FSOC obtaining a baseline picture of potential systemic risk across both the entire private fund industry and in particular kinds of private funds, such as hedge funds.[16]

Information the SEC obtains through reporting under section 404 of the Dodd-Frank Act is to be shared with FSOC as FSOC considers necessary for purposes of assessing the systemic risk posed by private funds and generally is to remain confidential.[17] Our staffs have consulted with staff representing FSOC's members in developing this proposal. We note that simultaneous with our staffs' FSOC consultations relating to this rulemaking, FSOC has been building out its standards for assessing

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Form CTA-PR (for CTAs). Additionally, to the extent that they operate or advise commodity pools that do not satisfy the definition of "private fund" under the Dodd-Frank Act, private fund advisers that are also registered as CPOs or CTAs would still be required to file proposed Form CPO-PQR (for CPOs) and proposed Form CTA-PR (for CTAs), as applicable.

16 The information reported through the various reporting forms is designed to be complementary, and not duplicative. Information reported on Form ADV would be publicly available, while information reported on Form PF and proposed Forms CPO-PQR and CTA-PR would be confidential to the extent permitted under applicable law. Form ADV and Form PF also have different principal purposes. Form ADV primarily aims at providing the SEC and investors with basic information about advisers (including private fund advisers) and the funds they manage for investor protection purposes, although Form ADV information also will be available to FSOC. Information on Form ADV is designed to provide the SEC with information necessary to its administration of the Advisers Act and to efficiently allocate its examination resources based on the risks the SEC discerns or the identification of common business activities from information provided by advisers. *See* Implementing Release, *supra* note 9. In contrast, the Commissions intend to use Form PF primarily as a confidential systemic risk disclosure tool to assist FSOC in monitoring and assessing systemic risk, although it also would be available to assist the Commissions in their regulatory programs, including examinations and investigations and investor protection efforts relating to private fund advisers.

17 *See* section 404 of the Dodd-Frank Act; *infra* note 39 and accompanying text.

systemic risk across different kinds of financial firms and has recently proposed standards for determining which nonbank financial companies should be designated as subject to FRB supervision.[18]

B. International Coordination

In assessing systemic risk, the Dodd-Frank Act requires that FSOC coordinate with foreign financial regulators.[19] This coordination may be particularly important in assessing systemic risk associated with hedge funds and other private funds because they often operate globally and make significant investments in firms and markets around the world.[20] As others have recognized, "[g]iven the global nature of the markets in which [private fund] managers and funds operate, it is imperative that a regulatory framework be applied on an internationally consistent basis."[21] International regulatory coordination also has been cited as a critical element in facilitating financial regulators' formulation of a comprehensive and effective response to future financial crises.[22] Collecting consistent and comparable information is of added value in private fund systemic risk reporting

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18 *See, e.g.*, *Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, Financial Stability Oversight Council Release (Jan. 18, 2011); *Advance Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, Financial Stability Oversight Council Release (Oct. 1, 2010), 75 FR 61653 (Oct. 6, 2010) ("FSOC Designation ANPR").

19 *See* section 175 of the Dodd-Frank Act.

20 *See* Damian Alexander, *Global Hedge Fund Assets Rebound to Just Over $1.8 Trillion*, HEDGE FUND INTELLIGENCE (Apr. 7, 2010) ("HFI").

21 Group of Thirty, FINANCIAL REFORM: A FRAMEWORK FOR FINANCIAL STABILITY (Jan. 15, 2009).

22 *See* U.S. Department of the Treasury, *Financial Regulatory Reform: A New Foundation* (2009), at 8; and *Equipping Financial Regulators with the Tools Necessary to Monitor Systemic Risk*, Senate Banking Subcommittee on Security and International Trade and Finance, Feb. 12, 2010 (testimony of Daniel K. Tarullo, member of the FRB). *See also* Group of 20 and the International Monetary Fund, THE GLOBAL PLAN FOR RECOVERY AND REFORM: LESSONS OF THE FINANCIAL CRISIS FOR FUTURE REGULATION OF FINANCIAL INSTITUTIONS AND MARKETS AND FOR LIQUIDITY MANAGEMENT (Feb. 4, 2009).

because it would aid in the assessment of systemic risk on a global basis and thus enhance the utility of information sharing among U.S. and foreign financial regulators.[23]

Recognizing this benefit, our staffs participated in the International Organization of Securities Commissions' ("IOSCO") preparation of a report regarding hedge fund oversight.[24] Among other matters, this report recommended that hedge fund advisers provide to their national regulators information for the identification, analysis, and mitigation of systemic risk. It also recommended that regulators cooperate and share information where appropriate in order to facilitate efficient and effective oversight of globally active hedge funds and to help identify systemic risks, risks to market integrity, and other risks arising from the activities or exposures of hedge funds.[25] The types of information that IOSCO recommended regulators gather from hedge fund advisers is consistent with and comparable to the types of information we propose to collect from hedge funds through Form PF, as described in further detail below.[26]

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23 The Commissions expect that they may share information reported on Form PF with various foreign financial regulators under information sharing agreements in which the foreign regulator agrees to keep the information confidential.

24 Technical Committee of the International Organization of Securities Commissions, HEDGE FUNDS OVERSIGHT (June 2009), *available at* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf ("IOSCO Report").

25 *Id.* at 3.

26 *See* IOSCO Report, *supra* note 24, at 14; Press Release, International Regulators Publish Systemic Risk Data Requirements for Hedge Funds (Feb. 25, 2010), *available at* https://www.iosco.org/news/pdf/IOSCONEWS179.pdf. The IOSCO Report states that systemic risk information that hedge fund advisers should provide to regulators should include, for example: (1) information on their prime brokers, custodian, and background information on the persons managing the assets; (2) information on the manager's larger funds including the net asset value, predominant strategy/regional focus and performance; (3) leverage and risk information, including concentration risk of the hedge fund adviser's larger funds; (4) asset and liability information for the manager's larger funds; (5) counterparty risk, including the biggest sources of credit; (6) product exposure for all of the manager's assets; and (7) investment activity known to represent a significant proportion of such activity in important markets or products. Some of this information would be collected through the revised Form ADV, as proposed by the SEC in the Implementing Release, rather than Form PF.

In addition, our staffs have consulted with the United Kingdom's Financial Services Authority (the "FSA"), which has conducted a voluntary semi-annual survey since October 2009 by sampling the largest hedge fund groups based in the United Kingdom.[27] Because many hedge fund advisers are located in the United Kingdom and subject to the jurisdiction of the FSA, this coordination has been particularly important.[28] UK hedge fund advisers complete this survey on a voluntary basis, and the survey collects information regarding all funds managed by the particular hedge fund adviser as well as for individual funds with at least $500 million in assets. The information the survey collects is designed to help the FSA better understand hedge funds' use of leverage, "footprints" in various asset classes (including concentration and liquidity issues), the scale of asset/liability mismatches, and counterparty credit risks.[29] In addition, for more than five years the FSA has been conducting a semi-annual survey of hedge fund counterparties to assist it in assessing trends in counterparty credit risk, margin requirements, and other matters.[30] Our staffs' consultation with the FSA as they designed and conducted their hedge fund surveys has been very informative, and we have incorporated into proposed Form PF many of the types of information collected through the FSA surveys.

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27 The survey canvasses approximately 50 FSA-authorized investment managers. *See, e.g.*, Financial Services Authority, *Assessing Possible Sources of Systemic Risk from Hedge Funds: A Report on the Findings of the Hedge Fund as Counterparty Survey and the Hedge Fund Survey* (Jul. 2010), *available at* http://www.fsa.gov.uk/pubs/other/hf_report.pdf ("FSA Survey").

28 According to Hedge Fund Intelligence, U.K.-based advisers manage approximately 16% of global hedge fund assets. This concentration of hedge fund advisers is second only to the United States (managing approximately 76% of global hedge fund assets). *See* HFI, *supra* note 20.

29 FSA Survey, *supra* note 27.

30 *Id.*

SEC staff also has consulted with Hong Kong's Securities and Futures Commission regarding hedge fund oversight and data collection because Hong Kong is an important jurisdiction for hedge funds in Asia.[31] This consultation also has proven helpful in designing proposed Form PF. Collectively, hedge fund advisers based in the United States, the United Kingdom, and Hong Kong represent over 92 percent of global hedge fund assets, and thus a broad consistency among these jurisdictions' hedge fund information collections, including our own, will facilitate the sharing of consistent and comparable information for systemic risk assessment purposes for most global hedge fund assets under management.[32] Finally, in connection with the IOSCO report, IOSCO members (including the SEC and CFTC) agreed, on a "best efforts" basis, to conduct a survey of hedge fund reporting data as of the end of September 2010 based on the guidelines established in the IOSCO report and the FSA survey. This internationally coordinated survey effort has also informed our proposed reporting.

International efforts also have focused on potential systemic considerations arising out of other types of private funds, such as private equity funds. For example, an International Monetary Fund ("IMF") staff paper has focused on "extending the perimeter" of effective regulatory oversight to capture all financial activities that may pose systemic risks, regardless of the type of institution in which they occur.[33] The IMF paper proposed that these financial activities be subject to reporting obligations so that

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31 According to Hedge Fund Intelligence, Hong Kong-based advisers manage approximately 0.54% of global hedge fund assets, which is the largest concentration of hedge fund advisers in Asia. *See* HFI, *supra* note 20.

32 *See* HFI, *supra* note 20.

33 *See* Ana Carvajal et al., *The Perimeter of Financial Regulation*, IMF Staff Position Note SPN/09/07 (Mar. 26, 2009), *available at* http://www.imf.org/external/pubs/ft/spn/2009/spn0907.pdf.

regulators may assess potential systemic risk and emphasized the need to capture all financial activities conducted on a leveraged basis, including activities of leveraged private equity vehicles.[34] Others also have recognized a need for monitoring the private equity sector because having information on its potentially systemically important interactions with the financial system are an important part of regulators' obtaining the complete picture of the broader financial system that is so vital to effective systemic risk monitoring.[35] We have taken these international efforts relating to systemic risk monitoring in private equity funds into account in the proposed reporting discussed below.

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34 *Id.*, at 8.

35 *See, e.g.*, Lorenzo Bini Smaghi, Member of the Executive Board of the European Central Bank, Going Forward – Regulation and Supervision after the Financial Turmoil, Speech by at the 4th International Conference of Financial Regulation and Supervision (Jun. 19, 2009), *available at* http://www.bis.org/review/r090623e.pdf (stating "macro-prudential analysis needs to capture all components of financial systems and how they interact. This includes all intermediaries, markets and infrastructures underpinning them. In this respect, it is important to consider that at present some of these components, such as hedge funds, private equity firms or over-the-counter (OTC) financial markets, are not subject to micro-prudential supervision. But they need to be part of macro-prudential analysis and risk assessments, as they influence the overall behaviour of the financial system. To gain a truly "systemic" perspective on the financial system, no material element should be left out."); *Private Equity and Leveraged Finance Markets*, Bank for International Settlements Committee on the Global Financial System Working Paper No. 30 (Jul. 2008), *available at* http://www.bis.org/publ/cgfs30.pdf ("BIS Private Equity Paper") ("Going forward, the Working Group believes that enhancing transparency and strengthening risk management practices [relating to private equity and leveraged finance markets] require special attention. …The recent market turmoil has demonstrated that a number of the risks in the leveraged finance market are likely to materialise in combination with other financial market risks in stressed market conditions. … In the public sector, there is a stronger case for developing early warning indicators and devoting more research efforts to modelling the dynamic relationships between risk factors with a view to understanding the interrelationships across markets and their impact on the financial sector."). *See also* Macroeconomic Assessment Group established by the Financial Stability Board and the Basel Committee on Banking Supervision, Interim Report: Assessing the Macroeconomic Impact of the Transition to Stronger Capital and Liquidity Requirements (Aug. 2010), at section 5.2, *available at* http://www.financialstabilityboard.org/publications/r_100818b.pdf.

II. DISCUSSION

The SEC is proposing a new rule 204(b)-1 under the Advisers Act to require that SEC-registered investment advisers report systemic risk information to the SEC on Form PF if they advise one or more private funds.[36] For registered CPOs and CTAs that are also registered as investment advisers with the SEC and advise a private fund, this report also would serve as substitute compliance for a portion of the CFTC's proposed systemic risk reporting requirements under proposed Commodity Exchange Act rule 4.27(d).[37] Because commodity pools that meet the definition of a private fund are categorized as hedge funds for purposes of Form PF as discussed below, CPOs and CTAs filing Form PF would need to complete only the sections applicable to hedge fund advisers, and the form would be a joint form only with respect to those sections.[38]

Form PF would elicit non-public information about private funds and their trading strategies the public disclosure of which, in many cases, could adversely affect the funds and their investors. The SEC does not intend to make public Form PF information identifiable to any particular adviser or private fund, although the SEC may use Form PF information in an enforcement action. Amendments to the Advisers Act added by the Dodd-Frank Act preclude the SEC from being compelled to reveal the information except

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36 *See* proposed Advisers Act rule 204(b)-1.

37 *See* proposed Commodity Exchange Act rule 4.27(d), which provides that these CPOs and CTAs would need to file other reports as required under rule 4.27 with respect to pools that are not private funds. For purposes of this proposed rule, it is the CFTC's position that any false or misleading statement of a material fact or material omission in the jointly proposed sections (sections 1 and 2) of proposed Form PF that is filed by these CPOs and CTAs shall constitute a violation of section 6(c)(2) of the Commodity Exchange Act. Proposed Form PF contains an oath consistent with this position.

38 Thus, private fund advisers that also are CPOs or CTAs would be obligated to complete only section 1 and, if they met the applicable threshold, section 2 of Form PF. Accordingly, Form PF is a joint form between the SEC and the CFTC only with respect to sections 1 and 2 of the form.

in very limited circumstances.[39] Similarly, the Dodd-Frank Act exempts the CFTC from being compelled under FOIA to disclose to the public any information collected through Form PF and requires that the CFTC maintain the confidentiality of that information consistent with the level of confidentiality established for the SEC in section 404 of the Dodd-Frank Act. The Commissions would make information collected through Form PF available to FSOC, as is required by the Dodd-Frank Act, subject to the confidentiality provisions of the Dodd-Frank Act.[40]

We propose that each private fund adviser report basic information about the operations of its private funds on Form PF once each year. We propose that a relatively small number of Large Private Fund Advisers (described in section II.B below) instead be required to submit this basic information each quarter along with additional systemic risk related information required by Form PF concerning certain of their private funds.[41] In the sections below, we describe the principal reasons we believe that FSOC needs this

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39 *See* section 404 of the Dodd-Frank Act stating that "[n]otwithstanding any other provision of law, the Commission [SEC] may not be compelled to disclose any report or information contained therein required to be filed with the Commission [SEC] under this subsection" except to Congress upon agreement of confidentiality. Section 404 also provides that nothing prevents the SEC from complying with a request for information from any other federal department or agency or any self-regulatory organization requesting the report or information for purposes within the scope of its jurisdiction or an order of a court of the U.S. in an action brought by the U.S. or the SEC. Section 404 of the Dodd-Frank Act also states that the SEC shall make available to FSOC copies of all reports, documents, records, and information filed with or provided to the SEC by an investment adviser under section 404 of the Dodd-Frank Act as FSOC may consider necessary for the purpose of assessing the systemic risk posed by a private fund and that FSOC shall maintain the confidentiality of that information consistent with the level of confidentiality established for the SEC in section 404 of the Dodd-Frank Act.

40 *See* section 404 of the Dodd-Frank Act.

41 *See* proposed Instructions to Form PF. Our proposed reporting thus complies with the Dodd-Frank Act directive that, in formulating systemic risk reporting and recordkeeping for investment advisers to mid-sized private funds, the Commission take into account the size, governance, and investment strategy of such funds to determine whether they pose systemic risk. *See* section 408 of the Dodd-Frank Act. The Dodd-Frank Act also states that the SEC may establish different reporting requirements for different classes of fund advisers, based on the type or size of private fund being advised. *See* section 404 of the Dodd-Frank Act.

information in order to monitor the systemic risk that may be associated with the operation of private funds.

A. Purposes of Form PF

The Dodd-Frank Act tasks FSOC with monitoring the financial services marketplace in order to identify potential threats to the financial stability of the United States.[42] It also requires FSOC to collect information from member agencies to support its functions.[43] Section 404 of the Dodd-Frank Act directs the SEC to support this effort by collecting from investment advisers to private funds such information as the SEC deems necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.[44] FSOC may, if it deems necessary, direct the Office of Financial Research ("OFR") to collect additional information from nonbank financial companies.[45]

The Commissions are jointly proposing sections 1 and 2 of Form PF, and the SEC is proposing sections 3 and 4 of Form PF, to collect information necessary to permit FSOC to monitor private funds in order to identify any potential systemic threats arising from their activities. The information we currently collect about private funds and their activities is very limited and is not designed for the purpose of monitoring systemic

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42 *See* section 112(a)(2)(C) of the Dodd-Frank Act.

43 *See* section 112(d)(1) of the Dodd-Frank Act.

44 Section 404 of the Dodd-Frank Act requires that reports and records that the SEC mandates be maintained for these purposes include a description of certain categories of information, such as assets under management, use of leverage, counterparty credit risk exposure, and trading and investment positions for each private fund advised by the adviser.

45 *See* sections 153 and 154 of the Dodd-Frank Act.

risk.[46] We do not currently collect information, for example, about hedge funds' primary trading counterparties or significant market positions. The SEC also does not currently collect data to assess the risk of a run on a private liquidity fund, a risk that could transfer into registered money market funds and into the broader short term funding markets and those that rely on those markets.[47] While we are proposing to collect information on Form PF to assist FSOC in its monitoring obligations under the Dodd-Frank Act, the information collected on Form PF would be available to assist the Commissions in their regulatory programs, including examinations and investigations and investor protection efforts relating to private fund advisers.[48]

We have designed Form PF, in consultation with staff representing FSOC's members, to provide FSOC with such information so that it may carry out its monitoring obligations.[49] Based upon the information we propose to obtain from advisers about the

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46 We note that the SEC has proposed amendments to Form ADV that also would require private funds to report certain basic information, such as the fund's prime broker and its gross and net asset values. *See* Implementing Release, *supra* note 9.

47 *See* section II.A.3 of this Release for a discussion of liquidity funds and their potential risks.

48 *See* SEC section VI.A of this Release for a discussion of how the SEC could use proposed Form PF data for its regulatory activities and investor protection efforts.

49 Industry participants (in response to FSOC Designation ANPR, *supra* note 18) acknowledged the potentially important function that such reporting may play in allowing FSOC to monitor the private fund industry more generally and to assess the extent to which any private funds may pose systemic risk more specifically. *See, e.g.*, Comment Letter of the Managed Funds Association (Nov. 5, 2010) ("the enhanced regulation of hedge fund managers and the markets in which they participate following the passage of the Dodd-Frank Act ensures that regulators will have a timely and complete picture of hedge funds and their activities"), Comment Letter of the Coalition of Private Investment Companies (Nov. 5, 2010) ("the registration and reporting structure for private funds subject to SEC oversight will result in an unprecedented range and depth of data to the Council, its constituent members and the newly created Office of Financial Research. From this information, in addition to the information gathered by the Council, the Council should be able to assemble a clear picture of the overall U.S. financial network and how private investment funds fit into it, both on an individual and overall basis"), Comment Letter of the Private Equity Growth Council (Nov. 5, 2010) ("regulators also now have the authority to require all private equity firms and private equity funds to provide any additional data needed to assess systemic risk") ("PE Council Letter"). Comment letters in response to the FSOC Designation ANPR are available at http://www.regulations.gov.

private funds they advise, together with market data it collects from other sources, FSOC should be able to identify whether any private funds merit further analysis or whether OFR should collect additional information. We have not sought to design a form that would provide FSOC in all cases with all the information it may need to make a determination that a particular entity should be designated for supervision by the FRB.[50] Such a form, if feasible, likely would require substantial additional and more detailed data addressing a wider range of possible fund profiles, since it could not be tailored to a particular adviser, and would impose correspondingly greater burdens on private fund advisers. This type of information gathering may be better accomplished by OFR through targeted information requests to specific private fund advisers identified through Form PF, rather than through a general reporting form.[51]

The amount of information a private fund adviser would be required to report on the proposed form would vary based on both the size of the adviser and the type of funds it advises. This approach reflects our initial view after consulting with staff representing FSOC's members that a smaller private fund adviser may present less risk to the stability of the U.S. financial system and thus merit reporting of less information.[52] It also reflects our understanding that different types of private funds could present different implications for systemic risk and that reporting requirements should be appropriately

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50 *See* section 113 of the Dodd-Frank Act for a discussion of the matters that FSOC must consider when determining whether a U.S. nonbank financial company shall be supervised by the FRB and subject to prudential standards

51 Recordkeeping requirements specific to private fund advisers for systemic risk assessment purposes will be addressed in a future release pursuant to our authority under section 404 of the Dodd-Frank Act.

52 We discuss the information we propose requiring smaller private fund advisers report in section II.D.1 of this Release.

calibrated.[53] As discussed in more detail below, Form PF would require more detailed information from advisers managing a large amount of hedge fund or liquidity fund assets. Less information would be required regarding advisers managing a large amount of private equity fund assets because, after a review of available literature and consultation with staff representing FSOC's members, it appears that private equity funds may present less potential risk to U.S. financial stability. The principal reasons for Form PF's proposed reporting specific to hedge funds, liquidity funds, and private equity funds are discussed below.

1. *Hedge Funds*

We believe that Congress expected hedge fund advisers would be required to report information to the Commissions under Title IV of the Dodd-Frank Act.[54] After consulting with staff representing FSOC's members, our initial view is that the investment activities of hedge funds[55] may have the potential to pose systemic risk for several reasons and, accordingly, that advisers to these hedge funds should provide

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53 Congress recognized this need as well. *See supra* note 41.

54 *See* Senate Committee Report, *supra* note 4, at 38 ("While hedge funds are generally not thought to have caused the current financial crisis, information regarding their size, strategies, and positions could be crucial to regulatory attempts to deal with a future crisis. The case of Long-Term Capital Management, a hedge fund that was rescued through Federal Reserve intervention in 1998 because of concerns that it was "too-interconnected-to-fail," shows that the activities of even a single hedge fund may have systemic consequences.").

55 *See* section II.B of this Release for a discussion of the definition of "hedge fund" in proposed Form PF. To prevent duplicative reporting, commodity pools that meet the definition of a private fund would be treated as hedge funds for purposes of Form PF. CPOs and CTAs that are not also registered as an investment adviser with the SEC would be required to file proposed Form CPO-PQR (for CPOs) and proposed Form CTA-PR (for CTAs) reporting similar information as Form PF requires for private fund advisers that advise one or more hedge funds. *See* Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, CFTC Release (Jan. __, 2011). Deeming commodity pools that meet the definition of a private fund to be hedge funds for purposes of Form PF, therefore, is designed to ensure that the CFTC obtains similar reporting regarding commodity pools that satisfy CFTC reporting obligations by the CPO or CTA filing proposed Form PF.

targeted information on Form PF to allow FSOC to gain a better picture of the potential systemic risks posed by the hedge fund industry. Hedge funds may be important sources, and users, of liquidity in certain markets. Hedge funds often use financial institutions that may have systemic importance to obtain leverage and enter into other types of transactions. Hedge funds employ investment strategies that may use leverage, derivatives, complex structured products, and short selling in an effort to generate returns. Hedge funds also may employ strategies involving high volumes of trading and concentrated investments. These strategies, and in particular high levels of leverage, can increase the likelihood that the fund will experience stress or fail, and amplify the effects on financial markets.[56] While many hedge funds are not highly leveraged, certain hedge fund strategies employ substantial amounts of leverage.[57] Significant hedge fund failures (whether caused by their investment positions or use of leverage or both) could result in material losses at the financial institutions that lend to them if collateral securing this lending is inadequate.[58] These losses could have systemic implications if they require these financial institutions to scale back their lending efforts or other financing activities

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56 *See* President's Working Group on Financial Markets, HEDGE FUNDS, LEVERAGE, AND THE LESSONS OF LONG TERM CAPITAL MANAGEMENT (Apr. 1999), at 23, *available at* http://www.ustreas.gov/press/releases/reports/hedgfund.pdf ("PWG LTCM Report").

57 *See* FSA Survey, *supra* note 27, at 5 (showing borrowings as a multiple of net equity ranging from 100% in strategies such as managed futures to 1400% in the fixed income arbitrage hedge fund strategy).

58 *See, e.g.*, *Id.*; Ben S. Bernanke, Hedge Funds and Systemic Risk, Speech at the Federal Reserve Bank of Atlanta's 2006 Financial Market's Conference (May 16, 2006), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20060516a.htm ("Bernanke"); Nicholas Chan et al., *Systemic Risk and Hedge Funds*, National Bureau of Economic Research Working Paper 11200 (Mar. 2005), *available at* http://www.nber.org/papers/w11200.pdf; Andrew Lo, *Regulatory Reform in the Wake of the Financial Crisis of 2007-2008*, 1 J. FIN. ECON. P. 4 (2009); and John Kambhu et al., *Hedge Funds, Financial Intermediation, and Systemic Risk*, FRBNY Econ. P. Rev. (Dec. 2007) ("Kambhu").

generally.[59] The simultaneous failure of several similarly positioned hedge funds could create contagion through the financial markets if the failing funds liquidate their investment positions in parallel at firesale prices, thereby depressing the mark-to-market valuations of securities that may be widely held by other financial institutions and investors.[60] Many of these concerns were raised in September 1998 by the near collapse of Long Term Capital Management, a highly leveraged hedge fund that experienced significant losses stemming from the 1997 Russian financial crisis.[61]

Accordingly, proposed Form PF would include questions about large hedge funds' investments, use of leverage and collateral practices, counterparty exposures, and market positions that are designed to assist FSOC in monitoring and assessing the extent to which stresses at those hedge funds could have systemic implications by spreading to prime brokers, credit or trading counterparties, or financial markets.[62] This information also is designed to help FSOC observe how hedge funds behave in response to certain stresses in the markets or economy. We request comment on this analysis of the potential systemic risk posed by hedge funds. Does it adequately identify the ways in which hedge funds might generate systemic risk? Are there other ways that hedge funds could create systemic risk? Are hedge funds not a potential source of systemic risk? Please explain your views and discuss their implications for the reporting we propose on Form PF.

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59 Kambhu, *supra* note 58; Financial Stability Forum, UPDATE OF THE FSF REPORT ON HIGHLY LEVERAGED INSTITUTIONS (May 19, 2007).

60 *See* Bernanke, *supra* note 58; David Stowell, AN INTRODUCTION TO INVESTMENT BANKS, HEDGE FUNDS & PRIVATE EQUITY: THE NEW PARADIGM 259-261 (2010).

61 *See* PWG LTCM Report, *supra* note 56.

62 *See* section II.D.2 of this Release.

2. *Liquidity Funds*

"Liquidity funds" also may be important to FSOC's monitoring and assessment of potential systemic risks, and the SEC believes information concerning them, therefore, should be included on Form PF.[63] The proposed Form PF would define a liquidity fund as a private fund that seeks to generate income by investing in a portfolio of short-term obligations in order to maintain a stable net asset value per unit or minimize principal volatility for investors.[64] Liquidity funds thus can resemble money market funds, which are registered under the Investment Company Act of 1940 and seek to maintain a "stable" net asset value per share, typically $1, through the use of the "amortized cost" method of valuation.[65]

A report recently released by the President's Working Group on Financial Markets (the "PWG MMF Report") discussed in detail how certain features of registered money market funds, many of which are shared by liquidity funds, may make them susceptible to runs and thus create the potential for systemic risk.[66] The PWG MMF

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63 Form PF is a joint form between the SEC and the CFTC only with respect to sections 1 and 2 of the form. Section 3 of the form, which would require more specific reporting regarding liquidity funds, would only be required by the SEC.

64 *See* section II.B of this Release for a discussion of the definition of "liquidity fund" in proposed Form PF.

65 Under the amortized cost method, securities are valued at acquisition cost, with adjustments for amortization of premium or accretion of discount, instead of at fair market value. To prevent substantial deviations between the amortized cost share price and the mark-to-market per-share value of the fund's assets (its "shadow NAV"), a money market fund must periodically compare the two. If there is a difference of more than one-half of 1 percent (typically, $0.005 per share), the fund must re-price its shares, an event colloquially known as "breaking the buck." *See Money Market Fund Reform*, Investment Company Act Release No. 28807 (June 30, 2009), 74 FR 32688 (July 8, 2009), at section III ("MMF Reform Proposing Release").

66 REPORT OF THE PRESIDENT'S WORKING GROUP ON FINANCIAL MARKETS: MONEY MARKET FUND REFORM OPTIONS (Oct. 2010), *available at* http://treas.gov/press/releases/docs/10.21%20PWG%20Report%20Final.pdf. The PWG MMF Report states that the work of the President's Working Group on Financial Reform relating to money market funds is now being taken over by FSOC. The SEC has discussed previously

Report describes how some investors may consider liquidity funds to function as substitutes for registered money market funds and the potential for systemic risk that results.[67] During the financial crisis, several sponsors of "enhanced cash funds," a type of liquidity fund, committed capital to those funds to prevent investors from realizing losses in the funds.[68] The fact that sponsors of certain liquidity funds felt the need to support the stable value of those funds suggests that they may be susceptible to runs like registered money market funds.

Registered money market funds are subject to extensive regulation under Investment Company Act rule 2a-7, which imposes credit-quality, maturity, and diversification requirements on money market fund portfolios designed to ensure that the funds' investing remains consistent with the objective of maintaining a stable net asset value.[69] While liquidity funds are not required to comply with rule 2a-7, we understand that many liquidity funds can suspend redemptions or impose gates on shareholder redemptions upon indications of stress at the fund. As a result, the risk of runs at liquidity funds may be mitigated. The information that the SEC is proposing to require

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registered money market funds' susceptibility to runs. *See* MMF Reform Proposing Release, *supra* note 65, at section III.

67 PWG MMF Report, *supra* note 66, at section 3.h ("These vehicles typically invest in the same types of short-term instruments that MMFs hold and share many of the features that make MMFs vulnerable to runs, so growth of unregulated MMF substitutes would likely increase systemic risks. However, such funds need not comply with rule 2a-7 or other [Investment Company Act] protections and in general are subject to little or no regulatory oversight. In addition, the risks posed by MMF substitutes are difficult to monitor, since they provide far less market transparency than MMFs.").

68 *See, e.g.*, Sree Vidya Bhaktavatsalam, *BlackRock Earnings Beat Estimates on Hedge-Fund Fees*, BLOOMBERG (Jan. 17, 2008) ("During the fourth quarter, BlackRock spent $18 million to support the net asset value of two enhanced cash funds whose values fell as the credit markets got squeezed"); Sree Vidya Bhaktavatsalam & Christopher Condon, *Federated Investors Bails Out Cash Fund After Losses*, BLOOMBERG (Nov. 20, 2007).

69 *See* 17 CFR 270.2a-7.

advisers to liquidity funds report is designed to allow FSOC to assess liquidity funds' susceptibility to runs and ability to otherwise pose systemic risk.

The SEC requests comment on this analysis of the potential systemic risk posed by liquidity funds. Does it adequately identify the ways in which liquidity funds might generate systemic risk? Are there other ways that liquidity funds could create systemic risk? Do liquidity funds lack any potential to create systemic risk? Please explain your views and discuss their implications for the reporting proposed on Form PF.

3. *Private Equity Funds*

It is the SEC's initial view, after consultation with staff representing FSOC's members, that the activities of private equity funds, certain of their portfolio companies, or creditors involved in financing private equity transactions also may be important to the assessment of systemic risk and, therefore, that large advisers to these funds should provide targeted information on Form PF to allow FSOC to conduct basic systemic risk monitoring.[70]

One aspect of the private equity business model that some have identified as potentially having systemic implications is its method of financing buyouts of companies. Leveraged private equity transactions often rely on banks to provide bridge financing until the permanent debt financing for the transaction is completed, whether through a syndicated bank loan or issuance of high yield bonds by the portfolio company or both.[71] When market conditions suddenly turn, these institutions can be left holding this

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70 See section II.B of this Release for a discussion of the definition of "private equity fund" in Form PF. Form PF is a joint form between the SEC and the CFTC only with respect to sections 1 and 2 of the form. Section 4 of the form, which would require more specific reporting regarding private equity funds, would only be required by the SEC.

71 *See* Steven M. Davidoff, *The Failure of Private Equity*, 82 S. Cal. L. Rev. 481, 494 (2009) ("Davidoff").

potentially risky bridge financing (or committed to provide the final bank financing, but no longer able to syndicate or securitize it and thus forced to hold it) at precisely the time when credit market conditions, and therefore the institutions' own general exposure to private equity transactions and other committed financings, have worsened.[72] For example, prior to the recent financial crisis, a trend in private equity transactions was for private equity firms to enter into buyout transactions with seller-favorable financing conditions and terms that placed much of the risk of market deterioration after the transaction agreement was signed on the financing institutions and the private equity adviser.[73]

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72 *See* Senior Supervisors Group, *Observations on Risk Management Practices during the Recent Market Turbulence*, at 2 (Mar. 6, 2008), *available at* http://www.occ.gov/publications/publications-by-type/other-publications/pub-other-risk-mgt-practices-2008.pdf ("Firms likewise found that they could neither syndicate to external investors their leveraged loan commitments to corporate borrowers nor cancel their commitments to fund those loans despite material and adverse changes in the availability of funding from other investors in the market"); BIS Private Equity Paper, *supra* note 35, at 1-2 ("Conditions in the leveraged loan market deteriorated in the second half of 2007, and demand for leveraged finance declined sharply. An initial temporary adverse investor reaction to loose lending terms and low credit spreads prevailing in early 2007 became more protracted over the course of the second half of the year as the turbulence in financial markets deepened and contraction in demand for leveraged loans became more severe. Global primary market leveraged loan volumes shrank by more than 50% in the second half of 2007. The contraction in demand for leveraged loans revealed substantial exposure of arranger banks to warehouse risk. Undistributed loans will contribute to increased funding costs and capital requirements for banks in 2008, on top of other offbalance sheet products that they have been forced to bring on-balance sheet. Moreover, with leveraged loan indices trading close to 90 cents on a dollar in March 2008, realisation of warehouse risks has resulted in significant mark to market losses to banks"); Bank of England, *Financial Stability Report*, at 19 (Oct. 2007), *available at* http://www.bankofengland.co.uk/publications/fsr/2007/fsrfull0710.pdf ("Bank of England") ("The near closure of primary issuance markets for collateralised loan obligations, and an increase in risk aversion among investors, left banks unable to distribute leveraged loans that they had originated earlier in the year. This exacerbated a problem banks already faced, as debt used to finance a number of high-profile private-equity sponsored leveraged buyouts (LBOs) had remained on their balance sheets.").

73 *See* Davidoff, *supra* note 71, at 495-496 (noting the trend in private equity transaction agreements signed prior to the financial crisis to have no financing condition and to have limited "market outs" and "lender outs" in the debt commitment letters and further noting that "by agreeing to a more certain debt commitment letter and providing bridge financing, the banks now took on the risk of market deterioration between the time of signing and closing."). Bank regulators and industry observers also noted the trend in private equity financing prior to the financial crisis for

In addition, some industry observers have noted that the leveraged buyout investment model of imposing significant amounts of leverage on their portfolio companies in an effort to meet investment return objectives subjects those portfolio companies to greater risk in the event of economic stress.[74] If private equity funds conduct a leveraged buyout of an entity that could be systemically important, information about that investment could be important in FSOC monitoring and assessing potential systemic risk.[75]

For these reasons, the SEC believes certain information on the activities of private equity funds and their portfolio companies is relevant for purposes of monitoring potential systemic risk.[76] In addition, based on the SEC's consultations with staff representing FSOC's members, private equity transaction financings, and their

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banks to enter into "covenant lite" loans, which did not require borrowers to meet certain performance metrics for cash flow or profits. *See The Economics of Private Equity Investments: Symposium Summary*, FRBSF Economic Letter (Feb. 29, 2008), *available at* http://www.frbsf.org/publications/economics/letter/2008/el2008-08.html (noting growth in the first half of 2007 in such "covenant lite" loans); Financial Stability Forum, Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience, at 7 (Apr. 7, 2008), *available at* http://www.financialstabilityboard.org/publications/r_0804.pdf ("Another segment that saw rapid growth in volume accompanied by a decline in standards was the corporate leveraged loan market, where lenders agreed to weakened loan covenants to obtain the business of private equity funds."); Bank of England, *supra* note 73, at 27 ("Market intelligence suggested that private equity sponsors had considerable market power to impose aggressive capital structures, tight spreads and weak covenants because investor demand was so strong. But in August, the flow of new LBOs came to a virtual standstill and the debt of a sequence of high-profile companies could not be sold [by banks].").

74 *See, e.g.*, *Paying the Price*, THE ECONOMIST (Jul. 31, 2010) ("Pension funds could decide to make a geared bet on equities by borrowing money and investing in the S&P 500 index. But they would understandably regard such a strategy as highly risky. Giving money to private-equity managers, who then use debt to acquire quoted companies, is viewed in an entirely different light but amounts to the same gamble"). *See also* BIS Private Equity Paper, *supra* note 35, at 24-25.

75 For example, some noted the role of private equity investments in companies that the government ultimately bailed out during the financial crisis. *See, e.g.*, Casey Ross, *Cerberus' Success Hurt by a Pair of Gambles*, THE BOSTON GLOBE (Mar. 25, 2010) (discussing private equity investments in GMAC and Chrysler Corp., both of which received government bailouts); and Louise Story, *For Private Equity, A Very Public Disaster*, N.Y. TIMES (Aug. 8, 2009) (same).

76 *See* section II.D.4 of this Release for a discussion of the information we propose requiring certain private equity fund advisers report on Form PF.

interconnected impact on the lending institutions, could be a useful area for FSOC to monitor in fulfilling its duty to gain a comprehensive picture of the financial services marketplace in order to identify potential threats to the stability of the U.S. financial system.

The SEC requests comment on this analysis of the potential systemic risk posed by the activities of private equity funds. Does it identify the ways in which private equity fund activities might generate systemic risk? Are there other ways that private equity funds or their activities could create systemic risk? Is the preliminary view that private equity fund activities may have less potential to create systemic risk than hedge funds and liquidity funds correct? Many advisers to private equity funds have noted that certain features of the private equity business model, such as its reliance on long-term capital commitments from investors, lack of substantial debt at the private equity fund level, and investment primarily in the equity of a diverse range of private companies, mitigate its potential to pose systemic risk.[77] Do private equity funds not have any potential to create systemic risk? Is the monitoring of private equity fund activities unnecessary to assess systemic risk generally? Please explain your views and discuss their implications for the reporting proposed on Form PF.

B. Who Must File Form PF

We propose that any investment adviser registered or required to register with the SEC that advises one or more private funds must file a Form PF with the SEC.[78] A CPO

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[77] *See, e.g.*, PE Council Letter, *supra* note 49; Testimony of Mark Tresnowksi, General Counsel, Madison Dearborn Partners, before the Senate Banking Subcommittee on Securities, Insurance and Investment, July 15, 2009.

[78] Proposed Advisers Act rule 204(b)-1.

or CTA that also is a registered investment adviser that advises one or more private funds would be required to file Form PF with respect to any advised commodity pool that is a "private fund." By filing Form PF with respect to these private funds, a CPO will be deemed to have satisfied certain of its filing requirements for these funds.[79] Under these rules, most private fund advisers would be required to complete only section 1 of Form PF, providing certain basic information regarding any hedge funds they advise in addition to information about their private fund assets under management and more generally about their funds' performance and use of leverage. The information collected under section 1 of Form PF is described in further detail in section II.D.1 of this Release. Certain larger private fund advisers would be required to complete additional sections of Form PF, which require more detailed information.

Three types of "Large Private Fund Advisers" would be required to complete certain additional sections of Form PF:[80]

- Advisers managing hedge funds that collectively have at least $1 billion in assets as of the close of business on any day during the reporting period for the required report;
- Advisers managing a liquidity fund and having combined liquidity fund and registered money market fund assets of at least $1 billion as of the

79 Proposed CEA rule 4.27(d). A CPO registered with the CFTC that is also registered as a private fund adviser with the SEC will be deemed to have satisfied its filing requirements for Schedules B and C of proposed Form CPO-PQR by completing and filing the applicable portions of Form PF for each of its commodity pools that satisfy the definition of "private fund" in the Dodd-Frank Act.

80 *See* proposed Instruction 3 to Form PF.

close of business on any day during the reporting period for the required report; and

- Advisers managing private equity funds that collectively have at least $1 billion in assets as of the close of business on the last day of the quarterly reporting period for the required report.

1. *Types of Funds*

Proposed Form PF would define "hedge fund" as any private fund that (1) has a performance fee or allocation calculated by taking into account unrealized gains; (2) may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (3) may sell securities or other assets short.[81] As noted above, "liquidity fund" would be defined as any private fund that seeks to generate income by investing in a portfolio of short term obligations in order to maintain a stable net asset value per unit or minimize principal volatility for investors.[82] "Private equity fund" would be defined as any private fund that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund or venture capital fund and does not provide investors with redemption rights in the ordinary course.[83]

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81 *See* proposed Glossary of Terms to Form PF. This definition also is the same as the SEC has proposed in amendments to Form ADV. *See* Implementing Release, *supra* note 9. For purposes of the definition, the fund should not net long and short positions in calculating its borrowings but should include any borrowings or notional exposure of another person that are guaranteed by the fund or that the fund may otherwise be obligated to satisfy. In addition, a commodity pool that meets the definition of a private fund is treated as a hedge fund for purposes of Form PF.

82 *See* proposed Glossary of Terms to Form PF.

83 *See* proposed.Glossary of Terms to Form PF. Proposed Form PF would define "real estate fund" as any private fund that is not a hedge fund, that does not provide investors with redemption rights in the ordinary course and that invests primarily in real estate and real estate-related assets. Proposed Form PF would define "securitized asset fund" as any private fund that is not a hedge fund and that issues asset backed securities and whose investors are primarily debt-holders. These

Our proposed definition of hedge fund would cover any private fund that has any one of three common characteristics of a hedge fund: a performance fee using market value (instead of only realized gains), high leverage or short selling. We are not aware of any standard definition of a hedge fund,[84] although we note that our proposed definition is broadly based on those used in the FSA survey and in the IOSCO report described in section I.B above and thus generally would promote international consistency in hedge fund reporting.[85] Moreover, we believe that any fund meeting this definition is an appropriate subject for this higher level of reporting even if the fund would not otherwise be considered a hedge fund.

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definitions are designed to encompass entities that we believe are typically considered real estate or securitized asset funds, respectively, and are primarily intended to exclude these types of funds from our definition of private equity fund to improve the quality of data reported on Form PF relating to private equity funds. Proposed Form PF would define "venture capital fund" as any private fund meeting the definition of venture capital fund in rule 203(l)-1 of the Advisers Act for consistency. *See* proposed Glossary of Terms to Form PF. *See also* Private Fund Exemption Release, *supra* note 9, for a discussion of proposed Advisers Act rule 203(l)-1.

84 *See, e.g.* Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006) ("'Hedge funds' are notoriously difficult to define. The term appears nowhere in the federal securities laws, and even industry participants do not agree upon a single definition.")

85 The FSA survey is voluntary and does not proscriptively define a hedge fund, but states that if a fund generally satisfies a number of the following criteria, it should be deemed to fall within the scope of the FSA hedge fund survey: (1) employs investment management techniques that can include the use of short selling, derivatives, and leverage; (2) takes in external investor money; (3) are not UCITS funds; (4) pursue absolute returns; (5) charge performance-based fees; (6) have broader mandates than traditional funds which give managers more flexibility to shift strategy; (7) have higher trading volumes/fund turnover; and (8) frequently set a high minimum investment limit. The IOSCO Report generally considered as a hedge fund all investment schemes displaying a combination of some of the following characteristics: (1) borrowing and leverage restrictions are not applied; (2) significant performance fees are paid to the manager in addition to an annual management fee; (3) investors are typically permitted to redeem their interests periodically, *e.g.*, quarterly, semi-annually or annually; (4) often significant 'own' funds are invested by the manager; (5) derivatives are used, often for speculative purposes, and there is an ability to short sell securities; and (6) more diverse risks or complex underlying products are involved. *See* IOSCO Report, *supra* note 24, at 4-5.

The Commissions request comment on the hedge fund definition proposed in Form PF.[86] Does this proposed definition capture the appropriate features of funds that should be subject to more detailed reporting as "hedge funds"? Many private funds sell short. Is the bright line of classifying any private fund that engages in short selling as a hedge fund appropriate? Is the proposed leverage threshold for hedge funds set at the appropriate level? One alternative approach we could take is to not define a hedge fund in Form PF and simply require that all advisers managing in excess of $1 billion in private fund assets (regardless of strategy) complete section 2 of Form PF. Would this be a more effective approach? For purposes of Form PF, a commodity pool satisfying the definition of a "private fund" is categorized as a hedge fund. Is this treatment appropriate?

The proposed definition of liquidity fund is designed to capture all potential substitutes for money market funds because we believe these funds may be susceptible to runs and otherwise pose systemic risk that FSOC will want to monitor. The SEC recognizes that its proposed definition of liquidity fund potentially could capture some short-term bond funds. Are there ways that the SEC could define a liquidity fund to capture all potential substitutes for money market funds, but not short-term bond funds? The SEC requests comment on the liquidity fund definition proposed in Form PF.

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86 The SEC previously defined private fund for purposes of registration of advisers to hedge funds by focusing on the structure of the fund to differentiate it from other pooled investment vehicles, while the definition of hedge fund we propose today for purposes of Form PF reporting focuses on the strategy of the fund in order to monitor trading strategies and behaviors which could contribute to systemic risk. *See Registration under the Advisers Act of Certain Hedge Fund Advisers*, Investment Advisers Act Release No. 2333 (Dec. 2, 2004), 69 FR 72054 (Dec. 10, 2004) (rulemaking vacated, *Goldstein*, 451 F.3d at 884).

Our proposed definition of a private equity fund is intended to distinguish private equity funds from other private funds based upon the lack of redemption rights and their not being engaged in certain investment strategies (such as securitization, real estate or venture capital), while these funds would typically have performance fees based on realized gains. Has the SEC appropriately distinguished private equity funds from other types of private funds in its proposed definition? Should others be excluded? The SEC requests comment on the private equity fund definition proposed in Form PF.

2. *Large Private Fund Adviser Thresholds*

As noted above, we are proposing $1 billion in hedge fund assets under management as the threshold for large hedge fund adviser reporting, $1 billion in combined liquidity fund and registered money market fund assets under management as the threshold for large liquidity fund adviser reporting, and $1 billion in private equity fund assets under management as the threshold for large private equity fund adviser reporting. Advisers would be required to measure whether these thresholds have been crossed daily for hedge funds and liquidity funds and quarterly for private equity funds based on our belief that, as a matter of ordinary business practice, advisers are aware of hedge fund and liquidity fund assets under management on a daily basis, but are likely to be aware of private equity fund assets under management only on a quarterly basis. We designed these thresholds so that the group of Large Private Fund Advisers that would be included based on the proposed thresholds is relatively small in number but represents the large majority of their respective industries based on assets under management. For example, we understand that the approximately 200 U.S.-based advisers managing at least $1 billion in hedge fund assets represent over 80 percent of the U.S. hedge fund industry based on assets under management.[87] Similarly, SEC staff estimates that the approximately 250 U.S.-based advisers managing over $1 billion in private equity fund assets represent approximately 85 percent of the U.S. private equity fund industry based on committed capital.[88]

The SEC is proposing that private fund advisers combine liquidity fund and registered money market fund assets for purposes of determining whether the adviser meets the threshold for more extensive reporting regarding its liquidity funds because it understands that an adviser's liquidity funds and registered money market funds often pursue similar strategies and invest in the same securities and thus are subject to many of the same risks. Historically, most advisers of enhanced cash funds or other unregistered money market funds also advised a substantial amount of registered money market fund assets, and so the SEC's criteria for liquidity fund reporting is expected to encompass most significant managers of liquidity funds, which it estimates number around 80 advisers.[89]

We believe that requiring basic information from all advisers about all private funds but more extensive and detailed information only from advisers with these amounts of assets under management in hedge funds, private equity funds, and liquidity funds would allow FSOC to effectively conduct basic monitoring for potential systemic risk in these private fund industries and to identify areas where OFR may want to obtain

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[87] *See* HFI, *supra* note 20.

[88] Preqin. The Preqin data relating to private equity fund committed capital is available in File No. S7-05-11.

[89] *See, e.g.*, iMoneyNet, Enhanced Cash Report (3rd quarter 2009). The estimate of the number of large liquidity fund advisers is based on the number of advisers with at least $1 billion in registered money market fund assets under management.

additional information. In addition, requiring that only these Large Private Fund Advisers complete additional reporting requirements under Form PF would provide systemic risk information for most private fund assets while minimizing burdens on smaller private fund advisers that are less likely to pose systemic risk concerns. The proposed approach thus incorporates Congress' directive in section 408 of the Dodd-Frank Act to take into account the size, governance, and investment strategy of advisers to mid-sized private funds in determining whether they pose systemic risk and formulating systemic risk reporting and recordkeeping requirements for private funds.[90]

We request comment on the proposed thresholds. Are there more appropriate dividing lines as to when a private fund adviser should be required to report more information? Should any of the assets under management thresholds be lower or higher? Are the daily (for hedge fund and liquidity fund managers) and quarterly (for private equity fund managers) measurement periods for the assets under management thresholds set appropriately? Should we, as proposed, base the threshold on the amount of assets under management? If not, what should we base it on?

We request comment on our proposed approach of only requiring these Large Private Fund Advisers to report additional information on Form PF. Will collecting the information required by sections 2, 3, and 4 of Form PF only from advisers managing in excess of these asset thresholds provide adequate information about potential systemic risk in these industries? Should we instead require that all private fund advisers registered with the SEC complete all of the information on Form PF appropriate to the

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90 We note that the SEC has proposed to collect information regarding the governance of private fund advisers through Form ADV. *See* Implementing Release, *supra* note 9.

type of private funds they advise regardless of fund size or assets under management? Are there advisers to other types of private funds that should be required to report more information on Form PF? For example, should advisers to other types of private fund report more information if they manage in excess of a certain threshold of that type of private fund assets?

3. *Aggregation of Assets under Management*

For purposes of determining whether an adviser is a Large Private Fund Adviser for purposes of Form PF, each adviser would have to aggregate together:

- assets of managed accounts advised by the firm that pursue substantially the same investment objective and strategy and invest in substantially the same positions as the private fund ("parallel managed accounts");[91] and
- assets of that type of private fund advised by any of the adviser's "related persons."[92]

These proposed aggregation requirements are designed to prevent an adviser from avoiding the proposed Large Private Fund Adviser reporting requirements by re-structuring the manner of providing private fund advice internally within the private fund manager group. The adviser also would be required to exclude any assets in any account

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91 *See* proposed Instructions 3, 5, and 6 to Form PF; and proposed Glossary of Terms to Form PF. *See also* definitions of "hedge fund assets under management," "liquidity fund assets under management," and "private equity fund assets under management" in the proposed Glossary of Terms to Form PF.

92 *See* proposed Instructions 3 and 5 to Form PF. "Related person" is defined generally as: (1) all of the adviser's officers, partners, or directors (or any person performing similar functions); (2) all persons directly or indirectly controlling, controlled by, or under common control with the adviser; and (3) all of the adviser's employees (other than employees performing only clerical, administrative, support or similar functions). *See* proposed Glossary of Terms to Form PF and Glossary of Terms to Form ADV. The adviser would be permitted, but not required, to file one consolidated Form PF for itself and its related persons. *See* section II.B.4 of this Release below.

that are solely invested in other funds (*i.e.*, internal or external fund of funds) in order to avoid duplicative reporting.[93] We request comment on these proposed aggregation requirements. Would these proposed aggregation rules appropriately meet our goal of preventing improper avoidance of the reporting requirements while giving a complete picture of private fund assets managed by a particular private fund adviser group? Would aggregating in a different manner be more effective at meeting our goal? Should funds that invest most (*e.g.*, 95 percent), but not all, of their assets in other funds be excluded from Form PF reporting? Would excluding such funds still provide FSOC with a complete enough picture of private fund activities to have an adequate baseline for systemic risk monitoring purposes?

If the adviser's principal office and place of business is outside the United States, the adviser could exclude any private fund that during the last fiscal year was neither a United States person nor offered to, or beneficially owned by, any United States person.[94] This aspect of the proposed form is designed to allow an adviser to report with respect to only those private funds that are more likely to implicate U.S. regulatory interests. We request comment on this aspect of the proposed form. Should we require different reporting relating to foreign advisers or foreign private funds?

4. *Reporting for Affiliated and Subadvised Funds*

To provide private fund advisers with reporting flexibility and convenience, the adviser could, but is not required to, report the private fund assets that it manages and the

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93 *See* proposed Instruction 7 to Form PF.

94 *See* proposed Instruction 1 to Form PF. "United States person" would have the meaning provided in proposed rule 203(m)-1 of the Advisers Act, and "principal office and place of business" would have the same meaning as in Form ADV. *See* Private Fund Exemption Release, *supra* note 9.

private fund assets that its related persons manage on a single Form PF.[95] This would allow affiliated entities that share reporting and risk management systems to report jointly while also permitting affiliated entities that operate separately to report separately. With respect to sub-advised funds, to prevent duplicative reporting, only one adviser would report information on Form PF with respect to that fund. For reporting efficiency and to prevent duplicative reporting, we are proposing that if an adviser completes information on Schedule D of Form ADV with respect to any private fund, the same adviser would be responsible for reporting on Form PF with respect to that fund.[96] We request comment on this approach. Should we not allow advisers to file a consolidated form with its related persons? Are there other persons related to a private fund adviser that should also be able to report on Form PF on a consolidated basis? For example, should we adjust Form PF to permit consolidated reporting with related persons that are exempt reporting advisers in the event an adviser chooses to voluntarily report exempt reporting adviser information? Should we allow a different arrangement on reporting of sub-advised funds? If so, what would those arrangements be?

5. *Exempt Reporting Advisers and Other Advisers Not Registered with the SEC*

We are proposing that only private fund advisers registered with the SEC (including those that are also registered with the CFTC as CPOs or CTAs) file Form PF.[97] The Dodd-Frank Act created exemptions from SEC registration under the Advisers Act for advisers solely to venture capital funds or for advisers to private funds that in the

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95 *See* proposed Instruction 2 to Form PF. *See supra* note 92 for the definition of "related person."

96 *See* proposed Instruction 4 to Form PF.

97 *See* proposed Advisers Act rule 204(b)-1.

aggregate have less than $150 million in assets under management in the United States ("exempt reporting advisers").[98] We are not proposing that exempt reporting advisers be required to file Form PF.[99] We believe that Congress' determination to exempt these advisers from SEC registration indicates Congress' belief that they are sufficiently unlikely to pose systemic risk that regular reporting of detailed information may not be necessary.[100] Based on consultation with staff representing FSOC's members and on the basic information that the SEC has proposed requiring exempt reporting advisers report to the SEC on Form ADV, the SEC is not proposing to extend Form PF reporting to these advisers.

Our proposed rules, however, would require some advisers managing less than $150 million in private fund assets to report limited information on Form PF. While Congress exempted from registration with the SEC advisers solely to private funds that in the aggregate have less than $150 million in assets under management, it provided no such exemption for advisers with less than $150 million in private fund assets under management that also, for example, advise individual clients with over $100 million in assets under management. Because this latter group of advisers is registered with the SEC and thus is subject to the full range of investor protection efforts that accompany registration, and because of the limited burden of the basic reporting, we believe it is

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98 *See* Private Fund Exemption Release, *supra* note 9; Implementing Release, *supra* note 9.

99 To the extent an exempt reporting adviser is registered with the CFTC as a CPO or CTA, that adviser would be obligated to file either proposed Form CPO-PQR or CTA-PR, respectively.

100 *See* Senate Committee Report, *supra* note 4, at 74 ("The Committee believes that venture capital funds...do not present the same risks as the large private funds whose advisers are required to register with the SEC under this title. Their activities are not interconnected with the global financial system, and they generally rely on equity funding, so that losses that may occur do not ripple throughout world markets but are borne by fund investors alone."). *See also* Private Fund Exemption Release, *supra* note 9.

appropriate to require these advisers to complete and file section 1 of Form PF. We request comment on this approach. Should we require that exempt reporting advisers file Form PF?[101] Why or why not? If so, which portions of Form PF should we require that exempt reporting advisers complete?

C. Frequency of Reporting

The Commissions propose to require that all private fund advisers other than the Large Private Fund Advisers discussed above complete and file a Form PF on an annual basis. A newly registering adviser's initial Form PF filing would be submitted within 15 days of the end of its next occurring calendar quarter after registering with the SEC so that FSOC can begin including this data in its analysis as soon as possible.[102] Annual updates would be due no later than the last day on which the adviser may timely file its annual updating amendment to Form ADV (currently, 90 days after the end of the adviser's fiscal year).[103] This frequency of reporting would allow the Commissions and FSOC to periodically monitor certain key information relevant to assessing systemic risk posed by these private funds on an aggregate basis. It also would allow these advisers to file amendments at the same time as they file their Form ADV annual updating amendment, which may make certain aspects of the reporting more efficient, such as reporting assets under management. Finally, this timing will facilitate FSOC's

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101 Section 404 of the Dodd-Frank Act states that the SEC "shall issue rules requiring <u>each investment adviser to a private fund</u> to file reports containing such information as the [SEC] deems necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk," (emphasis added).

102 *See* proposed rule 204(b)-1(a).

103 *See* proposed Advisers Act rule 204(b)-1(e).

compilation and analysis of Form PF and Form ADV data for these filers since both sets of data will be reported as of the same date.

Large Private Fund Advisers would be required to complete and file a Form PF no later than 15 days after the end of each calendar quarter.[104] Our preliminary view is that, unlike for smaller private fund advisers, quarterly reporting for Large Private Fund Advisers is necessary in order to provide FSOC with timely data to identify emerging trends in systemic risk. We understand that hedge fund advisers already collect and calculate much of the information that would be required by Form PF relating to hedge funds on a quarterly basis.[105] As a result, quarterly reporting on Form PF would coincide with most hedge fund advisers' internal reporting cycles and leverage data collection systems and processes already existing at these advisers. In addition, we believe that most liquidity fund advisers collect on a monthly basis much of the information that we are proposing be reported in section 3 of Form PF and thus quarterly reporting should be relatively efficient for these advisers. We anticipate that Large Private Fund Advisers would be able to collect and file this information within 15 days after the end of each quarter, which is sufficiently timely for FSOC's use in conducting systemic risk monitoring.

Advisers would be required to file Form PF to report that they are transitioning to only filing Form PF annually with the Commissions or to report that they no longer meet

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104 *See* proposed Instruction 7 to Form PF.

105 *See* Report of the Asset Manager's Committee to the President's Working Group on Financial Markets, Best Practices for the Hedge Fund Industry (Jan. 15, 2009), *available at* http://www.amaicmte.org/Public/AMC%20Report%20-%20Final.pdf (discussing best practices on disclosing to investors performance data, assets under management, risk management practices (including on asset types, geography, leverage, and concentrations of positions) with which SEC staff understands many hedge funds comply).

the requirements for filing Form PF no later than the last day on which the adviser's next Form PF update would be timely.[106] This would allow us to determine promptly whether an adviser's discontinuance in reporting is due to it no longer meeting the form's reporting thresholds as opposed to a lack of attention to its filing obligations. Advisers also would be able to avail themselves of a temporary hardship exemption in a similar manner as with other Commission filings if they are unable to file Form PF electronically in a timely manner due to unanticipated technical difficulties.[107]

We request comment on our proposed filing frequency. Are the filing requirements for private fund advisers frequent enough to assess high-level systemic risk posed by private funds? Should smaller private fund advisers have to file more frequently or less frequently? Should Large Private Fund Advisers be required to file Form PF more frequently (such as monthly) or less frequently (such as annually or semiannually)? Is 90 days for an annual update or 15 days for a quarterly update too long to ensure reporting of timely information? Would more or less time be more appropriate? Specifically, would 15 days be enough time for Large Private Fund Advisers to prepare and file quarterly reports? Is there information in the form that should be amended promptly if it becomes inaccurate? Should Large Private Fund Advisers be required to file Form PF as of the end of each calendar quarter or as of the end of each fiscal quarter?

Currently, we anticipate that the proposed rules requiring filing of Form PF would have a compliance date of December 15, 2011, at which time Large Private Fund

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106 *See* proposed Instruction 8 to Form PF.

107 *See* proposed rule 204(b)-1(f). The adviser would check the box in Section 1a of Form PF indicating that it was requesting a temporary hardship exemption and complete Section 5 of Form PF no later than one business day after the electronic Form PF filing was due and submit the filing that is the subject of the Form PF paper filing in electronic format with the Form PF filing system no later than seven business days after the filing was due.

Advisers would begin filing 15 days after the end of each quarter (*i.e.*, Large Private Fund Advisers would need to make their initial Form PF filing by January 15, 2012). This timing should allow sufficient time for Large Private Fund Advisers to develop systems for collecting the information required on Form PF and prepare for filing. We currently anticipate that this timeframe also would give the SEC sufficient time to create and program a system to accept filings of Form PF.[108] We are proposing that the rules allow smaller private fund advisers until 90 days after the end of their first fiscal year occurring on or after the compliance date of the proposed rule to file their first Form PF (with the expectation that this would result in smaller private fund advisers with a December 31 fiscal year end filing their first Form PF by March 31, 2012) because we anticipate that some of these advisers may require more time to prepare for their initial Form PF filing and so that the first group of private fund advisers filing Form PF would all be reporting based generally on information as of December 31, 2011.[109] Under this proposed compliance date and transition rule, smaller private fund advisers would have at least eight months after adoption of the proposed form, depending on their fiscal year end, to file their first Form PF. We request comment on when advisers should be required to comply with the proposed rules and file Form PF. Do the compliance dates and transition times that we have proposed provide sufficient time for smaller advisers and Large Private Fund Advisers to prepare for filing?

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108 The SEC will work closely with the firm it selects to create and program a system for Form PF filings and will monitor whether it could do so on this timeframe.

109 *See* proposed Advisers Act rule 204(b)-1(g).

D. Information Required on Form PF

The questions contained in proposed Form PF reflect relevant requirements and considerations under the Dodd-Frank Act, consultations with staff representing FSOC's members, and the Commissions' experience in regulating those private fund advisers that are already registered with the Commissions. As discussed above, with respect to hedge fund advisers in particular, the information we propose requiring registered advisers to file on Form PF also is broadly based on the guidelines discussed in the IOSCO Report with many of the more detailed items generally tracking questions contained in the surveys of large hedge fund advisers conducted by the FSA and other IOSCO members.[110] We expect that the information collected on Form PF would assist FSOC in monitoring and assessing any systemic risk, as discussed in section II.A above, that may be posed by private funds. We discuss below the information that Form PF would require.

1. *Section 1*

Section 1 would apply to all investment advisers required to file Form PF. Item A of Section 1a seeks identifying information about the adviser, such as its name and the name of any of its related persons whose information is also reported on the adviser's Form PF. Section 1a also would require reporting of basic aggregate information about the private funds managed by the adviser, such as total and net assets under management, and the amount of those assets that are attributable to certain types of private funds.[111]

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110 *See supra* note 24.

111 Section 1 would require the adviser to indicate the adviser's total "regulatory assets under management," using the same proposed definition of that term as used on proposed amendments to Part 1 of Form ADV, and its net assets under management, which subtracts out any liabilities of the private funds. *See* Implementing Release, *supra* note 9. Form PF, however, would require the

This identifying information would assist us and FSOC in monitoring the amount of assets managed by private fund advisers and the general distribution of those assets among various types of private funds.

Section 1b of Form PF would elicit certain identifying and other basic information about each private fund advised by the investment adviser. The adviser generally would need to complete a separate section 1b for each private fund it advised. However, because feeder funds typically invest substantially all their assets in a master fund, to prevent duplicative reporting the adviser must report information in section 1b on an aggregated basis for private funds that are part of a master-feeder arrangement and so would not file a separate section 1b for any feeder fund.[112]

Section 1b would require reporting of each private fund's gross and net assets and the aggregate notional value of its derivative positions.[113] It also would require basic information about the fund's borrowings, including a breakdown of the fund's borrowing based on whether the creditor is a U.S. financial institution, foreign financial institution or non-financial institution as well as the identity of, and amount owed to, each creditor to which the fund owed an amount equal to or greater than 5 percent of the fund's net

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adviser to aggregate parallel managed accounts with related private funds in reporting its assets under management (even if the accounts are not "securities portfolios" within the meaning of proposed Instruction 5.b, Instructions to Part 1A of Form ADV), and thus the total and net assets under management figures reported in section 1a of Form PF may differ from what the adviser reports on Form ADV. Proposed question 2 would require the adviser to report what portion of these assets under management are attributable to hedge funds, liquidity funds, private equity funds, real estate funds, securitized asset funds, venture capital funds, other private funds, and funds and accounts other than private funds. *See* section II.B.1 of this Release for a discussion of these different types of funds and their proposed definitions for purposes of Form PF.

112 *See* proposed Instructions 5 and 6 to Form PF. When providing responses in Form PF with respect to a private fund, the adviser also must include any parallel managed accounts related to the private fund. *Id.*

113 The form would require the adviser to report the total gross notional value of its funds' derivative positions, except that options would be reported using their delta adjusted notional value. Long and short positions would not be netted. *See* proposed Form PF, instructions to question 11.

asset value as of the reporting date. This section would require reporting of certain basic information about how concentrated the fund's investor base is, such as the number of beneficial owners of the fund's equity and the percentage of the fund's equity held by the five largest equity holders.[114] Finally, section 1b would require monthly and quarterly performance information about each fund.

The information required by section 1b would allow FSOC to monitor certain systemic trends for the broader private fund industry, such as how certain kinds of private funds perform and exhibit correlated performance behavior under different economic and market conditions and whether certain funds are taking significant risks that may have systemic implications.[115] It would allow FSOC to monitor borrowing practices for the broader private fund industry, which may have interconnected impacts on banks (including specific banks) and thus the broader financial system. We believe that collecting both monthly and quarterly performance data also would allow FSOC to monitor the data at sufficient granularity to track trends.

Finally, section 1c would require reporting of certain information only about hedge funds managed by the adviser, such as their investment strategies, percentage of the fund's assets managed using computer-driven trading algorithms, significant trading counterparty exposures (including identity of counterparties),[116] and trading and clearing

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114 *See* proposed question 12 on Form PF.

115 This information also would be useful for advancing the Commissions' investor protection goals.

116 Specifically, proposed questions 19 and 20 on Form PF would require the adviser to identify the five trading counterparties to which the fund has the greatest net counterparty credit exposure (measured as a percentage of the fund's net asset value) and that have the greatest net counterparty credit exposure to the fund (measured in U.S. dollars).

practices.[117] This information will enable FSOC to monitor systemic risk that could be transmitted through counterparty exposure, track how different strategies are affected by and correlated with different market stresses, and follow the extent of private fund activities conducted away from regulated exchanges and clearing systems. We have based some of this information, such as information about significant trading counterparty exposures and trading and clearing practices, on the FSA surveys, which would promote international consistency in hedge fund reporting.[118]

We request comment on section 1 of proposed Form PF. Is there additional basic information that we should require from all advisers filing Form PF or regarding all of the hedge funds or other private funds that they manage? For example, should we require any of the more detailed information about their borrowing practices that we require regarding large hedge funds in Item B of section 2b? Is a creditor providing 5 percent of the fund's borrowings an appropriate threshold for significant creditors of whose identity FSOC may want to be aware for purposes of assessing the fund's interconnectedness in the financial system? Should the threshold be more or less? Are the top five equity holders in the fund an appropriate threshold for significant investors in the fund? Should the threshold be more or less? Should we require assets under management information for other private fund categories than those specified in question 4? Should we request

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117 More specifically, proposed question 21 on Form PF would require estimated breakdowns of percentages of the hedge fund's securities and derivatives traded on a regulated exchange versus over the counter and percentages of the hedge fund's securities, derivatives, and repos cleared by a central clearing counterparty ("CCP") versus bilaterally (or, in the case of repos, that constitute a tri-party repo).

118 For example, the FSA survey asks for identification of the hedge fund's top five counterparties in terms of net credit exposure. It also asks for estimates of the percentage of the fund's securities or derivatives traded on a regulated exchange versus over the counter and the percentage of the fund's derivatives and repos cleared by a CCP versus bilaterally.

that performance data be reported on a different basis than monthly and quarterly? Are there other primary investment strategies that hedge funds use that should be included in question 17? Is the information we have proposed requiring on the fund's borrowings necessary given that other questions in section 1b ask for information on the fund's gross and net assets? Will asking for the amount and identity of the five trading counterparties to which the fund has the greatest net counterparty credit exposure and that have the greatest net counterparty credit exposure to the fund appropriately track significant exposures for systemic risk assessment purposes? Have we requested appropriate information on trading and clearing practices sufficient to allow FSOC to examine systemic risks relating to trading and clearing outside of regulated exchanges and central clearing systems? Is there information in section 1 that we should not require, or that we should only require of large hedge fund advisers and why? With respect to the aggregation of master-feeder arrangements for reporting purposes, are there common situations in which an adviser will not have sufficient access to a feeder fund's information to report accurately on Form PF? If so, how should the form address those situations? We also request comment more generally on the definitions of terms we have proposed in the glossary of terms for Form PF.

2. *Section 2*

Form PF would require private fund advisers who had at least $1 billion in hedge fund assets under management as of the close of business on any day during the reporting period to complete section 2.[119] Section 2a would require certain aggregate information about the hedge funds advised by Large Private Fund Advisers, such as the market value

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[119] *See* section II.B of this Release.

of assets invested (on a short and long basis) in different types of securities and commodities (*e.g.*, different types of equities, fixed income securities, derivatives, and structured products). It also would require the adviser to report the duration of fixed income portfolio holdings (including asset backed securities), to indicate the assets' interest rate sensitivity, as well as the turnover rate of the adviser's aggregate portfolios during the reporting period to provide an indication of the adviser's frequency of trading. Finally, the adviser would be required to report a geographic breakdown of investments held by the hedge funds it advises.

This information would assist FSOC in monitoring asset classes in which hedge funds may be significant investors and trends in hedge funds' exposures to allow FSOC to identify concentrations in particular asset classes (or in particular geographic regions) that are building or transitioning over time. It would aid FSOC in examining large hedge fund advisers' role as a source of liquidity in different asset classes. In some cases, we are proposing that the information be broken down into categories that would facilitate FSOC's use of flow of funds information, which is an important tool for evaluating trends in and risks to the U.S. financial system.[120] This information also is designed to address requirements under section 404 of the Dodd-Frank Act specifying certain mandatory contents for records and reports that must be maintained and filed by advisers to private funds. For example, it would provide information about the types of assets held and trading and investment positions and practices.

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120 For example, we are proposing that in some cases the data be broken down between issuers that are financial institutions and those that are not. The FRB publishes flow of funds data, which is available at http://www.federalreserve.gov/releases/z1/.

Section 2b of Form PF would require large hedge fund advisers to report certain additional information about any hedge fund they advise with a net asset value of at least $500 million as of the close of business on any day during the reporting period (a "qualifying hedge fund").[121] For purposes of determining whether a private fund is a qualifying hedge fund, the adviser would have to aggregate any parallel managed accounts, parallel funds, and funds that are part of the same master-feeder arrangement, and would have to treat any private funds managed by its related person as if they were managed by the filing adviser.[122] We are proposing this aggregation to prevent an adviser from structuring its activities to avoid the reporting requirement. We have selected $500 million as a threshold for more extensive individual hedge fund reporting because we believe that a $500 million hedge fund is a substantial fund the activities of which could have an impact on particular markets in which it invests or on its particular counterparties. We also believe that setting this threshold at this level would minimize reporting burdens on advisers to smaller or start up hedge funds that are less likely to have a systemic impact. Finally, this threshold is the same threshold used by the FSA in its hedge fund surveys and thus would create a certain level of consistency in reported data.

We request comment on the qualifying hedge fund threshold. Should it be lower or higher? If so, why? Should large hedge fund advisers have to report the information for all their hedge funds? Could all of such advisers' hedge funds, in the aggregate,

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121 *See* proposed Instruction 3 to Form PF. Advisers should not complete section 2 with respect to assets managed by a fund of hedge funds. *See* proposed Instruction 7 to Form PF.

122 *See* proposed Instructions 5 and 6 to Form PF. Parallel funds are a structure in which one or more private funds pursues substantially the same investment objective and strategy and invests side by side in substantially the same positions as another private fund. *See* proposed Glossary of Terms to Form PF.

potentially have a systemic impact that would merit such reporting? Should Form PF have different requirements regarding aggregating parallel managed accounts, parallel funds, or feeder funds or aggregating hedge funds managed by affiliates?

Section 2b would require reporting of the same information as that requested in section 2a regarding exposure to different types of assets.[123] In this section, however, this information would be reported separately for each qualifying hedge fund the adviser manages. Section 2b also would require on a per fund basis data not requested in section 2a. The adviser would be required to report information regarding the qualifying hedge fund's portfolio liquidity, concentration of positions, collateral practices with significant counterparties, and the identity of, and clearing relationships with, the three central clearing counterparties to which the fund has the greatest net counterparty credit exposure.[124] This information is designed to assist FSOC in monitoring the composition of hedge fund exposures over time as well as the liquidity of those exposures. The information also would aid FSOC in its monitoring of credit counterparties' unsecured exposure to hedge funds as well as the hedge fund's exposure and ability to respond to market stresses and interconnectedness with central clearing counterparties. Finally, some of this information, such as information about the identity of three central clearing counterparties to which the fund has the greatest net counterparty credit exposure and

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123 *See* proposed question 26 on Form PF.

124 *See* proposed questions 27-34 on Form PF. For example, question 28 would require reporting of the percentage of the fund's portfolio capable of being liquidated within different time periods. Question 31 would require reporting, for each position that represents 5% or more of the fund's net asset value, of the position's portion of the fund's net asset value and sub-asset class. Questions 32 and 33 would require reporting of initial and variation margin for collateral securing exposure to the fund's top five counterparty groups as well as the face amount of letters of credit posted and certain information on rehypothecation of such collateral.

fund asset liquidity information, was broadly based on information requested by the FSA survey, which would promote international consistency in hedge fund reporting.[125]

Section 2b also would require for each qualifying hedge fund data regarding certain hedge fund risk metrics, financing information, and investor information. If during the reporting period the adviser regularly calculated a value at risk ("VaR") metric for the qualifying hedge fund, the adviser would have to report VaR for each month of the reporting period.[126] The form also would require the adviser to report the impact on the fund's portfolio from specified changes to certain identified market factors, if regularly considered in the fund's risk management, broken down by the long and short components of the qualifying hedge fund's portfolio.[127] This information is designed to allow FSOC to track basic sensitivities of the hedge fund to common market sensitivities, correlations in those factor sensitivities, and trends in those factor sensitivities among large hedge funds.

Item D of Section 2b would require reporting of certain financing information for each qualifying hedge fund, including a monthly breakdown of its secured and unsecured

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[125] For example, the FSA survey asks for the percentage of the hedge fund's portfolio that can be liquidated within different time periods and the identity of the fund's top three CCPs in terms of net credit exposure.

[126] If VaR was calculated, the adviser would have to report the confidence interval, time horizon, whether any weighting was used, and the method used to calculate VaR (historical simulation, Monte Carlo simulation, parametric, or other). If applicable, the adviser would have to report the historical lookback period used. The adviser would also have to report if it did not regularly calculate VaR. *See* proposed question 35 on Form PF.

[127] The market factors are changes in: equity prices, risk free interest rates, credit spreads, currency rates, commodity prices, option implied volatilities, ABS default rates, and corporate bond default rates. Advisers are permitted to omit a response with respect to any market factor that it did not regularly consider in the reporting fund's risk management. However, to be "regularly considered" in the fund's risk management does not require that the adviser have conducted stress testing on that market factor (it could simply mean, for example, that the fund's risk managers recognized that such a market factor could have an impact on the fund's portfolio). *See* proposed question 36 on Form PF and related instructions.

borrowing and its derivatives exposures as well as information about the value of the collateral and letters of credit supporting the secured borrowing and derivatives exposures and the types of creditors. It also would require a breakdown of the term of the fund's committed financing. This information would assist FSOC in monitoring the qualifying hedge fund's leverage, the unsecured exposure of credit counterparties to the fund, and the committed term of that leverage, which may be important to monitor if the fund comes under stress. Collecting financing data broken down on a monthly basis should provide FSOC with sufficient granularity to identify trends.

Finally, Item E of section 2b would require the private fund adviser to report information about each qualifying hedge fund's investor composition and liquidity. For example, it contains questions about the fund's side pocket and gating arrangements and provides for a breakdown of the percentage of the fund's net asset value that is locked in for different periods of time.[128] We believe this information may be important in allowing FSOC to monitor the hedge fund's susceptibility to failure through investor redemptions in the event the fund experiences stress due to market or other factors.

The information in proposed section 2b also is designed to address requirements under section 404 of the Dodd-Frank Act for records and reports that the SEC requires of private fund advisers, such as monitoring the amount of assets under management and the use of leverage, counterparty credit risk exposure, trading and investment positions, and

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128 A side pocket is a type of account used by private funds to separate illiquid assets from other more liquid fund investments. Only investors in the hedge fund at the time the asset is put in the side pocket (and not future investors) will be entitled to a share of proceeds from that investment. A gate is a restriction imposed by the manager of a private fund on permissible redemptions from the fund during a certain period of time. The standards for imposing suspensions and gates may vary among funds, so in responding to these questions, an adviser would be expected to make a good faith determination as to which provisions of the reporting fund's governing documents would likely be triggered during conditions that it views as significant market stress.

the types of assets held. We request comment on the information that we propose requiring large hedge fund advisers to report under section 2. Is there additional information with respect to the types of their investments, use of leverage, or counterparties that we should require and why? Have we asked for appropriate time period breakdowns of the fund's liquidity in terms of asset liquidity, financing liquidity, and investor liquidity? Is there other information we could ask to assess hedge funds' potential impact on liquidity in particular markets? Would the threshold in the proposed form capture significant central clearing counterparties? Does the proposed form ask sufficient questions regarding the fund's collateral practices to ensure that FSOC will be able to monitor the fund's unsecured exposure to significant counterparties? Should the form require reporting of hedge funds' investment in different types of instruments or commodities than those proposed in questions 23 and 27?

Are there risk metrics or additional market factors that we should require? Should we require the proposed market factors but with different specified changes? Stress testing is an important metric for FSOC's assessment of potential systemic risk posed by hedge funds, but we understand that the type of stress testing conducted varies substantially depending on the strategy of the particular hedge fund and among hedge funds pursuing the same strategy. Is there a better way for the form to assess the effects of stresses on hedge funds than the stress testing questions included in the proposed form? Should we request the geographic breakdown of the hedge fund's investments for different geographic regions or countries? Are there existing collections of data broken down by geographic regions or countries with which we should be consistent? Should we require more or less detailed information regarding the types of assets in which the fund invests?

Is there information that we should not require and why? Is there information that we should require large hedge fund advisers to report regarding all of the hedge funds they manage that we only propose requiring qualifying hedge funds to report? Is there information in proposed Form PF that is unlikely to be reported in a comparable or meaningful fashion such that FSOC would be unable to draw any useful conclusions or insights for purposes of assessing systemic risk? If so, how could changes to the question or instructions to the question improve the utility of the information the form seeks? Are there any disclosure requirements in the SEC's proposed amendments to Form ADV (which will be publicly available) that should instead be reported through Form PF (which will not be publicly available) or vice versa?[129]

We request comment more generally on the information we propose requiring in Form PF with respect to hedge funds and their advisers. Is there additional information that would be helpful to FSOC in monitoring for systemic risk with respect to hedge funds?

We note that certain data in the proposed form, while filed with the Commissions on an annual or quarterly basis, would have to be reported on a monthly basis. In addition to providing more granular data to allow FSOC to better identify trends, this aspect of the proposal is designed to mitigate the ability of an adviser to "window dress,"

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129 *See* Implementing Release, *supra* note 9, for a discussion of the SEC's proposed amendments to Form ADV.

or manipulate certain reported data to mask activities or risks undertaken by the private funds it manages.

Is there information that should be broken down further and reported as of smaller time increments, such as weekly, or as of larger time increments? Is there information that should be reported to show ranges, averages, high points, or low points during the reporting period, rather than as of the last day of the month or quarter? If so what time period should the range or average cover and how should it be calculated? We note that we have considered in other contexts different ways of disclosing information that can fluctuate during a reporting period.[130] Are there approaches in these other contexts that should be used in Form PF? What would be the best method of avoiding "window dressing" in the form and why? Is there information that should not be reported on a monthly basis or, in contrast, information that should be reported on a monthly basis (in each case, when the information is filed with the Commissions quarterly or annually)? Please explain your response.

3. *Section 3*

Form PF would require private fund advisers advising a liquidity fund and managing at least $1 billion in combined liquidity fund and registered money market fund assets as of the close of business on any day in the reporting period to complete and file the information on section 3.[131] As discussed above, to the extent that liquidity funds

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130 *See Short-Term Borrowings Disclosure*, Securities Act Release No. 9143 (Sept. 17, 2010), at section II.A [75 Fed. Reg. 59866 (Sept. 28, 2010)].

131 *See* sections II.A.2 and II.B of this Release for a discussion of this reporting threshold and the definition of liquidity fund. For purposes of the $1 billion threshold, an adviser would have to treat any liquidity funds managed by any of the adviser's related persons as though they were advised by the adviser. *See* proposed Instruction 3 to Form PF. Form PF is a joint form between the SEC and the CFTC only with respect to sections 1 and 2 of the form. Section 3 of the form,

function as unregistered substitutes for money market funds or otherwise share certain basic characteristics of money market funds, they may be susceptible to runs and thus have the potential to pose systemic risk.[132]

Section 3 would require that these private fund advisers report certain information for each liquidity fund they manage. The section includes questions on whether the fund uses the amortized cost method of valuation and/or the penny rounding method of pricing in computing its net asset value per share to help determine how the fund might try to maintain a stable net asset value that could make the fund more susceptible to runs.[133] It asks whether the fund as a matter of policy is managed in compliance with certain provisions of rule 2a-7 under the Investment Company Act of 1940, which is the principal rule through which the SEC regulates registered money market funds.[134] This information would assist FSOC in assessing the extent to which the liquidity fund is being managed consistent with restrictions imposed on registered money market funds that might mitigate their likelihood of posing systemic risk.

Section 3 also would require reporting of certain information regarding the liquidity fund's portfolio. For example, it would ask, for each month of the reporting period, for the fund's net asset value, net asset value per share, market-based net asset

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which would require more specific reporting regarding liquidity funds, would only be required by the SEC.

132 *See* section II.A.2 of this Release. The SEC also notes that institutional investors—the principal investors in liquidity funds—were the primary participants in the run on money market funds in September 2008, rather than retail investors. *See* MMF Reform Proposing Release, *supra* note 65.

133 *See* proposed questions 43 and 44 of Form PF.

134 *See* proposed question 45 of Form PF. The restrictions in rule 2a-7 are designed to ensure, among other things, that money market funds' investing remains consistent with the objective of maintaining a stable net asset value. Many liquidity funds state in investor offering documents that the fund is managed in compliance with rule 2a-7 even though that rule does not apply to liquidity funds.

value per share, weighted average maturity ("WAM"), weighted average life ("WAL"), 7-day gross yield, amount of daily and weekly liquid assets, and amount of assets with a maturity greater than 397 days.[135] It also would require the fund to report the amount of its assets invested in different types of instruments, broken down by the maturity of those instruments, as well as information for each open position of the fund that represents 5 percent or more of the fund's net asset value.[136] This information would assist FSOC in assessing the risks undertaken by liquidity funds, their susceptibility to runs, and how their investments might pose systemic risks either among liquidity funds or through contagion to registered money market funds.

Item C of Section 3 would require reporting of any secured or unsecured borrowing of the liquidity fund, broken down by creditor type and the maturity profile of that borrowing, and of whether the fund has in place a committed liquidity facility. This information would aid FSOC in monitoring leverage practices among liquidity funds and their potential to magnify risks undertaken by the fund. Finally, Item D of Section 3 would ask for certain information regarding the concentration of the fund's investor base, gating and redemption policies, and investor liquidity.[137] It also would require reporting of a good faith estimate of the percentage of the fund purchased using securities lending collateral. The SEC believes this information would be important in allowing FSOC to

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135 *See* proposed question 46 of Form PF. WAM, WAL, daily liquid assets, and weekly liquid assets are to be calculated in accordance with rule 2a-7 under the Investment Company Act. The 7-day gross yield is to be calculated consistent with the methodology required under Form N-MFP, which must be filed by money market funds registered with the SEC. *See* 17 CFR 274.201.

136 *See* proposed question 47 of Form PF. Proposed question 48 of Form PF would require reporting for each month of the reporting period, for each of the fund's positions representing 5% or more of its net asset value, of the position's portion of the fund's net asset value and sub-asset class.

137 For example, question 52 would require reporting of the percentage of the reporting fund's equity that is beneficially owned by the beneficial owner having the largest equity interest in the fund and of how many investors beneficially own 5% or more of the fund's equity.

monitor the susceptibility of the liquidity fund to a run in the event the fund comes under stress and its interconnectedness to securities lending programs.

The SEC requests comment on the information that it proposes requiring in section 3. Is there additional information that the SEC should require? For example, is there information that the SEC requires to be reported for registered money market funds on Form N-MFP that the SEC also should require to be reported on Form PF for liquidity funds? Should the SEC require reporting of more specific information about the holdings or types of holdings of these liquidity funds? Is the threshold for when the private fund adviser is required to report information in section 3 for an individual liquidity fund appropriate for purposes of FSOC to be able to monitor for potential systemic risk in this sector? Is five percent an appropriate threshold for considering a liquidity fund investment or investor to be significant for purposes of Form PF reporting? Is our proposed breakdown of the liquidity fund's asset maturity and investor liquidity appropriate?

4. *Section 4*

The SEC is proposing that section 4 of Form PF require private fund advisers managing at least $1 billion in private equity fund assets as of the close of business on the last day of the reporting period to report certain information about each private equity fund they manage.[138] Section 4 would require reporting of certain information about the fund's borrowings and guarantees and the leverage of the portfolio companies in which the fund invests. Specifically, section 4 would require information about the outstanding

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[138] *See* section II.B of this Release for a discussion of this reporting threshold and the definition of "private equity fund." Form PF is a joint form between the SEC and the CFTC only with respect to sections 1 and 2 of the form. Section 4 of the form, which would require more specific reporting regarding private equity funds, would only be required by the SEC.

balance of the fund's borrowings and guarantees.[139] It also would require the adviser to report the weighted average debt-to-equity ratio of controlled portfolio companies in which the fund invests and the range of that debt-to equity ratio among these portfolio companies.[140] It asks for the maturity profile of its portfolio companies' debt, for the portion of that debt that is payment-in-kind or zero coupon, and whether the fund or any of its portfolio companies experienced an event of default on any of its debt during the reporting period.[141] It also asks for the identity of the institutions providing bridge financing to the adviser's portfolio companies and the amount of that financing.[142] The SEC believes that this information would allow FSOC to assess to what extent private equity funds use leverage and the potential exposure of banks and other lending providers to the larger private equity funds and their portfolio companies and leverage among portfolio companies of the larger private equity funds to monitor whether trends in those areas could pose systemic implications for the portfolio companies' lenders.

Section 4 also would require reporting of certain information if the fund invests in any financial industry portfolio company, such as its name, its debt-to-equity ratio, and the percentage of the portfolio company beneficially owned by the fund.[143] This

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139 *See* proposed questions 57 and 58.

140 *See* proposed questions 59-61. A "controlled portfolio company" is defined as a portfolio company that is controlled by the private equity fund, either alone or together with the private equity fund's related persons or other persons that are part of a club or consortium investing in the portfolio company. "Control" has the same meaning as used in Form ADV, and generally means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. *See* proposed Glossary of Terms to Form PF; Glossary of Terms to Form ADV.

141 *See* proposed questions 62-64.

142 *See* proposed question 65.

143 *See* proposed question 66. A "financial industry portfolio company" generally is defined as a nonbank financial company, as defined by section 102(a)(4) of the Dodd-Frank Act, bank or savings association, bank holding company or financial holding company, savings and loan

information would allow FSOC to monitor large private equity funds' investments in companies that may be particularly important to the stability of the financial system. Section 4 also would ask whether any of the adviser's related persons co-invest in any of the fund's portfolio companies.[144] Finally, the form would require a breakdown of the fund's investments by industry and by geography, which should provide FSOC with basic information about global and industry concentrations that may be relevant to monitoring risk exposures in the financial system.[145]

The SEC requests comment on the information it proposes requiring regarding private equity funds in section 4. Is there additional information that the SEC should request and why? For example, are their additional lending practices used in leveraged buyouts about which the form should collect information? Are there particular industries in which private equity funds might invest that could be systemically important? Should the Form ask additional questions specific to those industries? Should the form track private equity fund investments in different geographic and/or industry concentrations than those we have proposed? Should the SEC request less information and why? Should the SEC not require any reporting on Form PF specific to private equity funds? Why or why not?

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holding company, credit union, or Farm Credit System institution. *See* proposed Glossary of Terms to Form PF.

144 *See* proposed question 69.

145 *See* proposed questions 67 and 68. Industries would be identified using NAICS codes. "NAICS" stands for the "North American Industry Classification System," and is a system of industry classifications commonly used in the financial industry.

E. Filing Fees and Format for Reporting

Under proposed Advisers Act rule 204(b)-1(b), Form PF would need to be filed through an electronic system designated by the SEC for this purpose. There may be efficiencies realized if the current Investment Adviser Registration Depository ("IARD") platform, which is operated by the Financial Industry Regulatory Authority, were expanded for this purpose, such as the possible interconnectivity of Form ADV filings and Form PF filings, and possible ease of filing with one password. The filing system would need to have certain features, including being programmed with special confidentiality protections designed to ensure the heightened confidentiality protections created for Form PF filing information under the Dodd-Frank Act but to allow for secure access by FSOC and other regulators as permitted under the Dodd-Frank Act.

The SEC separately will decide on the system to be selected for the electronic filing of Form PF. That determination will be reflected in a separate notice.

Under the proposed rule, advisers required to file Form PF would be required to pay to the operator of the Form PF filing system fees that have been approved by the SEC.[146] We anticipate that Large Private Fund Advisers' filing fees would be set at a higher amount because their filings would be responsible for a larger proportion of system needs due to their more frequent and extensive filings. The SEC in a separate action would approve filing fees that reflect the reasonable costs associated with the filings and the establishment and maintenance of the filing system.[147]

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146 *See* proposed Advisers Act rule 204(b)-1(d).

147 *See* section 204(c) of the Advisers Act.

While we are not requiring that the information be filed in eXtensible Markup Language ("XML") tagged data format, we expect to look for a filing system that could accept information filed in XML format. We intend to establish data tags to allow Form PF to be submitted in XML format with the SEC. Accordingly, advisers would be able to file the information in Form PF in XML format if they choose. We believe that certain advisers may prefer to report in XML format because it allows them to automate aspects of their reporting and thus minimize burdens and generate efficiencies for the adviser. We anticipate that we may eventually require Form PF filers to tag data submitted on Form PF using a refined, future taxonomy defined by us, working in collaboration with the industry. Thereafter, the usability of data contained in Form PF is expected to increase greatly because tagged data would be easier to sort and analyze. We note that private initiatives are underway to create such taxonomies.[148] We request comment on our proposed system of electronic filing. Should we require that all filings be done in XML format? Should we allow or require the form to be provided in a format other than XML, such as eXtensible Business Reporting Language ("XBRL")? Is there another format that is more widely used or would be more appropriate for the required data? Should smaller and/or Large Private Fund Advisers be charged different amounts than what we have anticipated charging? If so, why?

III. GENERAL REQUEST FOR COMMENT

The Commissions request comment on the rules and form proposed in this Release and comment on other matters that might have an effect on the proposals contained in this Release. Commenters should provide empirical data to support their views.

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148 *See, e.g.*, http://www.operastandards.org.

IV. PAPERWORK REDUCTION ACT

CFTC:

Proposed CEA rule 4.27(d) does not impose any additional burden upon registered CPOs and CTAs that are dually registered as investment advisers with the SEC. By filing the Form PF with the SEC, these dual registrants would be deemed to have satisfied certain of their filing obligations with the CFTC, and the CFTC is not imposing any additional burdens herein. Therefore, any burden imposed by Form PF through proposed CEA rule 4.27(d) on entities registered with both the CFTC and the SEC has been accounted for within the SEC's calculations regarding the impact of this collection of information under the Paperwork Reduction Act of 1995 ("PRA").[149]

SEC:

Section 404 of the Dodd-Frank Act, which amends section 204(b) of the Advisers Act, directs the SEC to require private fund advisers to file reports containing such information as the SEC deems necessary and appropriate in the public interest and for investor protection or for the assessment of systemic risk. Proposed rule 204(b)-1 and Form PF under the Advisers Act, which would implement this requirement of the Dodd-Frank Act. Proposed Form PF contains a new "collections of information" within the meaning of the PRA.[150] The title for the new collection of information is: "Form PF under the Investment Advisers Act of 1940, reporting by investment advisers to private funds." For purposes of this PRA analysis, the paperwork burden associated with the requirements of proposed rule 204(b)-1 is included in the collection of information

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[149] 44 U.S.C. 3501-3521.

[150] 44 U.S.C. 3501-3521.

burden associated with proposed Form PF and thus does not entail a separate collection of information. The SEC is submitting this collection of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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.

Proposed Form PF is intended to provide FSOC with information that would facilitate fulfillment of its obligations under the Dodd-Frank Act relating to nonbank financial companies and systemic risk monitoring.[151] The SEC also may use the information in connection with its regulatory and examination programs. The respondents to Form PF would be private fund advisers.[152] Compliance with proposed Form PF would be mandatory for any private fund adviser. Smaller private fund advisers would be required to file Form PF only on an annual basis. These smaller private fund advisers would provide a limited amount of basic information about the operations of the private funds they advise.[153] Large Private Fund Advisers would be required to file Form PF on a quarterly basis reporting additional information regarding the private funds they advise. The PRA analysis set forth below takes into account the fact that the additional information proposed Form PF would require that large hedge fund advisers report would be more extensive than the additional information required from large liquidity fund

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151 *See* sections I.A and II.A of this Release.

152 The requirement to file the form would apply to investment advisers registered, or required to register, with the SEC that advise one or more private funds. *See* proposed rule 204(b)-1(a). It would not apply to state-registered investment advisers or exempt reporting advisers.

153 *See* section II.B of this Release for a description of who would be required to file Form PF, section II.C of this Release for information regarding the frequency with which smaller private fund advisers would be required to file Form PF, and section II.D.1 of this Release for a description of the information that smaller private fund advisers would be required to report on Form PF. *See also* proposed Instruction 8 to Form PF for information regarding the frequency with which smaller private fund advisers would be required to file Form PF.

advisers, which in turn would be more extensive than that required from large private equity fund advisers.[154]

As discussed in section II.B of this Release, the SEC has sought to minimize the reporting burden on private fund advisers to the extent appropriate. In particular, the SEC has designed the reporting frequency based on when it understands advisers to private funds are already collecting certain information that Form PF would require. In addition, the SEC has based certain more specific reporting items on information that it understands large hedge fund advisers frequently collect for purposes of reporting to investors in the funds.[155]

The information that Form PF would require would be filed through an electronic filing system expected to be operated by an entity designated by the SEC. Responses to the information collections would be kept confidential to the extent permitted by law.[156]

A. Burden Estimates for Annual Reporting by Smaller Private Fund Advisers

In the Implementing Release, the SEC estimated that 3,500 currently registered advisers would become subject to the private fund reporting requirements included in the

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154 *See* section II.B of this Release for a description of who would be required to file Form PF, section II.C of this Release for information regarding the frequency with which Large Private Fund Advisers would be required to file Form PF, section II.D.2 of this Release for a description of the information that large hedge fund advisers would be required to report on Form PF, and sections II.D.3 and II.D.4 of this Release for a description of the information that large liquidity and private equity fund advisers would be required to report on Form PF. *See also* proposed Instruction 8 to Form PF for information regarding the frequency with which Large Private Fund Advisers would be required to file Form PF.

155 *See* Report of the Asset Manager's Committee to the President's Working Group on Financial Markets, Best Practices for the Hedge Fund Industry (Jan. 15, 2009), *available at* http://www.amaicmte.org/Public/AMC%20Report%20-%20Final.pdf (discussing best practices on disclosing to investors performance data, assets under management, and risk management practices (including on asset types, geography, leverage, and concentrations of positions) with which we understand many hedge funds comply).

156 *See supra* note 39 and accompanying text.

proposed amendments to Form ADV.[157] The SEC further estimated that 200 advisers to private funds would register with the SEC as a result of normal growth in the population of registered advisers and that 750 advisers to private funds would register as a result of the Dodd-Frank Act's elimination of the private adviser exemption.[158] As a result, the SEC estimates that a total of approximately 4,450 registered investment advisers would become subject to the proposed private fund reporting requirements in Form ADV.[159] Because these advisers would also be required to report on Form PF, the SEC accordingly estimates that approximately 4,450 advisers would be required to file all or part of Form PF.[160] Out of this total number, the SEC estimates that approximately 3,920 would be smaller private fund advisers, not meeting the thresholds for reporting as Large Private Fund Advisers.[161]

Smaller private fund advisers would be required to complete all or portions of section 1 of Form PF and to file on an annual basis. As discussed in greater detail above,

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157 *See* section V.B.2.a.ii of the Implementing Release. As proposed in the Implementing Release, advisers to private funds would be required to complete Item 7.B and Section 7.B of Schedule D to the amended Form ADV.

158 *Id.* The estimates of registered private fund advisers are based in part on the number of advisers that reported a fund in Section 7.B of Schedule D to the current version of Form ADV. Because these responses include funds advised by a related person rather than the adviser, these data may over-estimate the total number of private fund advisers.

159 3,500 currently registered advisers to private funds + 200 advisers to private funds registering as a result of normal growth + 750 newly registered advisers to private funds = 4,450 advisers.

160 If a private fund is advised by both an adviser and one or more subadvisers, only one of these advisers would be required to complete Form PF. *See* section II.B.4 of this Release. As a result, it is likely that some portion of these advisers either would not be required to file Form PF or would be subject to a reporting burden lower than is estimated for purposes of this PRA analysis. The SEC has not attempted to adjust the burden estimates downward for this purpose because the SEC does not currently have reliable data with which to estimate the number of funds that have subadvisers.

161 Based on the estimated total number of registered private fund advisers that would not meet the thresholds to be considered Large Private Fund Advisers. (4,450 estimated registered private fund advisers – 200 large hedge fund advisers – 80 large liquidity fund advisers – 250 large private equity fund advisers = 3,920 smaller private fund advisers.)

section 1 would require basic data regarding the reporting adviser's identity and certain information about the private funds it manages, such as performance, leverage, and investor concentration data.[162] If the reporting adviser advises any hedge funds, section 1 also would require basic information regarding those funds, including their investment strategies, trading counterparty exposures, and trading and clearing practices.

Based on the SEC's experience with other data filings, it estimates that smaller private fund advisers would require an average of approximately 10 burden hours to compile, review and electronically file the required information in section 1 of Form PF for the initial filing and an average of approximately 3 burden hours for subsequent filings.[163] Accordingly, the amortized average annual burden of periodic filings would be 5 hours per smaller private fund adviser for each of the first three years,[164] and the amortized aggregate annual burden of periodic filings for smaller private fund advisers would be 19,600 hours for each of the first three years.[165]

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162 *See supra* section II.D.1.

163 These estimates reflect the SEC's understanding that much of the information in section 1 of Form PF is currently maintained by most private fund advisers in the ordinary course of business. In addition, the time required to determine a private fund adviser's aggregate assets under management and the amount of assets under management that relate to private funds of various types largely is expected to be included in the approved burden associated with the SEC's Form ADV (this information would only differ if the adviser managed parallel managed accounts). As a result, responding to questions on Form PF that relate to assets under management and determining whether an adviser is a Large Private Fund Adviser should impose little or no additional burden on private fund advisers.

164 The SEC estimates that a smaller private fund adviser would make 3 annual filings in three years, for an amortized average annual burden of 5 hours (1 initial filing x 10 hours + 2 subsequent filings x 3 hours = 16 hours; and 16 hours ÷ 3 years = approximately 5 hours). After the first three years, filers generally would not incur the start-up burdens applicable to the first filing.

165 5 burden hours on average per year x 3,920 smaller private fund advisers = 19,600 burden hours per year.

B. Burden Estimates for Quarterly Reporting by Large Private Fund Advisers

The SEC estimates that 530 of the private fund advisers registered with the SEC would meet one or more of the thresholds for reporting as Large Private Fund Advisers.[166] As discussed in section II.D above, Large Private Fund Advisers would be required to report more information on Form PF than smaller private fund advisers and would be required to report on a quarterly basis. The amount of additional information reported by a Large Private Fund Adviser would depend, in part, on whether it is a large hedge fund adviser, a large liquidity fund adviser, or large private equity fund adviser. A large hedge fund adviser would be required to report more information with respect to itself and the funds it advises than would a large liquidity fund adviser, which in turn would report more information than a large private equity fund adviser.[167] Of the total number of Large Private Fund Advisers, the SEC estimates that 200 are large hedge fund advisers, 80 are large liquidity fund advisers, and 250 are large private equity fund advisers.[168]

Because the proposed reporting requirements on Form PF for large hedge fund advisers would be the most extensive of the Large Private Fund Advisers, the SEC estimates that these advisers would require, on average, more hours than other Large Private Fund Advisers to configure systems and to compile, review and electronically file

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166 *See* section II.B.2 of this Release for estimates of the numbers of large hedge fund advisers, large liquidity fund advisers, and large private equity fund advisers. (200 large hedge fund advisers + 80 large liquidity fund advisers + 250 large private equity fund advisers = 530 Large Private Fund Advisers.)

167 *See supra* sections II.D.2, II.D.3 and II.D.4.

168 *See supra* section II.B.2.

the required information. Accordingly, the SEC estimates that large hedge fund advisers would require an average of approximately 75 burden hours for an initial filing and 35 burden hours for each subsequent filing.[169] In contrast, large liquidity fund advisers, which would report more information than smaller private fund advisers or large private equity fund advisers but less information than large hedge fund advisers, would require an average of approximately 35 burden hours for an initial filing and 16 burden hours for each subsequent filing. Finally, the SEC estimates that large private equity fund advisers, which would report more information than smaller private fund advisers but less than other Large Private Fund Advisers, would require an average of approximately 25 burden hours for an initial filing and 12 burden hours for each subsequent filing. Based on these estimates, the amortized average annual burden of periodic filings would be 153 hours per large hedge fund adviser,[170] 70 hours per large liquidity fund adviser,[171] and 52 hours per large private equity fund adviser, in each case for each of the first three years.[172] In

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169 The estimates of hour burdens and costs for Large Private Fund Advisers provided in the Paperwork Reduction Act and cost benefit analyses are based on burden data provided by advisers in response to the FSA hedge fund survey and on the experience of SEC staff. These estimates also assume that some Large Private Fund Advisers will find it efficient to automate some portion of the reporting process, which would increase the burden of the initial filing but reduce the burden of subsequent filings, which has been taken into consideration in our burden estimates.

170 The SEC estimates that a large hedge fund adviser would make 12 quarterly filings in three years, for an amortized average annual burden of 153 hours (1 initial filing x 75 hours + 11 subsequent filings x 35 hours = 460 hours; and 460 hours ÷ 3 years = approximately 153 hours). After the first three years, filers generally would not incur the start-up burdens applicable to the first filing.

171 The SEC estimates that a large liquidity fund adviser would make 12 quarterly filings in three years, for an amortized average annual burden of 70 hours (1 initial filing x 35 hours + 11 subsequent filings x 16 hours = 211 hours; and 211 hours ÷ 3 years = approximately 70 hours). After the first three years, filers generally would not incur the start-up burdens applicable to the first filing.

172 The SEC estimates that a large private equity fund adviser would make 12 quarterly filings in three years, for an amortized average annual burden of 52 hours (1 initial filing x 25 hours + 11 subsequent filings x 12 hours = 157 hours; and 157 hours ÷ 3 years = approximately 52 hours). After the first three years, filers generally would not incur the start-up burdens applicable to the first filing.

the aggregate, the amortized annual burden of periodic filings would then be 30,600 hours for large hedge fund advisers,[173] 5,600 hours for large liquidity fund advisers,[174] and 13,000 hours for large private equity fund advisers,[175] in each case for each of the first three years.

C. Burden Estimates for Transition Filings, Final Filings and Temporary Hardship Exemption Requests

In addition to periodic filings, a private fund adviser would be required to file very limited information on Form PF in three situations.

First, any adviser that transitions from quarterly to annual filing because it has ceased to be a Large Private Fund Adviser would be required to file a Form PF indicating that it is no longer obligated to report on a quarterly basis. The SEC estimates that approximately 9 percent of Large Private Fund Advisers would need to make a transition filing each year with a burden of 0.25 hours, or a total of 12 burden hours per year for all private fund advisers.[176]

Second, filers who are no longer subject to Form PF's periodic reporting requirements would file a final report indicating that fact. The SEC estimates that approximately 8 percent of the advisers required to file Form PF would have to file such

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173 153 burden hours on average per year x 200 large hedge fund advisers = 30,600 hours.

174 70 burden hours on average per year x 80 large liquidity fund advisers = 5,600 hours.

175 52 burden hours on average per year x 250 large private equity fund advisers = 13,000 hours.

176 Estimate is based on IARD data on the frequency of advisers to one or more private funds ceasing to have assets under management sufficient to cause them to be Large Private Fund Advisers. (530 Large Private Fund Advisers x 0.09 x 0.25 hours = 12 hours.)

an amendment each year with a burden of 0.25 of an hour, or a total of 89 burden hours per year for all private fund advisers.[177]

Finally, an adviser experiencing technical difficulties in submitting Form PF may request a temporary hardship exemption by filing portions of Form PF in paper format.[178] The information that must be filed is comparable to the information that Form ADV filers provide on Form ADV-H when requesting a temporary hardship exemption relating to that form. In the case of Form ADV-H, the SEC has estimated that the average burden of filing is 1 hour and that approximately 1 in every 1,000 advisers will file annually.[179] Assuming that Form PF filers request hardship exemptions at the same rate and that the applications impose the same burden per filing, the SEC would expect approximately 4 filers to request a temporary hardship exemption each year[180] for a total of 4 burden hours.[181]

D. Aggregate Burden Estimates

Based on the foregoing, the SEC estimates that Form PF would result in an aggregate of 68,905 burden hours per year for all private fund advisers for each of the first three years, or 15 burden hours per year on average for each private fund adviser over the same period.[182]

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177 Estimate is based on IARD data on the frequency of advisers to one or more private funds withdrawing from SEC registration. (4,450 private fund advisers x 0.08 x 0.25 hours = 89 hours.)

178 *See* proposed SEC rule 204(b)-1(f). The proposed rule would require that the adviser complete and file Item A of Section 1a and Section 5 of Form PF, checking the box in Section 1a indicating that the filing is a request for a temporary hardship exemption.

179 *See* section V.F of the Implementing Release.

180 4,450 private fund advisers x 1 request per 1,000 advisers = approximately 4 advisers.

181 4 advisers x 1 hour per response = 4 hours.

182 19,600 hours for periodic filings by smaller advisers + 30,600 hours for periodic filings by large hedge fund advisers + 5,600 hours for periodic filings by large liquidity fund advisers + 13,000

E. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the SEC solicits comments to: (i) evaluate whether the proposed amendments to the collection of information are necessary for the proper performance of the functions of the SEC, including whether the information would have practical utility; (ii) evaluate the accuracy of the SEC's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) determine 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. In particular, would private fund advisers seek to automate all or part of their Form PF reporting obligations? Would automation be efficient only for Large Private Fund Advisers, or would smaller private fund advisers also be able to automate efficiently? What is the likely burden of automation? Would advisers use internal personnel or pay outside service providers to make needed system modifications or to perform all or part of their Form PF reporting obligations? If outside service providers are used, what is the likely cost and how would it impact our estimates of internal costs and hourly burdens for the proposed reporting?

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC

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hours for periodic filings by large private equity fund advisers + 12 hours per year for transition filings + 89 hours per year for final filings + 4 hours per year for temporary hardship requests = approximately 68,905 hours per year. 68,905 hours per year ÷ 4,450 total advisers = 15 hours per year on average.

20503, and also should send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090 with reference to File No. S7-05-11. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-05-11, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE, Washington, DC 20549-0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this Release. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this Release.

V. CFTC COST-BENEFIT ANALYSIS

Section 15(a) of the CEA[183] requires the CFTC to consider the costs and benefits of its actions before issuing rules, regulations, or orders under the CEA. By its terms, section 15(a) does not require the CFTC to quantify the costs and benefits of its rules, regulations or orders or to determine whether the benefits outweigh the costs. Rather, section 15(a) requires that the CFTC "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of concern: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The CFTC may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding the

183 *See* 5 U.S.C. § 801(a)(1)(B)(i).

costs, a particular rule, regulation, or order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

The proposed rule 4.27(d) would deem a CPO registered with the CFTC that is dually registered as a private fund adviser with the SEC to have satisfied its filing requirements for Schedules B and C of proposed Form CPO-PQR by completing and filing the applicable portions of Form PF for each of its commodity pools that satisfy the definition of "private fund" in the Dodd-Frank Act. Under the proposed rule, most of the CPOs and CTAs that are dually registered as private fund advisers would be required to provide annually a limited amount of basic information on Form PF about the operations of their private funds. Only large CPOs and CTAs that are also registered as private fund advisers with the SEC would have to submit on a quarterly basis the full complement of systemic risk related information required by Form PF.

As noted above, the Dodd-Frank Act tasks FSOC with monitoring the financial services marketplace in order to identify potential threats to the financial stability of the United States.[184] The Dodd-Frank Act also requires FSOC to collect information from member agencies to support its functions.[185] The CFTC and the SEC are jointly proposing sections 1 and 2 of Form PF as a means to collect the information necessary to permit FSOC to fulfill its obligation to monitor private funds, and in order to identify any potential systemic threats arising from their activities. The CFTC and the SEC do not currently collect the information that is covered in proposed sections 1 and 2 of Form PF.

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184 *See* section 112(a)(2)(C) of the Dodd-Frank Act.

185 *See* section 112(d)(1) of the Dodd-Frank Act.

With respect to costs, the CFTC has determined that: (1) without the proposed reporting requirements imposed on dually-registered CPOs and CTAs , FSOC will not have sufficient information to identify and address potential threats to the financial stability of the United States (such as the near collapse of Long Term Capital Management); (2) the proposed reporting requirements, once finalized, will provide the CFTC with better information regarding the business operations, creditworthiness, use of leverage, and other material information of certain registered CPOs and CTAs that are also registered as investment advisers with the SEC; and (3) while they are necessary to U.S. financial stability, the proposed reporting requirements will create additional compliance costs for these registrants.

The CFTC has determined that the proposed reporting requirements will provide a benefit to all investors and market participants by providing the CFTC and other policy makers with more complete information about these registrants and the potential risk their activities may pose to the U.S. financial system. In turn, this information would enhance the CFTC's ability to appropriately tailor its regulatory policies to the commodity pool industry and its operators and advisors. As mentioned above, the CFTC and the SEC do not have access to this information today and have instead been made to use information from other, less reliable sources.

The CFTC invites public comment on its cost-benefit considerations as concerns sections 1 and 2 of Form PF. Commenters are also invited to submit any data and other information that they may have quantifying or qualifying the perceived costs and benefits of this proposed rule with their comment letters.

VI. SEC ECONOMIC ANALYSIS

As discussed above, the Dodd-Frank Act amended the Advisers Act to, among other things, authorize and direct the SEC to promulgate reporting requirements for private fund advisers. In enacting Sections 404 and 406 of the Dodd-Frank Act, Congress determined to require that private fund advisers file reports with the SEC and specified certain types of information that should be subject to reporting and/or recordkeeping requirements, but Congress left to the SEC the determination of the specific information to be maintained or reported. When determining the form and content of such reports, the SEC may require that private fund advisers file such information "as necessary and appropriate in the public interest and for the protection of investors" or for the assessment of system risk.

The SEC is proposing rule 204(b)-1 and Form PF, to implement the private fund adviser reporting requirements that the Dodd-Frank Act contemplates. Under the proposed rule, private fund advisers would be required to file information responsive to all or portions of Form PF on a periodic basis. The scope of the required information and the frequency of the reporting would be related to the amount of private fund assets that each private fund adviser manages and the type of private fund to which those assets relate. Specifically, smaller private fund advisers would be required to report annually and provide only basic information regarding their operations and the private funds they advise, while Large Private Fund Advisers would report on a quarterly basis and provide more information.[186]

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186 *See* section II.B of this Release for a description of who would be required to file Form PF, section II.C of this Release for information regarding the frequency with which private fund advisers would be required to file Form PF, and section II.D of this Release for a description of

The SEC is sensitive to the costs and benefits imposed by its rules. It has identified certain costs and benefits of proposed Advisers Act rule 204(b)-1 and Form PF, and it requests comment on all aspects of the cost-benefit analysis below, including identification and assessment of any costs and benefits not discussed in this analysis. In connection with its consideration of the costs and benefits, the SEC also has considered whether the proposal would promote efficiency, competition, and capital formation. Section 202(c) of the Advisers Act requires the SEC, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[187]

The SEC seeks comment and data on the value of the benefits identified. It also welcomes comments on the accuracy of the cost estimates in this analysis, and requests that commenters provide data that may be relevant to these cost estimates. In addition, the SEC seeks estimates and views regarding these costs and benefits for particular covered advisers, including small advisers, as well as any other costs or benefits that may result from the adoption of the proposed rule and form.

Because proposed Advisers Act rule 204(b)-1 and Form PF would implement sections 404 and 406 of the Dodd-Frank Act, the benefits and costs considered by Congress in passing the Dodd-Frank Act are not entirely separable from the benefits and costs imposed by the SEC in designing the proposed rule and form. Accordingly,

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the information that private fund advisers would be required to report on Form PF. *See also* proposed Instruction 8 to Form PF for information regarding the frequency with which private fund advisers would be required to file Form PF.

187 15 U.S.C. 80b-2(c).

although the PRA hourly burden estimates discussed above, and their corresponding dollar cost estimates, are included in full below and in the PRA analysis above, a portion of the reporting costs is attributable to the requirements of the Dodd-Frank Act and not specific requirements of the proposed rule or form.

A. Benefits

The SEC believes Form PF may create two principal classes of benefits. First, the information collected through Form PF is expected to facilitate FSOC's monitoring of the systemic risks that private funds may pose and to assist FSOC in carrying out its other duties under the Dodd-Frank Act with respect to nonbank financial companies. Second, this information may enhance the ability of the SEC to evaluate and form regulatory policies and improve the efficiency and effectiveness of the SEC's monitoring of markets for investor protection and market vitality.

The Dodd-Frank Act directs FSOC to monitor emerging risks to U.S. financial stability[188] and to require FRB supervision of designated nonbank financial companies that may pose risks to U.S. financial stability in the event of their material financial distress or failure or because of their activities.[189] In addition, the Dodd-Frank Act directs FSOC to recommend to the FRB heightened prudential standards for designated nonbank financial companies.[190]

In enacting Sections 404 and 406 of the Dodd-Frank Act, Congress recognized that FSOC would need information from private fund advisers to help it carry out its duties. As a result, proposed Form PF is designed to gather information regarding the

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188 *See supra* note 6 and accompanying text.

189 Section 112(a)(2) of the Dodd-Frank Act.

190 *See supra* note 7 and accompanying text.

private fund industry that would be useful to FSOC in monitoring systemic risk.[191] Systemic risk may arise from a variety of sources, including interconnectedness, changes in market liquidity and market concentrations, and so the information that Form PF elicits is intended to provide data that, individually or in the aggregate, would permit FSOC to identify where systemic risk may arise across a range of sources. The SEC expects that FSOC would use this data to supplement the data that it collects regarding other financial market participants and gain a broader view of the financial system than is currently available to regulators. In this manner, the SEC believes that the information collected through Form PF could play an important role in FSOC's monitoring of systemic risk, both in the private fund industry and in the financial markets more broadly.

The proposed private fund reporting on Form PF would also benefit all investors and market participants by improving the information available to the SEC regarding the private fund industry. Today, regulators have little reliable data regarding this rapidly growing sector and frequently have to rely on data from other sources, which when available may be incomplete. As discussed above, the more reliable data collected through Form PF would assist FSOC in identifying and addressing risks to U.S. financial stability, potentially protecting investors and other market participants from significant losses. In addition, this data would provide the SEC with a more complete view of the financial markets in general and the private fund industry in particular. This broader perspective and more reliable data may enhance its ability to form and frame regulatory policies regarding the private fund industry and its advisers, and to more effectively

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191 *See* section II.D of this Release for a description of the information that private fund advisers would be required to report on proposed Form PF.

evaluate the outcomes of regulatory policies and programs directed at this sector, including for the protection of private fund investors.

The SEC also estimates that the proposed rule may improve the efficiency and effectiveness of the SEC's oversight of private fund advisers by enabling SEC staff to manage and analyze information related to the risks posed by private funds more quickly, more effectively, and at a lower cost than is currently possible. This would allow the SEC to more efficiently and effectively target its examination program. The SEC would be able to use Form PF information to generate reports on the industry, its characteristics and trends. These reports may help the SEC anticipate regulatory problems, allocate and reallocate its resources, and more fully evaluate and anticipate the implications of various regulatory actions it may consider taking, which should increase both the efficiency and effectiveness of its programs and thus increase investor protection. Responses to many of the proposed questions would help the SEC better understand the investment activities of private funds and the scope of their potential effect on investors and the markets that the SEC regulates.

The coordination with the CFTC would also result in significant efficiencies for private fund advisers that are also registered as a CPO or CTA with the CFTC because, under the proposed rules in this Release, these advisers would satisfy certain reporting obligations under both proposed Advisers Act rule 204(b)-1 and proposed CEA rule 4.27(d) with respect to commodity pools that satisfy the definition of "private fund" (as proposed in Form PF) by filing Form PF. As discussed in section I.B of this Release, the SEC also has coordinated with foreign financial regulators regarding the reporting of systemic risk information regarding hedge funds and anticipates that this coordination, as reflected in proposed Form PF, would result in greater efficiencies in reporting by private fund advisers, as well as information sharing and private fund monitoring among foreign financial regulators.

As discussed in section II.B of this Release, the SEC has designed the reporting frequency in proposed Form PF based on when it understands advisers to private funds are already compiling certain information that Form PF would require, creating efficiencies for, and benefiting, the adviser in satisfying its reporting obligations. The SEC also has based certain more specific reporting items on information that it understands large hedge fund advisers frequently calculate for purposes of reporting to investors in the funds.[192]

The SEC does not expect that this proposal would have an effect on competition because the information generally would be non-public and similar types of advisers would have comparable burdens under the form. The SEC also does not expect that this proposal would have an effect on capital formation because the information generally would be non-public and thus should not impact private fund advisers' ability to raise capital or their market activities.

B. Costs

The proposed reporting requirement also would impose certain costs on private fund advisers. In order to minimize these costs, the scope of the required information and the frequency of the reporting generally would be less for private fund advisers that manage less private fund assets or that do not manage types of private funds that may be more likely to pose systemic risk. Specifically, smaller private fund advisers would be

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192 *See* note 105 and accompanying text.

required to report annually and provide only basic information regarding their operations and the private funds they advise, while Large Private Fund Advisers would report on a quarterly basis and provide more information.[193] Further, the additional information required from large hedge fund advisers would be more extensive than the additional information required from large liquidity fund advisers, which in turn would be more extensive than that required from large private equity fund advisers.

The SEC expects that the costs of reporting would be most significant for the first report that a private fund adviser is required to file because the adviser would need to familiarize itself with the new reporting form and may need to configure its systems in order to efficiently gather the required information. The SEC also anticipates that the initial report would require more attention from senior personnel, including compliance managers and senior risk management specialists, than would subsequent reports. In addition, the SEC expects that some Large Private Fund Advisers would find it efficient to automate some portion of the reporting process, which would increase the burden of the initial filing but reduce the burden of subsequent filings.

In subsequent reporting periods, the SEC anticipates that filers would incur significantly lower costs because much of the work involved in the initial report is non-recurring and because of efficiencies realized from system configuration and reporting automation efforts accounted for in the initial reporting period. In addition, the SEC

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193 *See* section II.B of this Release for a description of who would be required to file Form PF, section II.C of this Release for information regarding the frequency with which private fund advisers would be required to file Form PF, and section II.D of this Release for a description of the information that private fund advisers would be required to report on Form PF. *See also* proposed Instruction 8 to Form PF for information regarding the frequency with which private fund advisers would be required to file Form PF.

estimates that senior personnel would bear less of the reporting burden in subsequent reporting periods, reducing costs though not necessarily reducing the burden hours.

Based on the foregoing, the SEC estimates[194] that, for the purposes of the PRA, the periodic filing requirements under Form PF (including configuring systems and compiling, automating, reviewing and electronically filing the report) would impose:

(1) 10 burden hours at a cost of $3,410[195] per smaller private fund adviser for the initial annual report;

(2) 3 burden hours at a cost of $830[196] per smaller private fund adviser for each subsequent annual report;

(3) 75 burden hours at a cost of $23,270[197] per large hedge fund adviser for the initial quarterly report;

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194 The SEC understands that some advisers may outsource all or a portion of their Form PF reporting responsibilities to a filing agent, software consultant, or other third-party service provider. The SEC believes, however, that an adviser would engage third-party service providers only if the external costs were comparable, or less than, the estimated internal costs of compiling, reviewing, and filing the Form PF. The hourly wage data used in this Economic Analysis section of the Release is based on the Securities Industry and Financial Markets Association's *Report on Management & Professional Earnings in the Securities Industry 2010*. This data has been modified to account for an 1,800-hour work-year and multiplied by 5.35 for management and professional employees and by 2.93 for general and compliance clerks to account for bonuses, firm size, employee benefits and overhead.

195 The SEC expects that for the initial report these activities will most likely be performed equally by a compliance manager at a cost of $273 per hour and a senior risk management specialist at a cost of $409 per hour and that, because of the limited scope of information required from smaller private fund advisers, these advisers generally would not realize significant benefits from or incur significant costs for system configuration or automation. ($273/hour x 0.5 + $409/hour x 0.5) x 10 hours = approximately $3,410.

196 The SEC expects that for subsequent reports senior personnel will bear less of the reporting burden. As a result, the SEC estimates that these activities will most likely be performed equally by a compliance manager at a cost of $273 per hour, a senior compliance examiner at a cost of $235 per hour, a senior risk management specialist at a cost of $409 per hour and a risk management specialist at a cost of $192 per hour. ($273/hour x 0.25 + $235/hour x 0.25 + $409/hour x 0.25 + $192/hour x 0.25) x 3 hours = approximately $830.

197 The SEC expects that for the initial report, of a total estimated burden of 75 hours, approximately 45 hours will most likely be performed by compliance professionals and 30 hours will most likely be performed by programmers working on system configuration and reporting automation. Of the

(4) 35 burden hours at a cost of $9,700[198] per large hedge fund adviser for each subsequent quarterly report;

(5) 35 burden hours at a cost of $10,860[199] per large liquidity fund adviser for the initial quarterly report;

(6) 16 burden hours at a cost of $4,440[200] per large liquidity fund adviser for each subsequent quarterly report;

(7) 25 burden hours at a cost of $7,760[201] per large private equity fund adviser for the initial quarterly report; and

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work performed by compliance professionals, the SEC anticipates that it will be performed equally by a compliance manager at a cost of $273 per hour and a senior risk management specialist at a cost of $409 per hour. Of the work performed by programmers, the SEC anticipates that it will be performed equally by a senior programmer at a cost of $304 per hour and a programmer analyst at a cost of $224 per hour. ($273/hour x 0.5 + $409/hour x 0:5) x 45 hours + ($304/hour x 0.5 + $224/hour x 0.5) x 30 hours = approximately $23,270.

198 The SEC expects that for subsequent reports senior personnel will bear less of the reporting burden and that significant system configuration and reporting automation costs will not be incurred. As a result, the SEC estimates that these activities will most likely be performed equally by a compliance manager at a cost of $273 per hour, a senior compliance examiner at a cost of $235 per hour, a senior risk management specialist at a cost of $409 per hour and a risk management specialist at a cost of $192 per hour. ($273/hour x 0.25 + $235/hour x 0.25 + $409/hour x 0.25 + $192/hour x 0.25) x 35 hours = approximately $9,700.

199 The SEC expects that for the initial report, of a total estimated burden of 35 hours, approximately 21 hours will most likely be performed by compliance professionals and 14 hours will most likely be performed by programmers working on system configuration and reporting automation. Of the work performed by compliance professionals, the SEC anticipates that it will be performed equally by a compliance manager at a cost of $273 per hour and a senior risk management specialist at a cost of $409 per hour. Of the work performed by programmers, the SEC anticipates that it will be performed equally by a senior programmer at a cost of $304 per hour and a programmer analyst at a cost of $224 per hour. ($273/hour x 0.5 + $409/hour x 0.5) x 21 hours + ($304/hour x 0.5 + $224/hour x 0.5) x 14 hours = approximately $10,860.

200 The SEC expects that for subsequent reports senior personnel will bear less of the reporting burden and that significant system configuration and reporting automation costs will not be incurred. As a result, the SEC estimates that these activities will most likely be performed equally by a compliance manager at a cost of $273 per hour, a senior compliance examiner at a cost of $235 per hour, a senior risk management specialist at a cost of $409 per hour and a risk management specialist at a cost of $192 per hour. ($273/hour x 0.25 + $235/hour x 0.25 + $409/hour x 0.25 + $192/hour x 0.25) x 16 hours = approximately $4,440.

201 The SEC expects that for the initial report, of a total estimated burden of 25 hours, approximately 15 hours will most likely be performed by compliance professionals and 10 hours will most likely be performed by programmers working on system configuration and reporting automation. Of the

(8) 12 burden hours at a cost of \$3,330[202] per large private equity fund adviser for each subsequent quarterly report.

Assuming that there are 3,920 smaller private fund advisers, 200 large hedge fund advisers, 80 large liquidity fund advisers, and 250 large private equity fund advisers, the foregoing estimates would suggest an annual cost of \$30,200,000[203] for all private fund advisers in the first year of reporting and an annual cost of \$15,800,000 in subsequent years.[204]

In addition, as discussed above, a private fund adviser would be required to file very limited information on Form PF if it needed to transition from quarterly to annual filing, if it were no longer subject to the reporting requirements of Form PF or if it required a temporary hardship exemption under proposed rule 204(b)-1(f). The SEC

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work performed by compliance professionals, the SEC anticipates that it will be performed equally by a compliance manager at a cost of \$273 per hour and a senior risk management specialist at a cost of \$409 per hour. Of the work performed by programmers, the SEC anticipates that it will be performed equally by a senior programmer at a cost of \$304 per hour and a programmer analyst at a cost of \$224 per hour. (\$273/hour x 0.5 + \$409/hour x 0.5) x 15 hours + (\$304/hour x 0.5 + \$224/hour x 0.5) x 10 hours = approximately \$7,760.

202 The SEC expects that for subsequent reports senior personnel will bear less of the reporting burden and that significant system configuration and reporting automation costs will not be incurred. As a result, the SEC estimates that these activities will most likely be performed equally by a compliance manager at a cost of \$273 per hour, a senior compliance examiner at a cost of \$235 per hour, a senior risk management specialist at a cost of \$409 per hour and a risk management specialist at a cost of \$192 per hour. (\$273/hour x 0.25 + \$235/hour x 0.25 + \$409/hour x 0.25 + \$192/hour x 0.25) x 12 hours = approximately \$3,330.

203 (3,920 smaller private fund advisers x \$3,410 per initial annual report) + (200 large hedge fund advisers x \$23,270 per initial quarterly report) + (200 large hedge fund advisers x 3 quarterly reports x \$9,700 per subsequent quarterly report) + (80 large liquidity fund advisers x \$10,860 per initial quarterly report) + (80 large liquidity fund advisers x 3 quarterly reports x \$4,440 per subsequent quarterly report) + (250 large private equity fund advisers x \$7,760 per initial quarterly report) + (250 large private equity fund advisers x 3 quarterly reports x \$3,330 per subsequent quarterly report) = approximately \$30,200,000.

204 (3,920 smaller private fund advisers x \$830 per subsequent annual report) + (200 large hedge fund advisers x 4 quarterly reports x \$9,700 per subsequent quarterly report) + (80 large liquidity fund advisers x 4 quarterly reports x \$4,440 per subsequent quarterly report) + (250 large private equity fund advisers x 4 quarterly reports x \$3,330 per subsequent quarterly report) = approximately \$15,800,000.

estimates that transition and final filings would, collectively, cost private fund advisers as a whole approximately $6,770 per year.[205] The SEC further estimates that hardship exemption requests would cost private fund advisers as a whole approximately $760 per year.[206]

Finally, firms required to file Form PF would have to pay filing fees. The amount of these fees has not yet been determined.[207]

C. Request for Comment

The SEC requests comments on all aspects of the foregoing cost-benefit analysis, including the accuracy of the potential costs and benefits identified and assessed in this Release, as well as any other costs or benefits that may result from the proposals. The SEC encourages commenters to identify, discuss, analyze, and supply relevant data regarding these or additional costs and benefits. The SEC also requests comment on the foregoing analysis of the likely effect of the proposed rule on competition, efficiency, and capital formation. Commenters are requested to provide empirical data to support their views.

In addition, for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA,"[208] the SEC must advise OMB whether a proposed regulation

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205 The SEC estimates that, for the purposes of the PRA, transition filings will impose 12 burden hours per year on private fund advisers in the aggregate and that final filings will impose 89 burden hours per year on private fund advisers in the aggregate. The SEC anticipates that this work will most likely be performed by a compliance clerk at a cost of $67 per hour. (12 burden hours + 89 burden hours) x $67/hour = approximately $6,770.

206 The SEC estimates that, for the purposes of the PRA, requests for temporary hardship exemptions will impose 4 burden hours per year on private fund advisers in the aggregate. The SEC anticipants that five-eighths of this work will most likely be performed by a compliance manager at a cost of $273 per hour and that three-eighths of this work will most likely be performed by a general clerk at a cost of $50 per hour. (($273 per hour x 5/8 of an hour) + ($50 per hour x 3/8 of an hour)) x 4 hours = approximately $760.

207 *See supra* note 147 and accompanying text.

constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results in or is likely to result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment, or innovation.

We request comment on the potential impact of the proposed new rule and proposed rule amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

CFTC:

Under proposed rule 4.27(d), the CFTC would not impose any additional burden upon registered CPOs and CTAs that are dually registered as investment advisers with the SEC because such entities are only required to file Form PF with the SEC. Further, certain CPOs registered with the CFTC that are also registered with the SEC would be deemed to have satisfied certain CFTC-related filing requirements by completing and filing the applicable sections of Form PF with the SEC. Therefore, any burden imposed by Form PF through proposed rule 4.27(d) on small entities registered with both the CFTC and the SEC has been accounted for within the SEC's initial calculations regarding the impact of this collection of information under the Regulatory Flexibility Act ("RFA").[209] Accordingly, the Chairman, on behalf of the CFTC, hereby certifies

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[208] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[209] 5 U.S.C. 603(a).

pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant impact on a substantial number of small entities.

SEC:

The SEC has prepared the following Initial Regulatory Flexibility Analysis ("IRFA") regarding proposed Advisers Act rule 204(b)-1 in accordance with section 3(a) of the RFA.

A. Reasons for Proposed Action

The SEC is proposing rule 204(b)-1 and Form PF specifying information that private fund advisers must disclose confidentially to the SEC, which information the SEC will share with FSOC for systemic risk assessment purposes to help implement sections 404 and 406 of the Dodd-Frank Act. Under the proposed rule, private fund advisers would be required to file information responsive to all or portions of Form PF on a periodic basis. The scope of the required information and the frequency of the reporting would be related to the amount of private fund assets that each private fund adviser manages and the type of private fund to which those assets relate. Specifically, smaller private fund advisers would be required to report annually and provide only basic information regarding their operations and the private funds they advise, while Large Private Fund Advisers would report on a quarterly basis and provide more information.[210]

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210 *See* section II.B of this Release for a description of who would be required to file Form PF, section II.C of this Release for information regarding the frequency with which private fund advisers would be required to file Form PF, and section II.D of this Release for a description of the information that private fund advisers would be required to report on Form PF. *See also* proposed Instruction 8 to Form PF for information regarding the frequency with which private fund advisers would be required to file Form PF.

B. Objectives and Legal Basis

As described more fully in sections I and II of this Release, the general objective of proposed Advisers Act rule 204(b)-1 is to assist FSOC in its obligations under the Dodd-Frank Act relating to nonbank financial companies and in monitoring systemic risk. The SEC is proposing rule 204(b)-1 and Form PF pursuant to the SEC's authority set forth in sections 404 and 406 of the Dodd-Frank Act, to be codified at sections 204(b) and 211(e) of the Advisers Act [15 U.S.C. 80b-4(b) and 80b-11(e)].

C. Small Entities Subject to the Rule

Under SEC rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[211]

Under section 203A of the Advisers Act, most advisers qualifying as small entities are prohibited from registering with the SEC and are instead registered with state regulators. Therefore, few small advisers would be subject to the proposed rule and form. The SEC estimates that as of December 1, 2010, approximately 50 advisers that

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211 17 CFR 275.0-7(a).

were small entities were registered with the SEC and advised one or more private funds.[212]

D. Reporting, Recordkeeping, and other Compliance Requirements

The proposed rule and form would impose certain reporting and compliance requirements on advisers, including small advisers. The proposed rule would require all small advisers registered with the SEC and that advise one or more private funds to file Form PF, completing all or part of section 1 of that form. As discussed above, the SEC estimates that completing, reviewing, and filing Form PF would cost $3,410 per year for each small adviser in its first year of reporting and $830 per year for each subsequent year.[213] In addition, small entities would be required to pay a filing fee when submitting Form PF. The amount of the filing fee has not yet been determined, but we anticipate that Large Private Fund Advisers' filing fees would be set at a higher amount than small advisers.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The SEC has not identified any federal rules that duplicate or overlap or conflict with the proposed rule.

F. Significant Alternatives

The Regulatory Flexibility Act directs the SEC to consider significant alternatives that would accomplish the stated objective, while minimizing any significant impact on small entities. In connection with the proposed rules and amendments, the SEC considered the following alternatives: (i) the establishment of differing compliance or

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[212] Based on IARD data.

[213] *See supra* notes 195-196 and accompanying text.

reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for small entities.

Regarding the first and fourth alternatives, the SEC has proposed different reporting requirements and timetables for small entities. The proposed rule only would require small entity advisers to file Form PF annually and to complete applicable portions of section 1 of the form.[214] These smaller advisers also would have to pay a smaller amount of filing fees than Large Private Fund Advisers. Regarding the second alternative, the information that would be required of small entities under section 1 of Form PF is quite simplified from the more extensive reporting that would be required of Large Private Fund Advisers and is consolidated in one section of the form.

G. Solicitation of Comments

The SEC encourages written comments on matters discussed in this IRFA. In particular, the SEC seeks comment on:

- the number of small entities that would be subject to the proposed rule; and
- whether the effect of the proposed rule on small entities would be

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214 If the adviser had no hedge fund assets under management, it would not need to complete section 1.C of the proposed form. Advisers that manage both registered money market funds and liquidity funds would be required to complete section 3 of Form PF, but there are no small entities that manage a registered money market fund. *See* section II.B of this Release for a description of who would be required to file Form PF, section II.C of this Release for information regarding the frequency with which smaller private fund advisers would be required to file Form PF, and section II.D.1 of this Release for a description of the information that smaller private fund advisers would be required to report on Form PF. *See also* proposed Instruction 8 to Form PF for information regarding the frequency with which smaller private fund advisers would be required to file Form PF.

economically significant.

Commenters are asked to describe the nature of any effect and provide empirical data supporting the extent of the effect.

VIII. STATUTORY AUTHORITY

CFTC:

The CFTC is proposing rule 4.27(d) [17 CFR 4.27(d)] pursuant to its authority set forth in section 4n of the Commodity Exchange Act [7 U.S.C. 6n].

SEC:

The SEC is proposing rule 204(b)-1 [17 CFR 275.204(b)-1] pursuant to its authority set forth in sections 404 and 406 of the Dodd-Frank Act, to be codified at sections 204(b) and 211(e) of the Advisers Act [15 U.S.C. 80b-4 and 15 U.S.C. 80b-11], respectively.

The SEC is proposing rule 279.9 pursuant to its authority set forth in sections 404 and 406 of the Dodd-Frank Act, to be codified at sections 204(b) and 211(e) of the Advisers Act [15 U.S.C. 80b-4 and 15 U.S.C. 80b-11], respectively.

LIST OF SUBJECTS

17 CFR Part 4

Advertising, Brokers, Commodity Futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 275

Reporting and recordkeeping requirements, Securities.

Text of Proposed Rules

Commodity Futures Trading Commission

For the reasons set out in the preamble, the CFTC is proposing to amend Title 17, Chapter I of the Code of Federal Regulations as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

* * * * *

2. In §4.27, add paragraph (d) to read as follows:

§4.27 Additional reporting by advisors of commodity pools.

* * * * *

(d) Investment advisers to private funds. CPOs and CTAs who are dually registered with the Securities and Exchange Commission and advise one or more private funds, as defined in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)), shall file Form PF with the Securities and Exchange Commission. Dually registered CPOs and CTAs that file Form PF with the Securities and Exchange Commission will be deemed to have filed Form PF with the Commission for purposes of any enforcement action regarding any false or misleading statement of a material fact in Form PF. Dually registered CPOs and CTAs must file such other reports as are required under this section with respect to all pools that are not private funds.

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Securities and Exchange Commission

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

PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

3. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

4. Section 275.204(b)-1 is added to read as follows:

§ 275.204(b)-1 Reporting by investment advisers to private funds.

(a) *Reporting by investment advisers to private funds on Form PF.* Subject to paragraph (g), if you are an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) and act as an investment adviser to one or more private funds, you must complete and file a report on Form PF (17 CFR 279.9) within 15 days of the end of the next calendar quarter by following the instructions in the Form, which specify the information that an investment adviser must provide.

(b) *Electronic filing.* You must file Form PF electronically with the Form PF filing system.

Note to paragraph (b): Information on how to file Form PF is available on the Commission's website at http://www.sec.gov/[__].

(c) *When filed.* Each Form PF is considered filed with the Commission upon acceptance by the Form PF filing system.

(d) *Filing fees.* You must pay the operator of the Form PF filing system a filing fee as required by the instructions to Form PF. The Commission has approved the amount of the filing fee. No portion of the filing fee is refundable. Your completed Form PF will not be accepted by the operator of the Form PF filing system, and thus will not be considered filed with the Commission, until you have paid the filing fee.

(e) *Amendments to Form PF.* You must amend your Form PF:

(1) At least annually, no later than the last day on which you may timely file your annual amendment to Form ADV under rule 204-1(a)(1) (17 CFR 275.204-1(a)(1)); and

(2) More frequently, if required by the instructions to Form PF. You must file all amendments to Form PF electronically with the Form PF filing system.

(f) *Temporary hardship exemption.*

(1) If you have unanticipated technical difficulties that prevent you from submitting Form PF on a timely basis through the Form PF filing system, you may request a temporary hardship exemption from the requirements of this section to file electronically.

(2) To request a temporary hardship exemption, you must:

(i) Complete and file with the operator of the Form PF filing system in paper format Item A of Section 1a and Section 5 of Form PF, checking the box in Section 1a indicating that you are requesting a temporary hardship exemption, no later than one business day after the electronic Form PF filing was due; and

(ii) Submit the filing that is the subject of the Form PF paper filing in electronic format with the Form PF filing system no later than seven business days after the filing was due.

(3) The temporary hardship exemption will be granted when you file Item A of Section 1a and Section 5 of Form PF, checking the box in Section 1a indicating that you are requesting a temporary hardship exemption.

(g) *Transition for certain filers.* If you were an investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3), act as an investment adviser to one or more private funds immediately prior to the compliance date of rule 204(b)-1, and are only required to complete all or portions of section 1 of Form PF, no later than 90 days after the end of your then-current fiscal year you must complete and file your initial report on Form PF by following the instructions in the Form, which specify the information that an investment adviser must provide.

PART 279 – FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

5. The authority citation for Part 279 continues to read as follows:

Authority: 15 U.S.C. 80b-1, *et seq.*

6. Section 279.9 is amended to read as follows:

§ 279.9 Form PF, reporting by investment advisers to private funds.

This form shall be filed pursuant to Rule 204(b)-1 (§ 275.204(b)-1 of this chapter) by certain investment advisers registered or required to register under section 203 of the Act (15 U.S.C. 80b-3) that act as an investment adviser to one or more private funds.

Note: The text of the following Form PF will not appear in the Code of Federal Regulations.

[**Insert Form PF**]

By the Commodity Futures Trading Commission.

David A. Stawick
Secretary

Date: January 26, 2011

By the Securities and Exchange Commission.

Elizabeth M. Murphy
Secretary

Date: January 26, 2011

Appendix 1 — Commodity Futures Trading Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers (by proxy), Chilton and O'Malia voted in the affirmative; no Commissioner voted in the negative.

FORM PF (Paper Version)

Reporting Form for Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors

OMB APPROVAL	
OMB Number:	[ ]
Expires:	[ ]
Estimated average burden hours per response	[ ]

Read these instructions carefully before completing Form PF. Failure to follow these instructions, properly complete Form PF, or pay all required fees may result in your Form PF being delayed or rejected.

In these instructions and in Form PF, "you" means the *private fund adviser* completing or amending this Form PF. If you are a "separately identifiable department or division" (SID) of a bank, "you" means the SID rather than the bank (except as provided in Question 1(a)). Terms that appear in *italics* are defined in the Glossary of Terms to Form PF.

1. Who must complete and file a Form PF?

You must complete and file a Form PF, if:

A. You are registered or required to register with the *SEC* as an investment adviser;

OR

You are registered or required to register with the *CFTC* as a *CPO* or *CTA* and you are also registered or required to register with the *SEC* as an investment adviser;

AND

B. You manage one or more *private funds*.

Many *private fund advisers* meeting these criteria will be required to complete only Section 1 of Form PF and will need to file only on an annual basis. *Large private fund advisers*, however, will be required to provide additional data and file every quarter. See Instructions 3 and 8 below.

If your *principal office and place of business* is outside the United States, for purposes of this Form PF you may disregard any *private fund* that during your last fiscal year was neither a *United States person* nor offered to, or beneficially owned by, any *United States person*.

2. I have a *related person* who is required to file Form PF. May I and my *related person* file a single Form PF?

Related persons may (but are not required to) report on a single Form PF information with respect to all such *related persons* and the *private funds* they advise. You must identify in your response to Question 1 the *related persons* as to which you are reporting and, where information is requested about you or the *private funds* you advise, respond as though you and such *related persons* were one firm.

3. How is Form PF organized?

Section 1 – All Form PF filers

Section 1a — All *private fund advisers* required to file Form PF must complete Section 1a. Section 1a asks general identifying information about you and the types of *private* *funds* you advise.

Section 1b All *private fund advisers* required to file Form PF must complete Section 1b. Section 1b asks for certain information regarding the *private funds* that you advise.

Section 1c All *private fund advisers* that are required to file Form PF and advise one or more *hedge funds* must complete Section 1c. Section 1c asks for certain information regarding the *hedge funds* that you advise.

Section 2 – *Large private fund advisers* advising *hedge funds*

Section 2a You are required to complete Section 2a if you and your *related persons*, collectively, had at least $1 billion in *hedge fund assets under management* as of the close of business on any day during the most recently completed calendar quarter.

Subject to Instruction 4, Section 2a requires information to be reported on an aggregate basis for all *hedge funds* that you advise.

Section 2b If you are required to complete Section 2a, you must complete a <u>separate</u> Section 2b with respect to each *qualifying hedge fund* that you advise.

However:

for any *parallel fund structures* that collectively comprise a *qualifying hedge fund*, you must complete a separate Section 2b for each *parallel fund* that is part of that *parallel fund structure* (even if that *parallel fund* is not itself a *qualifying hedge fund*); and

if you report answers on an aggregated basis for any *master-feeder arrangement* in accordance with Instruction 5, you should only complete a separate Section 2b with respect to the *reporting fund* for such *master-feeder arrangement.*

Section 3 – *Large private fund advisers* advising *liquidity funds*

Section 3 You are required to complete Section 3 if (i) you advise one or more *liquidity funds* and (ii) as of the close of business on any day during the most recently completed calendar quarter, you and your *related persons*, collectively, had at least $1 billion in *combined money market and liquidity fund assets under management*.

You must complete a <u>separate</u> Section 3 with respect to each *liquidity fund* that you advise.

However, if you report answers on an aggregated basis for any *master-feeder arrangement* in accordance with Instruction 5, you should only complete a separate Section 3 with respect to the *reporting fund* for such *master-feeder arrangement*.

Section 4 – *Large private fund advisers* advising *private equity funds*

Section 4 You are required to complete Section 4 if you and your *related persons*, collectively, had at least $1 billion in *private equity fund assets under management* as of the close of business on the last day of the most recently completed calendar quarter.

You must complete a <u>separate</u> Section 4 with respect to each *private equity fund* that you advise.

However, if you report answers on an aggregated basis for any *master-feeder arrangement* in accordance with Instruction 5, you should only complete a separate Section 4 with respect to the *reporting fund* for such *master-feeder arrangement*.

Section 5 – Advisers requesting a temporary hardship exemption

Section 5 See Instruction 13 for details.

4. I am a subadviser or engage a subadviser for a *private fund*. Who is responsible for reporting information about that *private fund*?

Only one *private fund adviser* should complete and file Form PF for each *private fund*. If an adviser files *Form ADV Section 7.B.1* with respect to any *private fund*, the same adviser must also complete and file Form PF for that *private fund*.

Where a question requests aggregate information regarding the *private funds* that you advise, you should only include information regarding the *private funds* for which you are filing Section 1b of Form PF.

5. When am I required to aggregate information regarding *parallel funds*, *parallel managed accounts*, *master-feeder arrangements* and funds managed by *related persons*?

You are required to aggregate related funds and accounts differently depending on the purpose of the aggregation.

For purposes of determining whether you meet a reporting threshold, you must aggregate *parallel funds*, *parallel managed accounts* and master-feeder funds. In addition, you must treat any *private fund* or *parallel managed account* advised by any of your *related persons* as though it were advised by you.

In contrast, for questions that request information about individual funds, you must report aggregate information for *parallel managed accounts* and master-feeder funds, but not *parallel funds*. Where a question requests aggregate information regarding the *private funds* that you advise, you should only include information regarding the *private funds* for which you are filing Section 1b of Form PF. You should not report information for any *private fund* or *parallel managed account* advised by any of your *related persons* unless you have identified that *related person* in Question 1(b) as a *related person* for which you are filing Form PF.

See the table below for more detailed instructions.

For purposes of determining whether a *private fund* is a *qualifying hedge fund*	For purposes of reporting information in Sections 1b, 1c, 2b, 3 and 4
• You must aggregate any *private funds* that are part of the same *master-feeder arrangement* (even if you did not, or were not permitted to, aggregate these *private funds* for purposes of *Form ADV Section 7.B.1*)	• You must report answers on an aggregated basis for any *private funds* that are part of the same *master-feeder arrangement* (even if you did not, or were not permitted to, aggregate these *private funds* for purposes of *Form ADV Section 7.B.1*)
• You must aggregate any *private funds* that are part of the same *parallel fund structure*	• You must file a separate Section 1b, 1c, 2b, 3 or 4, as applicable, for each *parallel fund* (or, in the case of Section 2b, each *parallel fund* that is part of a *parallel fund structure* collectively comprising a *qualifying hedge fund*)
• Any *parallel managed account* must be aggregated with the largest *private fund* to which that *parallel managed account* relates	• Any *parallel managed account* must be aggregated with the largest *private fund* to which that *parallel managed account* relates
• You must treat any *private fund* or *parallel managed account* advised by any of your *related persons* as though it were advised by you (even if you have not identified that *related person* in Question 1(b) as a *related person* for which you are filing Form PF)	• You should not report information for any *private fund* or *parallel managed account* advised by any of your *related persons* unless you have identified that *related person* in Question 1(b) as a *related person* for which you are filing Form PF

In subsequent updates or amendments to this Form PF, you must report information in a manner that is consistent with previous filings made with respect to any *private fund.*

6. According to Instruction 5, I am required to aggregate funds or accounts to determine whether I meet a threshold or for reporting purposes. How do I "aggregate" funds or accounts for these purposes?

Where two or more *parallel funds* or master-feeder funds are aggregated in accordance with Instruction 5, you must treat the aggregated funds as if they were all one *private fund.* Investments that a *feeder fund* makes in a *master fund* should be disregarded but other investments of the *feeder fund* should be treated as though they were investments of the aggregated fund.

Similarly, for all purposes under this Form PF, assets held in *parallel managed accounts* should be treated as assets of the *private funds* with which they are aggregated.

Example 1. You advise a *master-feeder arrangement* with one *feeder fund.* The *feeder fund* has invested $500 in the *master fund* and holds a *foreign exchange derivative* with a notional value of $100. The *master fund* has used the $500 received from the *feeder fund* to invest in *corporate bonds.* Neither fund has any other assets or liabilities.

For all purposes under this Form PF, this *master-feeder arrangement* should be treated as a single *private fund* whose only investments are $500 in *corporate bonds* and a *foreign exchange derivative* with a notional value of $100.

Example 2. You advise a *parallel fund structure* consisting of two *hedge funds*, named *parallel fund* A and *parallel fund* B. You also advise a related *parallel managed account*. The account and each fund have invested in *corporate bonds* of Company X and have no other assets or liabilities. The value of *parallel fund* A's investment is $400, the value of *parallel fund* B's investment is $300 and the value of the account's investment is $200.

For purposes of determining whether either of the *parallel funds* is a *qualifying hedge fund*, the entire *parallel fund structure* and the related *parallel managed account* should be treated as a single *private fund* whose only asset is $900 of *corporate bonds* issued by Company X.

For purposes of responding to questions regarding the funds, information about each *parallel fund* should be reported separately but the assets of the *parallel managed account* should be treated as assets of the largest *private fund* to which it relates. Accordingly, *parallel fund* A should be treated as a *private fund* whose only asset is $600 of *corporate bonds* issued by Company X, while *parallel fund* B should be treated as a separate *private fund* whose only asset is $300 of *corporate bonds* issued by Company X.

7. I advise a *private fund* that only invests in other *private funds*. Should I include this "fund of funds" in responses to Form PF?

For each "fund of funds" that you advise, complete Section 1b. For all other purposes, you should disregard any "fund of funds." For example, where questions request aggregate information regarding the *private funds* you advise, do not include the assets or liabilities of any "fund of funds."

For purposes of this Form PF, a *private fund* is a "fund of funds" only if it invests exclusively in other *private funds*. (Please note that a "fund of funds" for purposes of question 8 of *Form ADV Section 7.B.1* may not be a "fund of funds" for purposes of Form PF.)

8. When am I required to update Form PF?

You are required to update Form PF at the following times:

Annual updates Unless you are a *large private fund adviser*, you must file an *annual update* each year that updates the answers to all Items in this Form PF. Your *annual update* is due no later than the last day on which you may timely file your "annual updating amendment" to Form ADV (currently, your *annual update* would be due 90 days after the end of your fiscal year).

Quarterly updates If you are a *large private fund adviser*, then within 15 calendar days after the end of each calendar quarter, you must file a *quarterly update* that updates the answers to all Items in this Form PF. *Quarterly updates* are filed in lieu of *annual updates*.

Transition filing — If you need to transition from quarterly to annual filing because you are no longer a *large private fund adviser*, then you must complete and file Item A of Section 1a and check the box in Section 1a indicating that you are making your final filing as a *large private fund adviser*. You must file your transition filing no later than the last day on which your next *quarterly update* would be timely.

Final filing — If you are no longer required to file Form PF, then you must complete and file Item A of Section 1a and check the box in Section 1a indicating that you are making your final filing. You must file your final filing no later than the last day on which your next Form PF update would be timely. This applies to all Form PF filers.

Failure to update your Form PF as required by these instructions is a violation of *SEC* and, where applicable, *CFTC* rules and could lead to revocation of your registration.

9. How do I obtain *private fund* identification numbers for my *reporting funds*?

Each *private fund* must have an identification number for purposes of reporting on *Form ADV* and Form PF. *Private fund* identification numbers can only be obtained by filing *Form ADV*.

If you need to obtain a *private fund* identification number and you are required to file a *quarterly update* of Form PF prior to your next annual update of *Form ADV*, then you must acquire the identification number by filing an other-than-annual amendment to your *Form ADV*. When filing an other-than-annual amendment for this purpose, you must complete and file all of *Form ADV Section 7.B.1* for the new *private fund*.

See Instruction 6 to Part 1A of *Form ADV* and General Instruction 4 to *Form ADV* for additional information regarding the acquisition and use of *private fund* identification numbers and filing other-than-annual amendments.

10. Who must sign my Form PF or update?

The individual who signs the Form PF depends upon your form of organization:

- For a sole proprietorship, the sole proprietor.
- For a partnership, a general partner.
- For a corporation, an authorized principal officer.
- For a limited liability company, a managing member or authorized person.
- For a SID, a principal officer of your bank who is directly engaged in the management, direction or supervision of your investment advisory activities.
- For all others, an authorized individual who participates in managing or directing your affairs.

The signature does not have to be notarized and should be a typed name.

If you and one or more of your *related persons* are filing a single Form PF, then Form PF may be signed by one or more individuals; however, the individual, or the individuals collectively, must have authority, as provided above, to sign both on your behalf and on behalf of all such *related persons*.

11. How do I file my Form PF?

You must file Form PF electronically through the [Form PF filing system] website (<www.[ ].com>), which contains detailed filing instructions. Questions regarding filing through the [Form PF filing system] should be addressed to the [Form PF filing system operator at [xxx-xxx-xxxx]].

12. Are there filing fees?

Yes, you must pay a filing fee for your Form PF filings. The Form PF filing fee schedule is published at <http://www.sec.gov/[ ]> and <http://www. [ ].com>.

13. What if I am not able to file electronically?

A temporary hardship exemption is available if you encounter unanticipated technical difficulties that prevent you from making a timely filing with the [Form PF filing system], such as a computer malfunction or electrical outage. This exemption does not permit you to file on paper; instead, it extends the deadline for an electronic filing for seven "business days" (as such term is used in *SEC* rule 204(b)-1(f)).

To request a temporary hardship exemption, you must complete and file on paper Item A of Section 1a and Section 5 of Form PF, checking the box in Section 1a indicating that you are requesting a temporary hardship exemption. Mail one manually signed original and one copy of your exemption filing to: U.S. Securities and Exchange Commission, Branch of Regulations and Examinations, Mail Stop 0-25, 100 F Street NE, Washington, DC 20549. You must preserve in your records a copy of any temporary hardship exemption filing. Any request for a temporary hardship exemption must be filed no later than one business day after the electronic Form PF filing was due. For more information, see *SEC* rule 204(b)-1(f).

14. How should I enter requested information?

Unless otherwise indicated,

- provide the requested information as of the close of business on the *data reporting date*;
- if information is requested for any month or quarter, provide the requested information as of the close of business on the last calendar day of the month or quarter, respectively;
- if a question asks for information expressed as a percentage, enter a percentage rounded to the nearest one-hundredth of one percent;
- if a question asks for a monetary value, provide the information in U.S. dollars as of the *data reporting date*, rounded to the nearest thousand;
- if a question asks for a numerical value other than a percentage or a dollar value, provide information rounded to the nearest whole number; and

- unless otherwise required by one of the preceding bullets, report using the same calculations you use internally and for investor reports.

Section 1a: Information about you and your *related persons*

WARNING: Complete this Form PF truthfully. False statements or omissions may result in revocation of your registration or criminal prosecution. You must keep this Form PF updated by filing periodic amendments. See Form PF General Instruction 8.

Check the box that indicates what you would like to do:

A. If you are not a *large private fund adviser*:

- ☐ Submit an initial filing
- ☐ Submit an *annual update*
- ☐ Submit a final filing
- ☐ Request a temporary hardship exemption

B. If you are a *large private fund adviser*:

- ☐ Submit an initial filing
- ☐ Submit a *quarterly update* (including fourth quarter updates)
- ☐ Transition to annual reporting
- ☐ Submit a final filing
- ☐ Request a temporary hardship exemption

Item A. Information about you

1. (a) Provide your name and the other identifying information requested below.

(This should be your full legal name. If you are a sole proprietor, this will be your last, first, and middle names. If you are a SID*, enter the full legal name of your bank. Please use the same name that you use in your* Form ADV.*)*

Legal name	SEC 801-Number, if any	NFA ID Number, if any

(b) Provide the following information for each of the *related persons*, if any, with respect to which you are reporting information on this Form PF:

Legal name	SEC 801-Number, if any	NFA ID Number, if any

2. Signatures of sole proprietor or authorized representative *(see Instruction 10 to Form PF).*

Signature on behalf of the firm *and its* related persons*:*

I, the undersigned, sign this Form PF on behalf of, and with the authority of, the *firm*. In addition, I sign this Form PF on behalf of, and with the authority of, each of the *related persons* identified in Question 1(b) (other than any *related person* for which another individual has signed this Form PF below). The *firm*, each *related person* for which I am signing this Form PF, and I all certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form PF relating in whole or in part to the *firm* or any such *related person* are true and correct, and that I am signing this Form PF execution page as a free and voluntary act.

To the extent that Section 1 or 2 of this Form PF is filed in accordance with a regulatory obligation imposed by *CEA* rule 4.27(d), the *firm*, each *related person* for which I am signing this Form PF, and I all accept that any false or misleading statement of a material fact therein or material omission therefrom shall constitute a violation of section 6(c)(2) of the *CEA*.

Name of individual:	
Signature:	
Title:	
Email address:	
Telephone contact number (include area code and, if outside the United States, country code):	
Date:	

Signature on behalf of related persons*:*

I, the undersigned, sign this Form PF on behalf of, and with the authority of, the *related person(s)* identified below. Each such *related person* and I certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this Form PF relating in whole or in part to any such *related person* are true and correct, and that I am signing this Form PF execution page as a free and voluntary act.

To the extent that Section 1 or 2 of this Form PF is filed in accordance with a regulatory obligation imposed by *CEA* rule 4.27(d), each *related person* identified below and I all accept that any false or misleading statement of a material fact therein or material omission therefrom shall constitute a violation of section 6(c)(2) of the *CEA*.

Name of each *related person* on behalf of which this individual is signing:	
Name of individual:	
Signature:	
Title:	
Email address:	
Telephone contact number (include area code	

and, if outside the United States, country code):	
Date:	

Item B. Information about assets of *private funds* that you advise

3. Assets under management (in U.S. dollars):

   (Your regulatory assets under management *for purposes of Form PF may differ from the amount you reported on* Form ADV *if you are filing Form PF on a quarterly basis or if you advise any* parallel managed accounts *that are not "securities portfolios" within the meaning of Instruction 5.b to* Form ADV.*)*

(a) Total *regulatory assets under management*	
(b) Total *net assets under management*	

4. Of your *regulatory assets under management* and your *net assets under management* listed above, provide a breakdown of the dollar amount attributable to the following types of *private funds* that you advise:

   (The totals of items (a) through (h) should equal the amounts reported in response to Question 3.)

	Regulatory assets under management	Net assets under management
(a) *Hedge funds*		
(b) *Liquidity funds*		
(c) *Private equity funds*		
(d) *Real estate funds*		
(e) *Securitized asset funds*		
(f) *Venture capital funds*		
(g) *Other private funds*		
(h) Funds and accounts other than *private funds*		

Item C. Miscellaneous

5. You may use the space below to explain any assumptions that you made in responding to any question in this Form PF. Assumptions must be in addition to, or reasonably follow from, any instructions or other guidance provided in, or in connection with, Form PF. If you are aware of any instructions or other guidance that may require a different assumption, provide a citation and explain why that assumption is not appropriate for this purpose.

Question number	Description

Section 1b: Information about the *private funds* you advise

You must complete a separate Section 1b for each *private fund* that you advise. You must aggregate information regarding *private funds* as provided in the General Instructions.

Item A. *Reporting fund* identifying information

6. (a) Name of the *reporting fund* ....
   (b) *Private fund* identification number of the *reporting fund* ....
   (c) *NFA* identification number of the *reporting fund*, if applicable ....
   (d) *LEI* of the *reporting fund*, if applicable ....

Item B. Assets, financing and investor concentration

7. *Gross asset value* of *reporting fund* ....

   (This amount may differ from the amount you reported in response to question 11(a) of Form ADV Section 7.B.1. *For instance, the amounts may not be the same if you are filing Form PF on a quarterly basis, if you are required to aggregate a* master-feeder arrangement *for purposes of this Form PF and you did not aggregate that* master-feeder arrangement *for purposes of* Form ADV Section 7.B.1. *or if you are required to aggregate a* parallel managed account *for purposes of this Form PF.)*

8. *Net asset value* of *reporting fund* ....

   (This amount may differ from the amount you reported in response to question 11(b) of Form ADV Section 7.B.1. *For instance, the amounts may not be the same if you are filing Form PF on a quarterly basis, if you are required to aggregate a* master-feeder arrangement *for purposes of this Form PF and you did not aggregate that* master-feeder arrangement *for purposes of* Form ADV Section 7.B.1. *or if you are required to aggregate a* parallel managed account *for purposes of this Form PF.)*

9. Provide the following information regarding the value of the *reporting fund's borrowings* and the types of creditors.

   (You are not required to respond to this question for any reporting fund *with respect to which you are answering Question 37 in Section 2b.)*

   (The percentages borrowed from the specified types of creditors should add up to 100%.)

   Dollar amount of total *borrowings* ....

   (a) Percentage borrowed from *U.S. financial institutions* ....
   (b) Percentage borrowed from *non-U.S. financial institutions* ....
   (c) Percentage borrowed from creditors that are not *financial institutions* .....

10. Identify each creditor, if any, to which the *reporting fund* owed an amount in respect of *borrowings* equal to or greater than 5% of the *reporting fund's net asset value* as of the *data reporting date*. For each such creditor, provide the amount owed to that creditor.

Name of creditor	**Dollar amount owed to each creditor**
[drop-down list of creditor/counterparty names] Other: ______________________	
[repeat drop-down list of creditor/counterparty names] Other: _______	
[repeat drop-down list of creditor/counterparty names] Other: _______	

11. Provide the aggregate value of all derivative positions of the *reporting fund* .... [ ]

    (The value of any derivative should be its total gross *notional value, except that the value of an option should be its delta adjusted notional value. Do not net long and short positions.)*

    (You are not required to respond to this question for any reporting fund *with respect to which you are answering Question 38 in Section 2b.)*

12. Provide the following information regarding investor concentration.

    (For purposes of this question, if you know that two or more beneficial owners of the reporting fund *are* affiliated *with each other, you should treat them as a single beneficial owner. Also, if you are aggregating any* parallel managed accounts *with the* reporting fund *in accordance with the General Instructions, you should treat the account owners as beneficial owners of the* reporting fund.*)*

    (a) Specify the total number of beneficial owners of the *reporting fund's* equity interests .... [ ]

    (b) Specify the percentage of the *reporting fund's* equity that is beneficially owned by the five beneficial owners having the largest equity interests in the *reporting fund* .... [ ]

Item C. *Reporting fund* performance

13. When does the fiscal year of the *reporting fund* end?

    (Please respond with the last day of the reporting fund's *fiscal year even if a* feeder fund *or* parallel managed account *aggregated with the* reporting fund *has a different fiscal year end.)*

    ☐ March 31 ☐ June 30 ☐ September 30 ☐ December 31 ☐ Other: ________

14. For each period specified below, provide the following information expressed as a percentage:

(i) the change in the *reporting fund's net asset value*; (ii) the *reporting fund's* performance, without deducting performance fees or charges; and (iii) the *reporting fund's* performance, after deducting performance fees and charges.

(Change in net asset value *should be determined by including subscriptions and redemptions as of the last day of the relevant period and deducting fees and expenses (including performance fees, performance allocation charges or accruals, fixed advisory fees and operating, trading and investment expenses).)*

(Performance should be determined by deducting fees and expenses (including fixed advisory fees and operating, trading and investment expenses). Include or exclude performance fee or performance allocation charges or accruals as indicated below (if you do not accrue a performance fee or performance allocation charge throughout the year, then your response should include a pro forma accrual of the fee or charge where indicated).)

(You must respond based on the performance of the equity class that has been in existence since the inception (or the representative limited partner invested since inception) of the reporting fund *("inception class"), inclusive of all investments made by the fund and based on the inception class fee structure. If you are aggregating one or more* private funds *and/or* parallel managed accounts *with the* reporting fund *in accordance with Instruction 5, use the inception class of the oldest* private fund *in the group.)*

(If your fiscal year is different from the reporting fund's *fiscal year, then for any portion of the* reporting fund's *fiscal year that has not been completed as of the* data reporting date, *provide the relevant information from that portion of the* reporting fund's *preceding fiscal year.)*

	***NAV* change**	**Performance**	
		Without deducting performance fees/charges	**After deducting performance fees/charges**
(a) 1st month of *reporting fund's* fiscal year			
(b) 2nd month of *reporting fund's* fiscal year			
(c) 3rd month of *reporting fund's* fiscal year			
(d) First quarter			
(e) 4th month of *reporting fund's* fiscal year			
(f) 5th month of *reporting fund's* fiscal year			
(g) 6th month of *reporting fund's* fiscal year			
(h) Second quarter			
(i) 7th month of *reporting fund's* fiscal year			
(j) 8th month of *reporting fund's* fiscal year			
(k) 9th month of *reporting fund's* fiscal year			
(l) Third quarter			
(m) 10th month of *reporting fund's* fiscal year			
(n) 11th month of *reporting fund's* fiscal year			

(o) 12th month of *reporting fund's* fiscal year			
(p) Fourth quarter			
(q) Twelve-month period ending on the *data reporting date*			

Section 1c: Information about the *hedge funds* you advise

You must complete a separate Section 1c for each *hedge fund* that you advise. You must aggregate information regarding *hedge funds* as provided in the General Instructions.

Item A. *Reporting fund* identifying information

15. (a) Name of the *reporting fund* .... ☐
    (b) *Private fund* identification number of the *reporting fund*.......................... ☐

Item B. Certain information regarding the *reporting fund*

16. Does the *reporting fund* have a single primary investment strategy or multiple strategies?
    ☐ Single primary strategy ☐ Multi-strategy

17. Indicate which of the strategies below best describe the investment strategies that the *reporting fund* used during the *reporting period*. For each strategy that you have selected, provide a good faith estimate of the percentage of the *reporting fund's net asset value* represented by that strategy.
    (Select the strategies that best describe the reporting fund's investment strategies, even if the descriptions below do not precisely match your characterization of those strategies; select "other" only if a strategy that the reporting fund uses is significantly different from any of the strategies identified below. The total among all strategies should add up to 100%.)

Strategy	% of *NAV*
☐ Equity, Market Neutral	
☐ Equity, Directional	
☐ Equity, Short Bias	
☐ Macro, Active Trading (high frequency trading)	
☐ Macro, Commodity	
☐ Macro, Currency	
☐ Macro, Global Macro	
☐ Relative Value, Fixed Income Asset Backed	
☐ Relative Value, Fixed Income Convertible Arbitrage	
☐ Relative Value, Fixed Income Corporate	
☐ Relative Value, Fixed Income Sovereign	
☐ Relative Value, Volatility	
☐ Event, Activist	

☐ Event, Distressed/Restructuring	
☐ Event, Merger Arbitrage/Special Situations	
☐ Event, Private Issue/Reg D	
☐ Investment in other funds	
☐ Other: __________	

18. During the *reporting period*, approximately what percentage of the *reporting fund's net asset value* was managed using computer-driven trading algorithms to select investments?

(In your response, please do not include algorithms that are used solely for trade execution.)

☐ 0% ☐ less than 10% ☐ 10-25% ☐ 26-50% ☐ 51-75% ☐ 76-99% ☐ 100%

19. Identify the five trading counterparties to which the *reporting fund* has the greatest net counterparty credit exposure, measured as a percentage of the *reporting fund's net asset value*.

(For purposes of this question, you should treat affiliated *entities as a single group and* CCPs *should not be regarded as trading counterparties.)*

(In your response, you should take into account: (i) mark to market gains and losses on derivatives; (ii) margin posted by the counterparty; and (iii) any loans or loan commitments.)

(However, you should not take into account: (i) assets that the counterparty is holding in custody on your behalf; (ii) securities transactions that have been executed but not yet settled; (iii) margin held in a customer omnibus account at a CCP, *which should be considered exposure to the* CCP *rather than a trading counterparty; or (iv) holdings of debt or equity securities issued by the counterparty.)*

	Name of counterparty	Exposure (% of *reporting fund's net asset value*)
(a)	[repeat drop-down list of creditor/counterparty names] Other: ______________________	
(b)	[repeat drop-down list of creditor/counterparty names] Other: _______	
(c)	[repeat drop-down list of creditor/counterparty names] Other: _______	
(d)	[repeat drop-down list of creditor/counterparty names] Other: _______	
(e)	[repeat drop-down list of creditor/counterparty names] Other: _______	

20. Identify the five trading counterparties that have the greatest net counterparty credit exposure to the *reporting fund*, measured in U.S. dollars.

(For purposes of this question, you should treat affiliated *entities as a single group and* CCPs *should not be regarded as trading counterparties.)*

(In your response, you should take into account: (i) mark to market gains and losses on derivatives; (ii) margin posted to the counterparty; and (iii) any loans or loan commitments.)

(However, you should not take into account: (i) assets that the counterparty is holding in custody on your behalf; (ii) securities transactions that have been executed but not yet settled; (iii) margin held in a customer omnibus account at a CCP, *which should be considered exposure to the* CCP *rather than a trading counterparty; or (iv) holdings of debt or equity securities issued by the counterparty.)*

	Name of counterparty	Exposure (in U.S. dollars)
(a)	[repeat drop-down list of creditor/counterparty names] Other: ________	
(b)	[repeat drop-down list of creditor/counterparty names] Other: ________	
(c)	[repeat drop-down list of creditor/counterparty names] Other: ________	
(d)	[repeat drop-down list of creditor/counterparty names] Other: ________	
(e)	[repeat drop-down list of creditor/counterparty names] Other: ________	

21. Provide the following information regarding your use of trading and clearing mechanisms during the *reporting period*.

(Provide good faith estimates of the mode in which instruments were traded and cleared by the reporting fund, *and not the market as a whole. For purposes of this question, a "trade" includes any transaction, whether entered into on a bilateral basis or through an exchange, trading facility or other system. With respect to clearing, transactions for which margin is held in a customer omnibus account at a* CCP *should be considered cleared by a* CCP. *Tri-party* repo *applies where* repo *collateral is held at a custodian (not including a* CCP*) that acts as a third party agent to both the* repo *buyer and the* repo *seller.)*

(An instrument should only be included in a single category for each of the trading and clearing portions of this question. The total in each row should add up to 100%.)

Trading of securities:

	On a regulated exchange	*OTC*
(a) Estimated % (in terms of market value) of equity securities (other than derivatives) that were traded by the *reporting fund*		
(b) Estimated % (in terms of market value) of debt securities (other than derivatives) that were traded by the *reporting fund*		
(c) Estimated % (in terms of market value) of *ABS* that were traded by the *reporting fund*		

Clearing of securities:

	Cleared by a *CCP*	Bilaterally transacted (i.e., not cleared by a *CCP*)
(d) Estimated % (in terms of market value) of equity securities (other than derivatives) that were traded by the *reporting fund* and		
(e) Estimated % (in terms of market value) of debt securities (other than derivatives) that were traded by the *reporting fund* and		
(f) Estimated % (in terms of market value) of *ABS* that were traded by the *reporting fund* and		

Trading of derivatives:

	On a regulated exchange or swap execution facility	*OTC*
(g) Estimated % (in terms of notional value) of *credit derivatives* that were traded by the *reporting fund*		
(h) Estimated % (in terms of notional value) of *interest rate derivatives* that were traded by the *reporting fund*		
(i) Estimated % (in terms of notional value) of *commodity* derivatives that were traded by the *reporting fund*		
(j) Estimated % (in terms of notional value) of equity derivatives that were traded by the *reporting fund*		
(k) Estimated % (in terms of notional value) of *foreign exchange derivatives* that were traded by the *reporting fund*		

(l) Estimated % (in terms of notional value) of *other derivatives* that were traded by the *reporting fund*		

Clearing of derivatives:

	Cleared by a *CCP*	**Bilaterally transacted (i.e., not cleared by a *CCP*)**
(m) Estimated % (in terms of notional value) of *credit derivatives* that were traded by the *reporting fund* and		
(n) Estimated % (in terms of notional value) of *interest rate derivatives* that were traded by the *reporting fund* and		
(o) Estimated % (in terms of notional value) of *commodity* derivatives that were traded by the *reporting fund* and		
(p) Estimated % (in terms of notional value) of equity derivatives that were traded by the *reporting fund* and		
(q) Estimated % (in terms of notional value) of *foreign exchange derivatives* that were traded by the *reporting fund* and		
(r) Estimated % (in terms of notional value) of *other derivatives* that were traded by the *reporting fund* and		

Clearing of *repos*:

	Cleared by a *CCP*	**Bilaterally transacted (i.e., not cleared by a *CCP*)**	**Constitute a tri-party *repo***
(s) Estimated % (in terms of market value) of *repo* trades that are entered into by the *reporting fund* and............................			

22. What percentage of the *reporting fund's net asset value* relates to transactions that are not described in any of the categories listed in items (a) through (s) of Question 21?

Section 2a: Aggregated information about *hedge funds* that you advise

Item A. Exposure of *hedge fund* assets

23. Aggregate *hedge fund* exposures.

(Give a dollar value for long and short positions as of the last day in each month of the reporting period, *by* sub-asset class, *including all exposure whether held physically, synthetically or through derivatives. The value of any derivative should be its* total gross *notional value, except that the value of an option should be its delta adjusted notional value. Include any closed out and* OTC *forward positions that have not yet expired/matured. Do not net positions within* sub-asset classes. *Positions held in side-pockets should be included as positions of the* hedge funds. *Provide the absolute value of short positions.)*

(Each position should only be included in a single sub-asset class.*)*

	1st Month		2nd Month		3rd Month	
	LMV	*SMV*	*LMV*	*SMV*	*LMV*	*SMV*
Listed equity						
Issued by *financial institutions*						
Other *listed equity*						
Unlisted equity						
Issued by *financial institutions*						
Other *unlisted equity*						
Listed equity derivatives						
Related to *financial institutions*						
Other *listed equity derivatives*						
Unlisted equity derivatives						
Related to *financial institutions*						
Other *unlisted equity derivatives*						
Corporate bonds issued by *financial institutions* (other than *convertible bonds*)						
Investment grade						
Duration						
Non-investment grade						
Duration						
Corporate bonds not issued by *financial institutions* (other than *convertible bonds*)						
Investment grade						
Duration						

Non-investment grade						
Duration						
Convertible bonds issued by *financial institutions*						
Investment grade						
Duration						
Non-investment grade						
Duration						
Convertible bonds not issued by *financial institutions*						
Investment grade						
Duration						
Non-investment grade						
Duration						
Sovereign bonds and municipal bonds						
U.S. treasury securities						
Duration						
Agency securities						
Duration						
GSE bonds						
Duration						
Sovereign bonds issued by *G10* countries other than the U.S.						
Duration						
Other *sovereign bonds* (including supranational bonds)						
Duration						
U.S. state and local bonds						
Duration						
Loans						
Leveraged loans						
Duration						
Certificates of deposit						
Duration						
Other loans (not including *repos*)						
Duration						

Repos						
Duration						
ABS/structured products						
RMBS						
Duration						
CMBS						
Duration						
Agency MBS						
Duration						
Auto ABS						
Duration						
Consumer ABS						
Duration						
ABCP						
Duration						
CDO						
Duration						
CLO						
Duration						
WBS						
Duration						
Other ABS						
Duration						
Other structured products						
Credit derivatives						
Single name CDS						
Index CDS						
Exotic CDS						
Foreign exchange derivatives						
Non-U.S. currency holdings						
Interest rate derivatives						
Commodities (derivatives)						
Crude oil						

Natural gas						
Gold						
Power						
Other commodities						

Commodities (physical)

Crude oil						
Natural gas						
Gold						
Power						
Other commodities						

Other derivatives						

Investments in internal private funds						
Investments in external private funds						
Investments in registered investment companies						

Investments in funds for cash management purposes						
Cash and cash equivalents (other than instruments covered by another category above)						
Investments in other sub-asset classes						

24. For each month of the *reporting period*, provide the *turnover rate* for the aggregate portfolio of the *hedge funds* that you advise.

	1st Month	**2nd Month**	**3rd Month**
Turnover rate (as a percentage)			

25. Provide a geographical breakdown of the investments made by the *hedge funds* that you advise (by percentage of the *hedge funds'* aggregate gross asset value).

(Except for foreign exchange derivatives, *investments should be allocated by the jurisdiction of organization of the issuer or counterparty, as applicable. In the case of* foreign exchange derivatives, *investments should be allocated by the country to whose currency the* reporting fund *has exposure through the derivative. The total should add up to 100%.)*

(The value of any derivative should be its total gross *notional value, except that the value of an option should be its delta adjusted notional value. Do not net long and short positions.)*

Region	**%**
Americas	
(a) Brazil	
(b) Canada	
(c) Mexico	
(d) United States	
(e) Other Americas	
Europe	
(f) *EEA*	
(g) Russia	
(h) Other Europe	
Asia and Pacific	
(i) Australia	
(j) China (including Hong Kong)	
(k) India	
(l) Japan	
(m) Korea, Republic of	
(n) Middle East	
(o) Other Asia and Pacific	
Africa	
(p) South Africa	
(q) Other Africa	

Section 2b: Information about *qualifying hedge funds* that you advise.

You must complete a separate Section 2b for each *qualifying hedge fund* that you advise (or, in the case of *parallel fund structures* that collectively comprise a *qualifying hedge fund*, each *parallel fund* that is part of that *parallel fund structure*). You must aggregate information regarding *qualifying hedge funds* as provided in the General Instructions.

Item A. *Reporting fund* identifying information

26. (a) Name of the *reporting fund* .... ☐

(b) *Private fund* identification number of the *reporting fund* .... ☐

Item B. *Reporting fund* exposures and trading

Check this box if you advise only one *hedge fund*. If you check this box, you may skip Question 27.
☐

27. *Reporting fund* exposures.

(Give a dollar value for long and short positions as of the last day in each month of the reporting period, *by* sub-asset class, *including all exposure whether held physically, synthetically or through derivatives. The value of any derivative should be its* total gross *notional value, except that the value of an option should be its delta adjusted notional value. Include any closed out and* OTC *forward positions that have not yet expired/matured. Do not net positions within* sub-asset classes. *Positions held in side-pockets should be included as positions of the* reporting fund. *Provide the absolute value of short positions.)*

(Each position should only be included in a single sub-asset class.*)*

	1st Month		**2nd Month**		**3rd Month**	
	LMV	***SMV***	***LMV***	***SMV***	***LMV***	***SMV***
Listed equity						
Issued by *financial institutions*						
Other *listed equity*						
Unlisted equity						
Issued by *financial institutions*						
Other *unlisted equity*						
Listed equity derivatives						
Related to *financial institutions*						
Other *listed equity derivatives*						
Unlisted equity derivatives						
Related to *financial institutions*						

Other *unlisted equity derivatives*						
Corporate bonds issued by *financial institutions* (other than *convertible bonds*)						
Investment grade						
Duration						
Non-investment grade						
Duration						
Corporate bonds not issued by *financial institutions* (other than *convertible bonds*)						
Investment grade						
Duration						
Non-investment grade						
Duration						
Convertible bonds issued by *financial institutions*						
Investment grade						
Duration						
Non-investment grade						
Duration						
Convertible bonds not issued by *financial institutions*						
Investment grade						
Duration						
Non-investment grade						
Duration						
Sovereign bonds and municipal bonds						
U.S. treasury securities						
Duration						
Agency securities						
Duration						
GSE bonds						
Duration						
Sovereign bonds issued by *G10* countries other than the U.S.						
Duration						

Other *sovereign bonds* (including supranational bonds)						
Duration						
U.S. state and local bonds						
Duration						

Loans

Leveraged loans						
Duration						
Certificates of deposit						
Duration						
Other loans (not including *repos*)						
Duration						

Repos						
Duration						

ABS/structured products

RMBS						
Duration						
CMBS						
Duration						
Agency MBS						
Duration						
Auto ABS						
Duration						
Consumer ABS						
Duration						
ABCP						
Duration						
CDO						
Duration						
CLO						
Duration						
WBS						
Duration						
Other ABS						
Duration						
Other structured products						

Credit derivatives						
Single name CDS						
Index CDS						
Exotic CDS						
Foreign exchange derivatives						
Non-U.S. currency holdings						
Interest rate derivatives						
Commodities (derivatives)						
Crude oil						
Natural gas						
Gold						
Power						
Other commodities						
Commodities (physical)						
Crude oil						
Natural gas						
Gold						
Power						
Other commodities						
Other derivatives						
Investments in internal private funds						
Investments in external private funds						
Investments in registered investment companies						
Investments in funds for cash management purposes						
Cash and cash equivalents (other than instruments covered by another category above)						
Investments in other sub-asset classes						

28. Provide the following information regarding the liquidity of the *reporting fund's* portfolio.

(Specify the percentage of the reporting fund's *positions that may be liquidated within each of the periods specified below. Each investment should be assigned to only one period and such assignment should be based on the shortest period during which such position could reasonably be liquidated at or near its carrying value. Use good faith estimates for liquidity based on market conditions over the* reporting period *and assuming no fire-sale discounting (e.g., for listed equities, assume that you will not trade more than 20% of the 90 day average daily trading volume in a single day). In the event that individual positions are important contingent parts of the same trade, group all those positions under the liquidity period of the least liquid part (so, for example, in a convertible bond arbitrage trade, the liquidity of the short should be the same as the* convertible bond*). Exclude* cash and cash equivalents.*)*

(The total should add up to 100%.)

	% of portfolio capable of being liquidated within
1 day or less	
2 days – 7 days	
8 days – 30 days	
31 days – 90 days	
91 days – 180 days	
181 days – 364 days	
365 days or longer	

	1st Month	**2nd Month**	**3rd Month**
29. Dollar value of *reporting fund's unencumbered cash*			
30. Total number of open positions (approximate), determined on the basis of each position and not the issuer or counterparty			

31. For each open position of the *reporting fund* that represents 5% or more of the *reporting fund's net asset value*, provide the information requested below.

(This question relates to investment portfolio concentration. For purposes of this question, two or more positions in securities (or derivatives based on securities) of a single issuer should be treated as a single position and the sub-asset class *specified should be the* sub-asset class *of the security accounting for the greatest proportion of the aggregate position. Do not net long and short positions. Exclude* cash and cash equivalent *instruments.)*

(a) First month of the *reporting period*

	% of *net asset value*	***Sub-asset class***
(i) Position		[drop-down of asset classes]
(ii) Position		[drop-down of asset classes]

(b) Second month of the *reporting period*

(i) Position .... | | [drop-down of asset classes] |

(ii) Position .... | | [drop-down of asset classes] |

(c) Third month of the *reporting period*

(i) Position .... | | [drop-down of asset classes] |

(ii) Position .... | | [drop-down of asset classes] |

32. For each of the top five trading counterparties listed in your response to Question 19 with respect to the *reporting fund*, provide the following information regarding the collateral and other credit support that the counterparty has posted to the *reporting fund.*

(For purposes of this question, include as collateral any assets purchased in connection with a repo *and any collateral that the counterparty has posted to the* reporting fund *under an arrangement pursuant to which the* reporting fund *has loaned securities to the counterparty.)*

(If you do not separate collateral into initial margin/independent amount and variation margin amounts or a trade does not require posting of variation margin, then include all of the collateral in initial margin/independent amount.)

(a) Counterparty [1, 2, 3, 4, 5]:

(i) value of collateral posted in the form of *cash and cash equivalents*:

(x) as initial margin/independent amounts ....

(y) as variation margin ....

(ii) value of collateral posted in the form of securities (other than *cash and cash equivalent* instruments):

(x) as initial margin/independent amounts ....

(y) as variation margin ....

(iii) value of other collateral posted:

(x) as initial margin/independent amounts ....

(y) as variation margin ....

(iv) face amount of letters of credit (or other similar third party credit support) posted ....

(v) percentage of initial margin/independent amounts that:

(x) may be rehypothecated ....

(y) the *reporting fund* has rehypothecated ....

(vi) percentage of variation margin that:

(x) may be rehypothecated ....

(y) the *reporting fund* has rehypothecated ....

33. For each of the top five trading counterparties listed in your response to Question 20 with respect to the *reporting fund*, provide the following information regarding the collateral and other credit support that the *reporting fund* has posted to the counterparty.

(For purposes of this question, include as collateral any assets sold in connection with a reverse repo *and any collateral that the* reporting fund *has posted to the counterparty under an arrangement pursuant to which the counterparty has loaned securities to the* reporting fund.)

(If you do not separate collateral into initial margin/independent amount and variation margin amounts or a trade does not require posting of variation margin, then include all of the collateral in initial margin/independent amount.)

(a) Counterparty [1, 2, 3, 4, 5]:

(i) value of collateral posted in the form of *cash and cash equivalents*:

(x) as initial margin/independent amounts.. ☐

(y) as variation margin.. ☐

(ii) value of collateral posted in the form of securities (other than *cash and cash equivalent* instruments):

(x) as initial margin/independent amounts.. ☐

(y) as variation margin.. ☐

(iii) value of other collateral posted:

(x) as initial margin/independent amounts.. ☐

(y) as variation margin.. ☐

(iv) face amount of letters of credit (or other similar third party credit support) posted.. ☐

(v) percentage of initial margin/independent amounts that may be rehypothecated.. ☐

(vi) percentage of variation margin that may be rehypothecated.................. ☐

34. Identify the three *CCPs* to which the *reporting fund* has the greatest net counterparty credit exposure, measured as a percentage of the *reporting fund's net asset value.*

(Margin held at a CCP *typically represents the net counterparty credit exposure to the* CCP. *Where margin is held in a customer omnibus account at a* CCP *this should be considered exposure to the* CCP *rather than a trading counterparty. Any margin that a prime broker posts to a* CCP *on the* reporting fund's *behalf should be treated as margin posted by the* reporting fund *to the* CCP.)

	Name of *CCP*	**Exposure (% of *NAV*)**
(a)	[Drop-down list of CCP names] ☐ Other: __________	☐
(b)	[Repeat drop-down list of CCP names]	☐

☐ Other: __________

(c) [Repeat drop-down list of CCP names]
☐ Other: __________

Item C. *Reporting fund* risk metrics

35. (a) During the *reporting period*, did you regularly calculate the *VaR* of the *reporting fund*? *(Please respond without regard to whether you reported the result of this calculation internally or to investors.)*

☐ Yes ☐ No

(b) If you responded "yes" to Question 35 (a), provide the following information.

(If you regularly calculate the VaR *of the* reporting fund *using multiple combinations of confidence interval, horizon and historical observation period, complete a separate response to this Question 35(b) for each such combination.)*

(i) Confidence interval used (e.g., 1 – alpha) ....

(ii) Time horizon used (in number of days)..

(iii) What weighting method was used to calculate *VaR*?

☐ None ☐ Equal ☐ Geometric ☐ Other: __________

(iv) If you responded "geometric" to Question 35(b)(iii), provide the weighting factor used.

(v) What method was used to calculate *VaR*?

☐ Historical simulation ☐ Monte Carlo simulation

☐ Parametric ☐ Other: ____________

(vi) Historical lookback period used, if applicable (in number of years).......

(vii) *VaR* for the 1st month of the *reporting period* (as a % of *NAV*) ....

(viii) *VaR* for the 2nd month of the *reporting period* (as a % of *NAV*) ....

(ix) *VaR* for the 3rd month of the *reporting period* (as a % of *NAV*)............

36. For each of the market factors identified below, determine the effect of the specified changes on the *reporting fund's* portfolio and provide the results.

(You may omit a response to any market factor that you do not regularly consider (whether in formal testing or otherwise) in the reporting fund's *risk management. If you omit any market factor, check the box in the first column indicating that this market factor is not relevant to the* reporting fund's *portfolio.)*

(For each market factor, separate the effect on your portfolio into long and short components where (i) the long component represents the aggregate result of all positions with a positive change in valuation under a given stress scenario and (ii) the short component represents the aggregate result of all positions with a negative change in valuation under a given stress

scenario.)

(Please note the following regarding the market factors identified below:

(i) A change in "equity prices" means that the prices of all equities move up or down by the specified amount, without regard to whether the equities are listed on any exchange or included in any index;

(ii) "Risk free interest rates" means rates of interest accruing on sovereign bonds *issued by governments having the highest credit quality, such as* U.S. treasury bonds;

(iii) A change in "credit spreads" means that all spreads against risk free interest rates change by the specified amount;

(iv) A change in "currency rates" means that the values of all currencies move up or down by the specified amount relative to the reporting fund's *base currency;*

(v) A change in "commodity prices" means that the prices of all physical commodities move up or down by the specified amount;

(vi) A change in "option implied volatilities" means that the implied volatilities of all the options that the reporting fund *holds increase or decrease by the specified number of percentage points; and*

(vii) A change in "default rates" means that the rate at which debtors default on all instruments of the specified type increases or decreases by the specified number of percentage points.)

Not relevant	**Market factor – changes in market factor**	**Effect on long component of portfolio (as % of *NAV*)**	**Effect on short component of portfolio (as % of *NAV*)**
☐	Equity prices:		
	Equity prices increase 5%		
	Equity prices decrease 5%		
	Equity prices increase 25%		
	Equity prices decrease 25%		
☐	Risk free interest rates:		
	Risk free interest rates increase 10*bp*		
	Risk free interest rates decrease 10*bp*		
	Risk free interest rates increase 100*bp*		
	Risk free interest rates decrease 100*bp*		
☐	Credit spreads:		
	Credit spreads increase 10*bp*		
	Credit spreads decrease 10*bp*		
	Credit spreads increase 300*bp*		

	Credit spreads decrease 300*bp*		
☐	Currency rates:		
	Currency rates increase 5%		
	Currency rates decrease 5%		
	Currency rates increase 25%		
	Currency rates decrease 25%		
☐	Commodity prices:		
	Commodity prices increase 10%		
	Commodity prices decrease 10%		
	Commodity prices increase 50%		
	Commodity prices decrease 50%		
☐	Option implied volatilities:		
	Implied volatilities increase 2 percentage points		
	Implied volatilities decrease 2 percentage points.....		
	Implied volatilities increase 10 percentage points ...		
	Implied volatilities decrease 10 percentage points...		
☐	Default rates (*ABS*):		
	Default rates increase 1 percentage point.................		
	Default rates decrease 1 percentage point		
	Default rates increase 5 percentage points		
	Default rates decrease 5 percentage points...............		
☐	Default rates (*corporate bonds*):		
	Default rates increase 1 percentage point.................		
	Default rates decrease 1 percentage point		
	Default rates increase 5 percentage points		
	Default rates decrease 5 percentage points...............		

Item D. Financing information

37. For each month of the *reporting period*, provide the following information regarding the value of the *reporting fund's borrowings*, the types of creditors and the collateral posted to secure its *borrowings*.

(For each type of borrowing, *information is requested regarding the percentage borrowed from specified types of creditors. In each case, the total percentages allocated among these types of*

creditors should add up to 100%.)

	1st Month	2nd Month	3rd Month
(a) Dollar amount of *unsecured borrowing*			
(i) Percentage borrowed from *U.S. financial institutions*			
(ii) Percentage borrowed from *non-U.S. financial institutions*			
(iii) Percentage borrowed from creditors that are not *financial institutions*			

(b) *Secured borrowing.*

(Classify secured borrowing *according to the legal agreement governing the borrowing (e.g., Global Master Repurchase Agreement for* reverse repo *and Prime Brokerage Agreement for prime brokerage). Please note that for* reverse repo borrowings, *the amount should be the net amount of cash borrowed (after taking into account any initial margin/independent amount, 'haircut' and repayments). Positions under a Global Master Repurchase Agreement should not be netted.)*

	1st Month	2nd Month	3rd Month
(i) Dollar amount via prime brokerage			
(A) value of collateral posted in the form of *cash and cash equivalents*			
(B) value of collateral posted in the form of securities (other than *cash and cash equivalent* instruments).			
(C) value of other collateral posted			
(D) face amount of letters of credit (or other similar third party credit support) posted			
(E) percentage of posted collateral that may be rehypothecated			
(F) percentage borrowed from *U.S. financial institutions*			
(G) percentage borrowed from *non-U.S. financial institutions*			
(H) percentage borrowed from creditors that are not *financial institutions*			
(ii) Dollar amount via *reverse repo (for purposes of items (A) through (E) below, include as collateral any assets sold in connection with the* reverse repo *as well as any variation margin)*			
(A) value of collateral posted in the form of *cash and cash equivalents*			
(B) value of collateral posted in the form of securities (other than *cash and cash equivalent* instruments).			

(C) value of other collateral posted			
(D) face amount of letters of credit (or other similar third party credit support) posted			
(E) percentage of posted collateral that may be rehypothecated			
(F) percentage borrowed from *U.S. financial institutions*			
(G) percentage borrowed from *non-U.S. financial institutions*			
(H) percentage borrowed from creditors that are not *financial institutions*			
(iii) Dollar amount of other *secured borrowings*			
(A) value of collateral posted in the form of *cash and cash equivalents*			
(B) value of collateral posted in the form of securities (other than *cash and cash equivalent* instruments).			
(C) value of other collateral posted			
(D) face amount of letters of credit (or other similar third party credit support) posted			
(E) percentage of posted collateral that may be rehypothecated			
(F) percentage borrowed from *U.S. financial institutions*			
(G) percentage borrowed from *non-U.S. financial institutions*			
(H) percentage borrowed from creditors that are not *financial institutions*			

38. For each month of the *reporting period*, provide the following information regarding the value of the *reporting fund's* derivative positions and the collateral posted to secure those positions.

(The value of any derivative should be its total gross *notional value, except that the value of an option should be its delta adjusted notional value. Do not net long and short positions.)*

(For items regarding collateral postings, if you do not separate collateral into initial margin/independent amount and variation margin amounts or a trade does not require posting of variation margin, then include all of the collateral in initial margin/independent amount.)

	1st Month	2nd Month	3rd Month
Aggregate value of all derivative positions of the *reporting fund*			
(a) value of collateral posted in the form of *cash and cash*			

equivalents:

(i) as initial margin/independent amounts ....

(ii) as variation margin ....

(b) *value* of collateral posted in the form of securities (other than *cash and cash equivalent* instruments):

(i) as initial margin/independent amounts ....

(ii) as variation margin ....

(c) value of other collateral posted:

(i) as initial margin/independent amounts ....

(ii) as variation margin ....

(d) face amount of letters of credit (or other similar third party credit support) posted ....

(e) percentage of initial margin/independent amounts that may be rehypothecated ....

(f) percentage of variation margin that may be rehypothecated......

39. Financing liquidity:

(a) Provide the aggregate dollar amount of *borrowing* by and cash financing available to the *reporting fund* (including all drawn and undrawn, committed and uncommitted lines of credit as well as any term financing) ....

(b) Divide the amount reported in response to Question 39(a) among the periods specified below depending on the longest period for which the creditor is contractually committed to provide such financing.

(If a creditor (or syndicate or administrative/collateral agent) is permitted to vary unilaterally the economic terms of the financing or to revalue posted collateral in its own discretion and demand additional collateral, then the financing should be deemed uncommitted for purposes of this question. Uncommitted financing should be included under "1 day or less.")

(The total should add up to 100%.)

	% of total financing
1 day or less	
2 days – 7 days	
8 days – 30 days	
31 days – 90 days	
91 days – 180 days	
181 days – 364 days	
365 days or longer	

Item E. Investor information

40. Provide the following information regarding the *reporting fund's* use of side-pockets and restrictions on investor withdrawals and redemptions.

(For Questions 40 and 41, please note that the standards for imposing suspensions and restrictions on withdrawals/redemptions may vary among funds. Make a good faith determination of the provisions that would likely be triggered during conditions that you view as significant market stress.)

As of the *data reporting date*, what percentage of the *reporting fund's net asset value*, if any:

(a)	Is subject to a "side-pocket" arrangement	
(b)	May be subjected to a suspension of investor withdrawals/redemptions by an adviser or fund governing body *(this question relates to an adviser's or governing body's right to suspend and not just whether a suspension is currently effective)*	
(c)	May be subjected to material restrictions on investor withdrawals/ redemptions (e.g., "gates") by an adviser or fund governing body *(this question relates to an adviser's or governing body's right to impose a restriction and not just whether a restriction has been imposed)*	
(d)	Is subject to a suspension of investor withdrawals/redemptions *(this question relates to whether a suspension is currently effective and not just an adviser's or governing body's right to suspend)*	
(e)	Is subject to a material restriction on investor withdrawals/redemptions (e.g., a "gate") *(this question relates to whether a restriction has been imposed and not just an adviser's or governing body's right to impose a restriction)*	

41. Investor liquidity (as a % of *net asset value*):

(Divide the reporting fund's net asset value *among the periods specified below depending on the shortest period within which invested funds could be withdrawn or investors could receive redemption payments, as applicable. Assume that you would impose gates where applicable but that you would not completely suspend withdrawals/redemptions and that there are no redemption fees. Please base on the valuation date rather than the date paid to investor.)*

(The total should add up to 100%.)

	% of *NAV* locked for
1 day or less	
2 days – 7 days	
8 days – 30 days	
31 days – 90 days	

91 days – 180 days	
181 days – 364 days	
365 days or longer	

Section 3: Information about *liquidity funds* that you advise.

You must complete a separate Section 3 for each *liquidity fund* that you advise. You must aggregate information regarding *liquidity funds* as provided in the General Instructions.

Item A. *Reporting fund* identifying and operational information

42. (a) Name of the *reporting fund* ☐

(b) *Private fund* identification number of the *reporting fund* ☐

43. Does the *reporting fund* use the amortized cost method of valuation in computing its *net asset value*?

☐ Yes ☐ No

44. Does the *reporting fund* use the penny rounding method of pricing in computing its *net asset value*?

☐ Yes ☐ No

45. (a) Does the *reporting fund* have a policy of complying with the *risk limiting conditions* of *rule 2a-7*?

☐ Yes ☐ No

(b) If you responded "no" to Question 45(a) above, does the *reporting fund* have a policy of complying with the following provisions of *rule 2a-7*:

(i) the diversification conditions? ☐ Yes ☐ No

(ii) the credit quality conditions? ☐ Yes ☐ No

(iii) the liquidity conditions? ☐ Yes ☐ No

(iv) the maturity conditions? ☐ Yes ☐ No

Item B. *Reporting fund* assets

46. Provide the following information for each month of the *reporting period*.

		1st Month	2nd Month	3rd Month
(a)	*Net asset value* of *reporting fund*			
(b)	*Net asset value* per share of *reporting fund*			
(c)	*Market-based net asset value per share* of *reporting fund*			
(d)	*WAM* of *reporting fund*			
(e)	*WAL* of *reporting fund*			
(f)	*7-day gross yield* of *reporting fund*			
(g)	Dollar amount of the *reporting fund's* assets that are *daily*			

liquid assets			
(h) Dollar amount of the *reporting fund's* assets that are *weekly liquid assets*			
(i) Dollar amount of the *reporting fund's* assets that have a *maturity* greater than 397 days			

47. Selected product exposures by *maturity* for *liquidity fund assets under management.*

(Give the gross dollar value of the reporting fund's *positions as of the* data reporting date *in each of the following asset classes, divided by* maturity. *Include all exposure whether held physically, synthetically or through derivatives. The value of any derivative should be its* total gross *notional value, except that the value of an option should be its delta adjusted notional value. Include any closed out and* OTC *forward positions that have not yet expired/matured. Do not net positions within asset classes. Assets held in side-pockets should be included as assets of the* reporting fund.*)*

(Each asset should only be included in a single asset class.)

			Maturity		
	1 day or less	**2 days to 7 days**	**8 days to 30 days**	**31 days to 397 days**	**Greater than 397 days**
***Sovereign bonds* and municipal bonds**					
U.S. treasury securities					
Agency securities					
GSE bonds					
Sovereign bonds issued by *G10* countries other than the U.S.					
Other *sovereign bonds* (including supranational bonds)					
U.S. state and local bonds					
Instruments issued by *U.S. financial institutions*					
Unsecured commercial paper					
ABCP					
ABS and *structured products* other than *ABCP*					
Certificates of deposit					
Floating rate notes					
Repos					
Where assets purchased are *U.S. treasury securities* or *agency securities*					
Where assets purchased are *corporate bonds* that are *investment grade*					
Where other assets are purchased					

Instruments issued by companies organized in the U.S. (other than *U.S. financial institutions*)					
Unsecured commercial paper					
Corporate bonds (other than unsecured commercial paper), loans, *ABS*, *structured products* and *repos*, combined					
Instruments issued by *non-U.S. financial institutions*					
Unsecured commercial paper					
ABCP					
ABS and *structured products* other than *ABCP*					
Certificates of deposit					
Floating rate notes					
Repos					
Where assets purchased are *U.S. treasury securities* or *agency securities*					
Where assets purchased are *corporate bonds* that are *investment grade*					
Where other assets are purchased					
Instruments issued by companies organized outside the U.S. (other than *non-U.S. financial institutions*)					
Unsecured commercial paper					
Corporate bonds (other than unsecured commercial paper), loans, *ABS*, *structured products* and *repos*, combined					
Other instruments					
Investments in *money market funds*					
Investments in *liquidity funds*					
Cash and cash equivalents (other than instruments covered by another category above)					

48. For each open position of the *reporting fund* that represents 5% or more of the *reporting fund's net asset value*, provide the information requested below.

(This question relates to investment portfolio concentration. For purposes of this question, two or more positions in securities (or derivatives based on securities) of a single issuer should be treated as a single position and the sub-asset class *specified should be the* sub-asset class *of the security accounting for the greatest proportion of the aggregate position.*

Do not net long and short positions. Exclude cash and cash equivalent *instruments.)*

	% of *net asset value*	*Sub-asset class*
(a) First month of the *reporting period*		
(i) Position		[drop-down of asset classes]
(ii) Position		[drop-down of asset classes]
(b) Second month of the *reporting period*		
(i) Position		[drop-down of asset classes]
(ii) Position		[drop-down of asset classes]
(c) Third month of the *reporting period*		
(i) Position		[drop-down of asset classes]
(ii) Position		[drop-down of asset classes]

Item C. Financing information

49. (a) Is the amount of total *borrowing* reported in response to Question 9 equal to or greater than 5% of the *reporting fund's net asset value*?

☐ Yes ☐ No

(b) If you responded "yes" to Question 49(a) above, divide the dollar amount of total *borrowing* reported in response to Question 9 among the periods specified below depending on the type of *borrowing*, the type of creditor and the latest date on which the reporting fund may repay the principal amount of the borrowing without defaulting or incurring penalties or additional fees.

(If a creditor (or syndicate or administrative/collateral agent) is permitted to vary unilaterally the economic terms of the financing or to revalue posted collateral in its own discretion and demand additional collateral, then the borrowing *should be deemed to have a maturity of 1 day or less for purposes of this question. For amortizing loans, each amortization payment should be treated separately and grouped with other* borrowings *based on its payment date.)*

(The total amount of borrowings *reported below should equal the total amount of* borrowing *reported in response to Question 9.)*

	1 day or less	**2 days to 7 days**	**8 days to 30 days**	**31 days to 397 days**	**Greater than 397 days**
Unsecured borrowing					
U.S. financial institutions					
Non-U.S. financial institutions					
Other creditors					
Secured borrowing					
U.S. financial institutions					

Non-U.S. financial institutions					
Other creditors					

50. (a) Does the *reporting fund* have in place one or more committed liquidity facilities?

☐ Yes ☐ No

(b) If you responded "yes" to Question 50(a), provide the aggregate dollar amount of commitments under the liquidity facilities ☐

Item D. Investor information

51. Specify the number of outstanding shares or units of the *reporting fund's* stock or similar securities ☐

52. Provide the following information regarding investor concentration.

(For purposes of this question, if you know that two or more beneficial owners of the reporting fund *are* affiliated *with each other, you should treat them as a single* beneficial owner. *Also, if you are aggregating any* parallel managed accounts *with the* reporting fund *in accordance with the General Instructions, you should treat the account owners as beneficial owners of the* reporting fund.*)*

(a) Specify the percentage of the *reporting fund's* equity that is beneficially owned by the beneficial owner having the largest equity interest in the *reporting fund* ☐

(b) How many investors beneficially own 5% or more of the *reporting fund's* equity? ☐

53. Provide a good faith estimate, as of the *data reporting date*, of the percentage of the *reporting fund's* outstanding equity that was purchased using *securities lending collateral* ☐

54. Provide the following information regarding the restrictions on withdrawals and redemptions by investors in the *reporting fund*.

(For Questions 54 and 55, please note that the standards for imposing suspensions and restrictions on withdrawals/redemptions may vary among funds. Make a good faith determination of the provisions that would likely be triggered during conditions that you view as significant market stress.)

As of the *data reporting date*, what percentage of the *reporting fund's net asset value*, if any:

(a) May be subjected to a suspension of investor withdrawals/redemptions by an adviser or fund governing body *(this question relates to an adviser's or governing body's right to suspend and not just whether a suspension is currently effective)* ☐

(b) May be subjected to material restrictions on investor withdrawals/redemptions (e.g., "gates") by an adviser or fund governing body *(this question relates to an adviser's or governing body's right to* ☐

impose a restriction and not just whether a restriction has been imposed).

(c) Is subject to a suspension of investor withdrawals/redemptions *(this question relates to whether a suspension is currently effective and not just an adviser's or governing body's right to suspend)* ....

(d) Is subject to a material restriction on investor withdrawals/redemptions (e.g., a "gate") *(this question relates to whether a restriction has been imposed and not just an adviser's or governing body's right to impose a restriction)* ....

55. Investor liquidity (as a % of *net asset value*):

(Divide the reporting fund's net asset value *among the periods specified below depending on the shortest period within which invested funds could be withdrawn or investors could receive redemption payments, as applicable. Assume that you would impose gates where applicable but that you would not completely suspend withdrawals/redemptions and that there are no redemption fees. Please base on the valuation date rather than the date paid to investor. The total should add up to 100%.)*

	% of *NAV* locked for
1 day or less	
2 days – 7 days	
8 days – 30 days	
31 days – 90 days	
91 days – 180 days	
181 days – 364 days	
365 days or longer	

Section 4: Information about *private equity funds* that you advise.

You must complete a separate Section 4 for each *private equity fund* that you advise. You must aggregate information regarding *private equity funds* as provided in the General Instructions.

Item A. *Reporting fund* identifying information

56. (a) Name of the *reporting fund* ....
    (b) *Private fund* identification number of the *reporting fund* ....

Item B. *Reporting fund* financing and investments

57. (a) Does the *reporting fund* have in place one or more loan or other borrowing facilities?
    ☐ Yes ☐ No

    If you responded "yes" to Question 57(a) above, provide the total outstanding balance for all such facilities:

    (b) As a dollar value ....
    (c) As a percentage of the *reporting fund's unfunded commitments* ......

58. (a) Does the *reporting fund* guarantee the obligations of any portfolio company in which the *reporting fund* invests?
    ☐ Yes ☐ No

    If you responded "yes" to Question 58(a) above, report the total value of all such guarantee obligations of the *reporting fund*:

    (b) As a dollar value ....
    (c) As a percentage of the *reporting fund's unfunded commitments* ......

59. What is the weighted average debt-to-equity ratio of the *controlled portfolio companies* in which the *reporting fund* invests?

    (Weighting should be based on gross assets of each controlled portfolio company *as a percentage of the aggregate gross assets of the* reporting fund's controlled portfolio companies.*)*

60. What is the highest debt-to-equity ratio of any *controlled portfolio company* in which the reporting fund invests?

61. What is the lowest debt-to-equity ratio of any *controlled portfolio company* in which the reporting fund invests?

62. Provide a breakdown of the indebtedness of the *reporting fund's controlled portfolio companies* by maturity.

    (For amortizing debt, each amortization payment should be treated separately and grouped with other debt based on its payment date.)

Maturity	**Principal amount**
6 months or less following the *data reporting date*	
More than 6 months but less than or equal to 1 year following the *data reporting date*	
More than 1 year but less than or equal to 2 years following the *data reporting date*	
More than 2 years but less than or equal to 3 years following the *data reporting date*	
More than 3 years following the *data reporting date*	

63. What percentage of the aggregate indebtedness of the *reporting fund's controlled portfolio companies* is payment-in-kind (PIK) or zero-coupon debt?

64. During the *reporting period*, did the *reporting fund* or any of its portfolio companies experience an event of default under any of its indentures, loan agreements or other instruments evidencing obligations for borrowed money?

☐ Yes ☐ No

65. (a) Does any *controlled portfolio company* of the *reporting fund* have in place one or more bridge loans or commitments (subject to customary conditions) for a bridge loan?

☐ Yes ☐ No

(b) If you responded "yes" to Question 65(a), identify each *person* that has provided all or part of any bridge loan or commitment to the relevant *controlled portfolio company*. For each such *person*, provide the applicable outstanding amount or commitment amount.

Name	**Outstanding amount of financing, if drawn**	**Amount of commitment, if undrawn**
[repeat drop-down list of creditor/counterparty names] Other: _______		
[repeat drop-down list of creditor/counterparty names] Other: _______		
[repeat drop-down list of creditor/counterparty names] Other: _______		

66. (a) Does the *reporting fund* invest in any *financial industry portfolio companies*?

☐ Yes ☐ No

(b) If you responded "yes" to Question 66(a), then for each *financial industry portfolio company* in which the *reporting fund* invests, provide the following information.

Legal Name	**Address of principal office (include city, state and country)**	***NAICS code***	***LEI*, if any**	**Debt-to-equity ratio of portfolio company**	**% of *reporting fund's* gross assets invested in this portfolio company**	**% of portfolio company beneficially owned by the *reporting fund***

67. Provide a breakdown of the *reporting fund's* investments by industry, based on the *NAICS codes* of its portfolio companies.

(The total should add up to 100%.)

NAICS code	**% of *reporting fund's* gross assets invested in this industry**

68. Provide a geographical breakdown of the *reporting fund's* investments by percentage of gross asset value.

(Except for foreign exchange derivatives, *investments should be allocated by the jurisdiction of organization of the issuer or counterparty, as applicable. In the case of* foreign exchange derivatives, *investments should be allocated by the country to whose currency the* reporting fund *has exposure through the derivative. The total should add up to 100%.)*

(The value of any derivative should be its total gross *notional value, except that the value of an option should be its delta adjusted notional value. Do not net long and short positions.)*

Region	**%**
Americas	
(a) Brazil	
(b) Canada	
(c) Mexico	

(d) United States ....

(e) Other Americas ....

Europe

(f) *EEA* ....

(g) Russia ....

(h) Other Europe ....

Asia and Pacific

(i) Australia ....

(j) China (including Hong Kong) ....

(k) India ....

(l) Japan ....

(m) Korea, Republic of ....

(n) Middle East ....

(o) Other Asia and Pacific ....

Africa

(p) South Africa ....

(q) Other Africa ....

69. If you or any of your *related persons* invest in any companies that are portfolio companies of the *reporting fund*, provide the aggregate dollar amount of these investments.

Section 5: Request for temporary hardship exemption.

You must complete Section 5 if you are requesting a temporary hardship exemption pursuant to *SEC* rule 204(b)-1(f).

A. For which type of Form PF filing are you requesting a temporary hardship exemption?

1. If you are not a *large private fund adviser*:
   - ☐ Initial filing
   - ☐ *Annual update*
   - ☐ Final filing
2. If you are a *large private fund adviser*:
   - ☐ Initial filing
   - ☐ *Quarterly update*
   - ☐ Filing to transition to annual reporting
   - ☐ Final filing

B. Provide the following information regarding your request for a temporary hardship exemption (attach a separate page if additional space is needed).

1. Describe the nature and extent of the temporary technical difficulties when you attempt to submit the filing to the [Form PF filing system]:

2. Describe the extent to which you previously have submitted documents in electronic format with the same hardware and software that you are unable to use to submit this filing:

3. Describe the burden and expense of employing alternative means (e.g., a service provider) to submit the filing in electronic format in a timely manner:

4. Provide any other reasons that a temporary hardship exemption is warranted:

GLOSSARY OF TERMS

A. General terms

Advisers Act	U.S. Investment Advisers Act of 1940, as amended.
Affiliate	With respect to any *person*, any other *person* that directly or indirectly *controls*, is *controlled* by or is under common *control* with such person. The term *affiliated* means that two or more *persons* are *affiliates*.
Annual update	An update of this Form PF with respect to any fiscal year.
Borrowings	*Secured borrowings* and *unsecured borrowings*, collectively.
bp	Basis points.
Cash and cash equivalents	Cash (including U.S. and non-U.S. currencies), cash equivalents and government securities. For purposes of this definition: • cash equivalents are: (i) bank deposits, certificates of deposit, bankers acceptances and similar bank instruments held for investment purposes; (ii) the net cash surrender value of an insurance policy; and (iii) investments in *money market funds*; and • government securities are: (i) *U.S. treasury securities*; (ii) *agency securities*; and (iii) any certificate of deposit for any of the foregoing.
CCP	Central clearing counterparties (or central clearing houses), such as CC&G, CME Clearing, The Depository Trust & Clearing Corporation (including FICC, NSCC and Euro CCP), EMCF, Eurex Clearing, Fedwire, ICE Clear Europe, ICE Clear U.S., ICE Trust, LCH Clearnet Limited, LCH Clearnet SA, Options Clearing Corporation and SIX x-clear.
CEA	U.S. Commodity Exchange Act, as amended.
CFTC	U.S. Commodity Futures Trading Commission.
Combined money market and liquidity fund assets under management	With respect to any adviser, the sum of: (i) such adviser's *liquidity fund assets under management*; and (ii) such adviser's *regulatory assets under management* that are attributable to *money market funds* that it advises.
Committed capital	Any commitment pursuant to which a *person* is obligated to acquire an interest in, or make capital contributions to, the *private fund*.
Commodity pool	A "commodity pool," as defined in section 1a(10) of the CEA.
Control	Has the meaning provided in *Form ADV*. The term *controlled* has a corresponding meaning.
Controlled portfolio company	With respect to any *private equity fund*, a portfolio company that is *controlled* by the *private equity fund*, either alone or together with the *private equity fund's affiliates* or other *persons* that are part of a club or consortium including the *private equity fund*.
CPO	A "commodity pool operator," as defined in section 1a(11) of the CEA.
CTA	A "commodity trading advisor," as defined in section 1a(12) of the CEA.

Daily liquid assets	Has the meaning provided in *rule 2a-7*.
Data reporting date	In the case of an initial filing, the *data reporting date* is the last calendar day of your most recently completed fiscal year (or, if you are a *large private fund adviser*, the most recently completed calendar quarter). In the case of an *annual update*, the *data reporting date* is the last calendar day of your most recently completed fiscal year. In the case of a *quarterly update*, the *data reporting date* is the last calendar day of the most recently completed calendar quarter.
Duration	The weighted average maturity of a portfolio comprised of the specified fixed income assets, where the weights are the relative discounted cash flows in each period.
EEA	The European Economic Area. As of the effective date of this Form PF, the *EEA* is comprised of: (i) the European Union member states, which are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom; and (ii) Iceland, Liechtenstein and Norway.
Feeder fund	See *master-feeder arrangement*.
Financial industry portfolio company	Any of the following: (i) a nonbank financial company, as defined in the Financial Stability Act of 2010; or (ii) a *financial institution*.
Financial institution	Any of the following: (i) a bank or savings association, in each case as defined in the Federal Deposit Insurance Act; (ii) a bank holding company or financial holding company, in each case as defined in the Bank Holding Company Act of 1956; (iii) a savings and loan holding company, as defined in the Home Owners' Loan Act; (iv) a Federal credit union, State credit union or State-chartered credit union, as those terms are defined in section 101 of the Federal Credit Union Act; (v) a Farm Credit System institution chartered and subject to the provisions of the Farm Credit Act of 1971; or (vi) an entity chartered or otherwise organized outside the United States that engages in banking activities.
Firm	The *private fund adviser* completing or amending this Form PF.
Form ADV	Form ADV, as promulgated and amended by the *SEC*.
Form ADV Section 7.B.1	Section 7.B.1 of Schedule D to *Form ADV*.
G10	The Group of Ten. As of the effective date of this Form PF, the *G10* is comprised of: Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States.
Gross asset value	Value of gross assets, calculated in accordance with Part 1A, Instruction 6.e(3) of *Form ADV*, provided that, for all purposes under this Form PF, assets held in *parallel managed accounts* should be treated as assets of the *private funds* with which they are aggregated (see Instruction 5 of Form PF).
Hedge fund	Any *private fund* that: (a) has a performance fee or allocation calculated by taking into account

unrealized gains;

(b) may borrow an amount in excess of one-half of its *net asset value* (including any *committed capital*) or may have gross notional exposure in excess of twice its *net asset value* (including any *committed capital*); or

(c) may sell securities or other assets short.

Solely for purposes of this Form PF, a *commodity pool* satisfying the definition of "*private fund*" is categorized as a *hedge fund*.

For purposes of this definition, do not net long and short positions. Include any borrowings or notional exposure of another person that are guaranteed by the *private fund* or that the *private fund* may otherwise be obligated to satisfy.

Hedge fund assets under management	With respect to any adviser, *hedge fund assets under management* are the portion of such adviser's *regulatory assets under management* that are attributable to *hedge funds* that it advises.
Investment grade	A security is *investment grade* if it is sufficiently liquid that it can be sold at or near its carrying value within a reasonably short period of time and is subject to no greater than moderate credit risk.
Large private fund adviser	Any *private fund adviser* that is required to file Section 2a, 3 or 4 of Form PF. See Instruction 3 to determine whether you are required to file one or more of these sections.
LEI	With respect to any company, the "legal entity identifier" assigned by or on behalf of an internationally recognized standards setting body and required for reporting purposes by the U.S. Department of the Treasury's Office of Financial Research or a financial regulator. In the case of a *financial institution*, if a "legal entity identifier" has not been assigned, then provide the RSSD ID assigned by the National Information Center of the Board of Governors of the Federal Reserve System, if any.
Liquidity fund	Any *private fund* that seeks to generate income by investing in a portfolio of short term obligations in order to maintain a stable *net asset value* per unit or minimize principal volatility for investors.
Liquidity fund assets under management	With respect to any adviser, *liquidity fund assets under management* are the portion of such adviser's *regulatory assets under management* that are attributable to *liquidity funds* it advises (including *liquidity funds* that are also *hedge funds*).
LMV	Total market value of long positions, measured as specified in the instructions to this Form PF.
Market-based net asset value per share	*Net asset value* per share calculated using available market quotations (or an appropriate substitute that reflects current market conditions), to the nearest hundredth of a cent. Exclude the value of any capital support agreement or similar arrangement.
Master fund	See *master-feeder arrangement*.
Master-feeder arrangement	An arrangement in which one or more funds ("*feeder funds*") invest all or substantially all of their assets in a single *private fund* ("*master fund*"). A fund would also be a *feeder fund* investing in a *master fund* for purposes of this definition if it issued multiple classes (or series) of shares or interests and each

	class (or series) invests substantially all of its assets in a single *master fund*.
Maturity	The maturity of the relevant asset, taking into account the maturity shortening provisions contained in paragraph (d) of *rule 2a-7*.
Money market fund	Has the meaning provided in *rule 2a-7*.
NAICS code	With respect to any company, the six-digit North American Industry Classification System code that best describes the company's primary business activity and principal source of revenue.
Net assets under management	*Net assets under management* are your *regulatory assets under management* minus any outstanding indebtedness or other accrued but unpaid liabilities.
Net asset value or *NAV*	With respect to any *reporting fund*, the gross assets reported in response to Question 7 minus any outstanding indebtedness or other accrued but unpaid liabilities.
NFA	The National Futures Association.
Non-investment grade	A security is *non-investment grade* if it is not an *investment grade* security.
Non-U.S. financial institution	Any of the following *financial institutions*: (i) a *financial institution* chartered outside the United States; (ii) a subsidiary of a *U.S. financial institution* that is separately incorporated or otherwise organized outside the United States; or (iii) a branch or agency that resides in the United States but has a parent that is a *financial institution* chartered outside the United States.
OTC	With respect to any instrument, the trading of that instrument over the counter.
Other private fund	Any *private fund* that is not a *hedge fund, liquidity fund, private equity fund, real estate fund, securitized asset fund* or *venture capital fund*.
Parallel fund	See *parallel fund structure*.
Parallel fund structure	A structure in which one or more *private funds* (each, a "*parallel fund*") pursues substantially the same investment objective and strategy and invests side by side in substantially the same positions as another *private fund*.
Parallel managed account	With respect to any *private fund*, a *parallel managed account* is any managed account or other pool of assets that you advise and that pursues substantially the same investment objective and strategy and invests side by side in substantially the same positions as the identified *private fund*.
Person	Has the meaning provided in *Form ADV*.
Principal office and place of business	Has the meaning provided in *Form ADV*.
Private equity fund	Any *private fund* that is not a *hedge fund, liquidity fund, real estate fund, securitized asset fund* or *venture capital fund* and does not provide investors with redemption rights in the ordinary course.
Private equity fund assets under management	With respect to any adviser, *private equity fund assets under management* are the portion of such adviser's *regulatory assets under management* that are attributable to *private equity funds* it advises.
Private fund	Any issuer that would be an investment company as defined in section 3 of the

	Investment Company Act of 1940 but for sections 3(c)(1) or 3(c)(7) of that Act. If any *private fund* has issued two or more series (or classes) of equity interests whose values are determined with respect to separate portfolios of securities and other assets, then each such series (or class) should be regarded as a separate *private fund*. This only applies with respect to series (or classes) that you manage as if they were separate funds and not a fund's side pockets or similar arrangements.
Private fund adviser	Any investment adviser that (i) is registered or required to register with the *SEC* (including any investment adviser that is also registered or required to register with the *CFTC* as a *CPO* or *CTA*) and (ii) advises one or more *private funds*.
Qualifying hedge fund	Any *hedge fund* that has a *net asset value* individually, or in combination with any *parallel funds* and/or *parallel managed accounts*, of at least $500 million as of the close of business on any day during the most recently completed calendar quarter.
Quarterly update	An update of this Form PF with respect to any calendar quarter.
Real estate fund	Any *private fund* that is not a *hedge fund*, that does not provide investors with redemption rights in the ordinary course and that invests primarily in real estate and real estate related assets.
Regulatory assets under management	Regulatory assets under management, calculated in accordance Part 1A, Instruction 5.b of *Form ADV*, provided that, for all purposes under this Form PF, assets held in *parallel managed accounts* should be treated as assets of the *private funds* with which they are aggregated (see Instruction 5 of Form PF).
Related person	Has the meaning provided in *Form ADV*.
Reporting period	With respect to an *annual update*, the twelve month period ending on the *data reporting date*. With respect to a *quarterly update*, the three month period ending on the *data reporting date*.
Reporting fund	A *private fund* as to which you must report information on Form PF. Typically, each *private fund* is a *reporting fund*. This includes *parallel funds*, each of which is a separate *reporting fund*. However, only the *master fund* in any *master-feeder arrangement* should be identified as the *reporting fund* with respect to any such arrangement. See Instructions 3 and 5.
Risk limiting conditions	The conditions specified in paragraphs (c)(2) (maturity), (c)(3) (quality), (c)(4) (diversification), and (c)(5) (liquidity) of *rule 2a-7*.
Rule 2a-7	Rule 2a-7 promulgated by the *SEC* under the Investment Company Act of 1940.
SEC	U.S. Securities and Exchange Commission.
Secured borrowing	Obligations for borrowed money in respect of which the borrower has posted collateral or other credit support. For purposes of this definition, *reverse repos* are *secured borrowings*.
Securities lending collateral	Cash pledged to the *reporting fund's* beneficial owners as collateral in respect of securities lending arrangements.
Securitized asset fund	Any *private fund* that is not a *hedge fund* and that issues asset backed securities and whose investors are primarily debt-holders.

7-day gross yield	Based on the 7 days ended on the *data reporting date*, calculate the *liquidity fund*'s yield by determining the net change, exclusive of capital changes and income other than investment income, in the value of a hypothetical pre-existing account having a balance of one share at the beginning of the period and dividing the difference by the value of the account at the beginning of the base period to obtain the base period return, and then multiplying the base period return by (365/7) with the resulting yield figure carried to at least the nearest hundredth of one percent. The 7-day gross yield should not reflect a deduction of shareholders fees and fund operating expenses.
SMV	Total market value of short positions, measured as specified in the instructions to this Form PF.
Sub-asset class	Each sub-asset class identified in Questions 23 and 27.
Total gross	The gross nominal or notional value of all transactions that have been entered into but not yet settled as of the *data reporting date*. For contracts with variable nominal or notional principal amounts, the basis for reporting is the nominal or notional principal amounts as of the *data reporting date*.
Turnover rate	Divide the lesser of amounts of purchases or sales of securities or other investments for the month by the average value of the securities or other investments owned by the *hedge funds* during the month. Calculate the average value by totaling the values of securities and other investments as of the beginning and as of the end of the month and dividing the sum by 2. The value of any derivative should be its *total gross* notional value, except that the value of an option should be its delta adjusted notional value. Do not net long and short positions. However, in relation to derivatives, packages such as call-spreads may be treated as a single position (rather than as a long position and a short position) Purchases include any cash paid upon the conversion of one security into another and the cost of rights or warrants. Sales include net proceeds of the sale of rights and warrants and net proceeds of securities that have been called or for which payment has been made through redemption or maturity. Include proceeds from a short sale in the value of the securities sold during the period; include the cost of covering a short sale in the value of securities purchased during the period. Include premiums paid to purchase options in the value of securities purchased during the period; include premiums received from the sale of options in the value of the securities sold during the period.
U.S. financial institution	Any of the following *financial institutions*: (i) a *financial institution* chartered in the United States (whether federally-chartered or state-chartered); (ii) a subsidiary of a *non-U.S. financial institution* that is separately incorporated or otherwise organized in the United States; or (iii) a branch or agency that resides outside the United States but has a parent that is a *financial institution* chartered in the United States.
Unencumbered cash	The fund's *cash and cash equivalents* minus the sum of the following (without duplication): (i) *cash and cash equivalents* transferred to a collateral taker pursuant to a title transfer arrangement; and (ii) *cash and cash equivalents* subject to a security interest, lien or other encumbrance (this could include *cash and cash equivalents* in an account subject to a control agreement).

Unfunded commitments	*Committed capital* that has not yet been contributed to the *private equity fund* by investors.
United States person	Has the meaning provided in rule 203(m)-1 under the Advisers Act, which includes any natural person that is resident in the United States.
Unsecured borrowing	Obligations for borrowed money in respect of which the borrower has not posted collateral or other credit support.
VaR	For a given portfolio, the loss over a target horizon that will not be exceeded at some specified confidence level.
Venture capital fund	Any *private fund* meeting the definition of venture capital fund in rule 203(l)-1 of the *Advisers Act*.
WAL	Weighted average portfolio maturity of a *liquidity fund* calculated taking into account the maturity shortening provisions contained in paragraph (d) of *rule 2a-7*, but determined without reference to the exceptions in paragraph (d) of *rule 2a-7* regarding interest rate readjustments.
WAM	Weighted average portfolio maturity of a *liquidity fund* calculated taking into account the maturity shortening provisions contained in paragraph (d) of *rule 2a-7*.
Weekly liquid assets	Has the meaning provided in *rule 2a-7*.

B. Types of securities and instruments

ABCP	Asset backed commercial paper, including (but not limited to) structured investment vehicles, single-seller conduits and multi-seller conduit programs. Provide the market value of all investments in *ABCP*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
ABS	Securities derived from the pooling and repackaging of cash flow producing financial assets.
Agency MBS	Agency mortgage-backed securities (whether residential or commercial). Provide the market value of all investments in *agency MBS*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Agency securities	Any security issued by a *person* controlled or supervised by and acting as an instrumentality of the government of the United States pursuant to authority granted by the Congress of the United States and guaranteed as to principal or interest by the United States. Provide the market value of all investments in *agency securities*. Include bond derivatives.
Auto ABS	*ABS* secured by automobile loans. Provide the market value of all investments in *auto ABS*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
CDO	Collateralized debt obligations (including cash flow and synthetic) other than *CLO, agency MBS, CMBS, RMBS, auto ABS* and *consumer ABS*. Provide the market value of all investments in *CDOs*, but do not include any

	positions held via *CDS* (these should be recorded in the *CDS* category).
CDS	Credit default swaps, including any *LCDS*. *LMV* should be the *total gross* notional value of protection written and *SMV* should be the *total gross* notional value of protection bought.
CLO	Collateralized loan obligations other than *CDO, agency MBS*, *CMBS*, *RMBS*, *auto ABS* and *consumer ABS*. Provide the market value of all investments in *CLOs*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
CMBS	Commercial mortgage backed securities, other than *agency MBS*. Provide the market value of all investments in *CMBS*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Commodities	Has the meaning provided in the *CEA*. Include *ETFs* that hold commodities. For questions regarding *commodity* derivatives, provide the value of all exposure to *commodities* that you do not hold physically, whether held synthetically or through derivatives (whether cash or physically settled).
Consumer ABS	*ABS* secured by loans to consumers other than *RMBS* and *auto ABS*. Provide the market value of all investments in *consumer ABS*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Convertible bonds	Convertible *corporate bonds* (not yet converted into shares or cash). Provide the market value of all investments in *convertible bonds*. Include bond derivatives, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Corporate bonds	Bonds, debentures and notes, including commercial paper, issued by corporations and other non-governmental entities. Do not include preferred equities. Provide the market value of all investments in *corporate bonds*. Include bond derivatives, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Credit derivatives	*Single name CDS*, *index CDS* and *exotic CDS*.
Crude oil	For questions regarding crude oil derivatives, provide the value of all exposure to crude oil that you do not hold physically, whether held synthetically or through derivatives (whether cash or physically settled).
ETF	Exchange-traded fund.
Exotic CDS	*CDS*s referencing bespoke baskets or tranches of *CDOs*, *CLOs* and other structured investment vehicles, including credit default tranches. Provide the *total gross* notional value of all investments in *Exotic CDSs*. *LMV* should be the *total gross* notional value of protection written and *SMV* should be the *total gross* notional value of protection bought.
Foreign exchange derivative	Any derivative whose underlying asset is a currency other than U.S. dollars or is an exchange rate. Cross-currency interest rate swaps should be included in *foreign exchange derivatives* and excluded from *interest rate derivatives*. Provide the *total gross* notional value of outstanding transactions (or, in the case of options, the delta adjusted notional value of outstanding transactions). Only

	one currency side of every transaction should be counted.
Gold	For questions regarding gold derivatives, provide the value of all exposure to gold that you do not hold physically, whether held synthetically or through derivatives (whether cash or physically settled).
GSE bonds	Notes, bonds and debentures issued by private entities sponsored by the U.S. federal government but not guaranteed as to principal and interest by the U.S. federal government. Provide the market value of all investments in *GSE bonds*. Include bond derivatives, but <u>do not</u> include any positions held via *CDS* (these should be recorded in the *CDS* category).
Index CDS	*CDSs* referencing a standardized basket of credit entities, including *CDS* indices and indices referencing leveraged loans. Provide the *total gross* notional value of all investments in *Index CDSs*. *LMV* should be the *total gross* notional value of protection written and *SMV* should be the *total gross* notional value of protection bought.
Interest rate derivative	Any derivative whose underlying asset is the obligation to pay or the right to receive a given amount of money accruing interest at a given rate. Cross-currency interest rate swaps should be included in *foreign exchange derivatives* and excluded from *interest rate derivatives*. Provide the *total gross* notional value of outstanding transactions (or, in the case of options, the delta adjusted notional value of outstanding transactions). This information must be presented in terms of 10-year bond-equivalents.
Investments in external private funds	Investments in *private funds* that neither you nor your *related persons* advise (other than cash management funds).
Investments in internal private funds	Investments in *private funds* that you or any of your *related persons* advise (other than cash management funds).
Investments in other sub-asset classes	Any investment not included in another *sub-asset class*.
Investments in registered investment companies	Investments in registered investment companies (other than cash management funds).
LCDS	Loan credit default swaps.
Leveraged loans	Loans that are made to entities whose senior unsecured long term indebtedness is *non-investment grade*. This may include loans made in connection with the financing structure of a leveraged buyout. Provide the market value of all investments in *leveraged loans*, but <u>do not</u> include any positions held via *LCDS* (these should be recorded in the *CDS* category).
Listed equity	Direct beneficial ownership of equities, including preferred equities, listed on a regulated exchange. Do not include synthetic or derivative exposures to equities. *ETFs* should be categorized based on the assets that the fund holds and should only be included in *listed equities* if the fund holds *listed equities* (e.g., a

	commodities *ETF* should be categorized based on the commodities it holds). Provide the market value of all investments in *listed equities*.
Listed equity derivatives	All synthetic or derivative exposures to equities, including preferred equities, listed on a regulated exchange. Include single stock futures, equity index futures, dividend swaps, total return swaps (contracts for difference), warrants and rights. Provide the *total gross* notional value of outstanding transactions (or, in the case of options, the delta adjusted notional value of outstanding transactions).
Natural gas	For questions regarding natural gas derivatives, provide the value of all exposure to natural gas that you do not hold physically, whether held synthetically or through derivatives (whether cash or physically settled).
Other ABS	*ABS* products that are not covered by another *sub-asset class*. Provide the market value of all investments in *other ABS*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Other commodities	*Commodities* other than *crude oil*, *natural gas*, *gold* and *power*. All types of oil and energy products (aside from *crude oil* and *natural gas*), including (but not limited to) ethanol, heating oil propane and gasoline, should be included in this category. For questions regarding *other commodity* derivatives, provide the value of all exposure to *other commodities* that you do not hold physically, whether held synthetically or through derivatives (whether cash or physically settled).
Other derivatives	Any derivative not included in another *sub-asset class*. Provide the *total gross* notional value of outstanding transactions (or, in the case of options, the delta adjusted notional value of outstanding transactions).
Other loans	All loans other than *leveraged loans* and certificates of deposit. *Other loans* includes (but is not limited to) bilateral or syndicated loans to corporate entities. Provide the market value of all investments in *other loans*, but do not include any positions held via *LCDS* (these should be recorded in the *CDS* category).
Other structured products	Any *structured products* not included in another *sub-asset class*. Provide the market value of all investments in *other structured products*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Power	For questions regarding power derivatives, provide the value of all exposure to power that you do not hold physically, whether held synthetically or through derivatives (whether cash or physically settled).
Repo	Any purchase of securities coupled with an agreement to sell the same (or similar) securities at a later date at an agreed upon price. Provide the market value of all investments in *repos*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).
Reverse repo	Any sale of securities coupled with an agreement to repurchase the same (or similar) securities at a later date at an agreed upon price.
RMBS	Residential mortgage backed securities, other than *agency MBS*. Provide the market value of all investments in *RMBS*, but do not include any positions held via *CDS* (these should be recorded in the *CDS* category).

Single name CDS	*CDSs* referencing a single entity. Provide the *total gross* notional value of all investments in *single name CDSs*. LMV should be the *total gross* notional value of protection written and SMV should be the *total gross* notional value of protection bought.
Sovereign bonds	Any notes, bonds and debentures issued by a national government (including central governments, other governments and central banks but excluding U.S. state and local governments), whether denominated in a local or foreign currency. Provide the market value of all investments in *sovereign bonds*. Include bond derivatives, but <u>do not</u> include any positions held via *CDS* (these should be recorded in the *CDS* category).
Structured products	Pre-packaged investment products, typically based on derivatives and including structured notes.
Unlisted equity	Direct beneficial ownership of equities, including preferred equities, that are not listed on a regulated exchange. Do not include synthetic or derivative exposures to equities. Provide the market value of all investments in *unlisted equities*.
Unlisted equity derivatives	All synthetic or derivative exposures to equities, including preferred equities, that are not listed on a regulated exchange. Include single stock futures, equity index futures, dividend swaps, total return swaps (contracts for difference), warrants and rights. Provide the *total gross* notional value of outstanding transactions (or, in the case of options, the delta adjusted notional value of outstanding transactions).
U.S. treasury securities	Direct obligations of the U.S. Government. Provide the market value of all investments in *U.S. treasury securities*. Include *U.S. treasury security* derivatives.
WBS	Whole business securitizations. Provide the market value of all investments in *WBS*, but <u>do not</u> include any positions held via *CDS* (these should be recorded in the *CDS* category).

Chairman Schapiro not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63785 / January 27, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14207

In the Matter of **DAVID M. TAMMAN, ESQ.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 4C OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 102(e) OF THE COMMISSION'S RULES OF PRACTICE**

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 David M. Tamman, Esq. ("Tamman" or "Respondent") pursuant to Section 4C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.[1]

II.

After a referral from the Los Angeles Regional Office and an investigation, the Office of the General Counsel alleges that:

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1 Rule 102(e)(1)(ii), 17 C.F.R. 201.102(e)(1)(ii), provides, in pertinent part, that:

> The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission . . . to have engaged in unethical or improper professional conduct . . . .

Section 4C(a), 15 U.S.C. 78d-3(a), provides, in pertinent part, that:

> The Commission may . . . deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission . . . to have engaged in unethical or improper professional conduct . . . .

A. RESPONDENT

Tamman is an attorney and a member of the California Bar. He is 43 years old and is a resident of Santa Monica, California.

B. IMPROPER PROFESSIONAL CONDUCT

1. From approximately May 2003 through approximately October 2009, Tamman represented NewPoint Financial Services, Inc. ("NewPoint") in connection with a number of corporate transactional matters, including several offerings of debentures issued by NewPoint. Between approximately May 2003 and approximately January 2009, Tamman prepared several versions of private placement memoranda (PPMs) to be provided to investors in NewPoint's debentures offerings. Those PPMs stated that the funds raised in the offerings would be used primarily for real estate related investments. In fact, the vast majority of money raised in the offerings was misappropriated by NewPoint's principal, John Farahi. *See SEC v. NewPoint Financial Services, Inc., et al.* (Case No. CV10-0124 DDP (JEMx), C.D. Cal.), Docket Nos. 1, 39, and 42.

2. In March 2009, Tamman, then a partner in the Los Angeles, California office of a large international law firm, arranged a call with himself, two other attorneys at the law firm (Attorney A and Attorney B), and John Farahi to discuss disclosures to be added to a PPM to be used for a future NewPoint offering. On that call, Mr. Farahi said that most of the money raised would be loaned to him. He also indicated that most of the money raised in the previous offerings had been loaned to him. Later that month, Attorney A proposed adding several disclosures to the PPM regarding loans to be made to John Farahi. Tamman had Attorney B, an associate at the law firm, add the proposed disclosures to a draft PPM to be used for a future offering. That was the first time that such language regarding loans to John Farahi appeared in any NewPoint PPM.

3. On April 13, 2009, the Commission's Los Angeles Regional Office examination staff initiated an unannounced examination of NewPoint Securities, LLC (a broker-dealer affiliated with NewPoint). That same day, Tamman met with John Farahi in person to discuss the Commission's examination. Later that day, Tamman, for the first time, added purported disclosures regarding loans to John Farahi to a PPM dated October 2008. On May 14, 2009, Tamman added, for the first time, similar purported disclosures to a PPM dated May 2003. Tamman knew that the language regarding loans to John Farahi that he added to the PPMs were not contained in PPMs provided to investors in May 2003 or October 2008.

4. During the course of its examination, the staff discovered information indicating that NewPoint might be engaged in an offering fraud. In mid-May 2009, examination staff notified the Commission's enforcement staff of its findings and later the Commission issued a formal order of investigation. On May 19, 2009, the Commission's examination staff provided NewPoint Securities with formal document requests seeking, among other things, copies of any PPMs provided to NewPoint investors. The next day, another attorney at Tamman's law firm (Attorney C) gave Tamman a document retention memorandum that stated that, given the ongoing

Commission examination, it was important that NewPoint not "**discard, alter or destroy** any [] documents or records." (emphasis in original). After Tamman agreed that the memorandum should be provided to NewPoint, Attorney C sent the document retention memorandum to NewPoint (copying Tamman) along with an article regarding obstruction of justice charges brought by the United States Attorney's office in Houston against an individual for obstructing a Commission investigation.

5. Later in May 2009, NewPoint retained new outside counsel (Attorney D) to represent it in connection with the Commission's examination of NewPoint Securities and any related enforcement inquiries. In response to requests from Attorney D for copies of PPMs to be produced to the Commission, Tamman provided the versions of the PPMs dated May 2003 and October 2008 that he had altered to add disclosures regarding loans to John Farahi. On June 8, 2009, those altered PPMs were produced to the Commission in response to the formal document requests by the Commission's examination staff. The altered PPMs were later produced in response to a subpoena served by the Commission's enforcement staff seeking, among other things, copies of all PPMs provided to NewPoint investors.

6. In mid-July 2009, Attorney D told Tamman that the Commission's enforcement staff was insisting on production of native file copies of the PPMs with metadata showing when the documents were created. On July 14, 2009, Tamman forwarded an email to Attorney C regarding a seminar on the ethical implications of removing metadata from documents. Only two days later, Tamman asked his law firm's IT department to remove metadata from the native file copies of the PPMs that had been produced to the Commission. He then produced the documents, in their altered, metadata-less form to Attorney D with the understanding that the documents were to be reviewed for possible production to the Commission. Attorney D continued to press Tamman to provide native file copies of all versions of the PPMs, not just those produced to the Commission. After repeatedly resisting providing the documents, Tamman finally provided them to Attorney D on July 31, 2009, stressing that he wanted to be informed before the documents were provided to the Commission so that he could assert any potential work product objections. Tamman never told Attorney D or other attorneys at his law firm working on the matter that he had altered the PPMs that were produced to the Commission's examination and enforcement staff.

C. VIOLATIONS

As a result of the conduct described above, Tamman engaged in improper professional conduct and is subject to discipline pursuant to Section 4C of the Exchange Act and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

Tamman's knowing conduct violates California Business and Professions Code § 6106 providing for the disbarment or suspension of an attorney engaged in "[t]he commission of any act involving moral turpitude, dishonesty, or corruption . . . ."

Tamman's knowing conduct violates California Rules of Professional Conduct § 5-220 which prohibits a member of the California Bar from "suppress[ing] any evidence that the member or the member's client has a legal obligation to reveal or to produce."

Tamman's knowing conduct further violates 18 U.S.C. § 1519 which makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. . . ." *See also* California Penal Code § 135 (making it a crime to destroy or conceal evidence to be produced in an investigation).

III.

In view of the allegations made by the Office of the General Counsel, 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 Tamman an opportunity to establish any defenses to such allegations; and

B. What, if any, remedial action is appropriate in the public interest against Tamman pursuant to Section 4C of the Exchange Act and Rule 102(e) of the Commission's Rules of Practice including, but not limited to, denying, temporarily or permanently, the privilege of appearing or practicing before the Commission.

IV.

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

IT IS FURTHER ORDERED that Tamman 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 Tamman fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice, 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

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229 and 249

[Release No. 34-63793; File No. S7-40-10]

RIN 3235-AK84

CONFLICT MINERALS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Securities and Exchange Commission is extending the comment period for a release proposing amendments to its rules to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. [Release No. 34-63547; 75 FR 80948 (December 23, 2010)]. The original comment period for Release No. 34-63547 is scheduled to end on January 31, 2011. The Commission is extending the time period in which to provide the Commission with comments on that release for 30 days until Wednesday, March 2, 2011. This action will allow interested persons additional time to analyze the issues and prepare their comments.

DATES: Comments should be received on or before March 2, 2011.

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-40-10 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 S7-40-10. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room 100 F Street, NE, Washington, DC 20549-1090, on official business days between the hours of 10:00 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 Fieldsend, Special Counsel in the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, at the U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: The Commission has requested comment on a release proposing amendments to its rules to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rules would affect the annual reporting requirements of issuers that file reports pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") and would require any such issuer for which conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer to disclose in the body of its annual report whether its conflict minerals originated in the Democratic Republic of the Congo or an adjoining country. If so, that issuer would be required to furnish a separate report as an exhibit to its annual report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals. These due diligence measures would include, but would not be limited to, an independent private sector audit of the issuer's report conducted in accordance with standards established by the Comptroller General of the United States. Further, any issuer furnishing such a report would be required, in that report, to certify that it obtained an independent private sector audit of its report, provide the audit report, and make its reports available to the public on its Internet website. The release was published in the Federal Register on December 23, 2010.

The Commission originally requested that comments on the release be received by January 31, 2011. The nature of the proposed disclosure requirements differs from the disclosure traditionally required by the Exchange Act, and the proposal requested comment on a variety of significant aspects of the proposed rules. The Commission has received requests for an extension of time for public comment on the proposal to, among other things, allow for the collection of information and improve the quality of responses.[1] The Commission believes that providing the public additional time to consider thoroughly the matters addressed by the release

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[1] See, e.g., Advanced Medical Technology Association et al. (Dec. 16, 2010); Representative Spencer Bachus, Chairman, Committee on Financial Services, U.S. House of Representatives (Jan. 25, 2011); Department of State (Jan. 25, 2011); Jewelers Vigilance Committee et al. (Jan. 10, 2011); National Mining Association (Jan. 3, 2011); National Stone, Sand Gravel Association (Jan. 13, 2011); and World Gold Council (Jan. 7, 2011). Comments are available on the Commission's Internet website at http://www.sec.gov/comments/s7-40-10/s74010.shtml.

and to submit comprehensive responses to the release would benefit the Commission in its consideration of final rules. Therefore, the Commission is extending the comment period for Release No. 34-63547 "Conflict Minerals" for 30 days, to Wednesday, March 2, 2011.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

January 28, 2011

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229, 239 and 249

RELEASE NOS. 33-9179; 34-63794; File No. S7-41-10]

RIN 3235-AK83

MINE SAFETY DISCLOSURE

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Securities and Exchange Commission is extending the comment period for a release proposing amendments to its rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. [Release No. 33-9164; 75 FR 80374 (December 22, 2010)]. The original comment period for Release No. 33-9164 is scheduled to end on January 31, 2011. The Commission is extending the time period in which to provide the Commission with comments on that release for 30 days until Wednesday, March 2, 2011. This action will allow interested persons additional time to analyze the issues and prepare their comments.

DATES: Comments should be received on or before March 2, 2011.

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

<u>Electronic Comments:</u>

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

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-41-10 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 S7-41-10. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jennifer Zepralka, Senior Special Counsel, or Jennifer Riegel, Attorney-Advisor, Division of Corporation Finance at (202) 551-3300, at the U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission has requested comment on a release proposing amendments to its rules to implement Section 1503 of the Dodd-Frank Wall Street

Reform and Consumer Protection Act (the "Act"). Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8-K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration. The disclosure requirements set forth in the Act are currently in effect,[1] but the Commission is proposing to amend its rules to implement and specify the scope and application of the disclosure requirements set forth in the Act and to require a limited amount of additional disclosure to provide context for certain items required by the Act. This release was published in the Federal Register on December 22, 2010.

The Commission originally requested that comments on the release be received by January 31, 2011. The nature of the proposed disclosure requirements differs from the disclosure traditionally required by the Securities Exchange Act of 1934, and the proposal requested comment on a variety of significant aspects of the proposed rules. The Commission has received requests for an extension of time for public comment on the proposal to, among other things, allow for the collection of information and improve the quality of responses.[2] The Commission believes that providing the public additional time to consider thoroughly the matters addressed

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[1] See Section 1503(f) of the Act.

[2] See, e.g., National Mining Association (January 3, 2011); National Stone, Sand & Gravel Association (January 13, 2011); and World Gold Council (January 7, 2011). Comments are available on the Commission's Internet website at http://www.sec.gov/comments/s7-41-10/s74110.shtml.

by the release and to submit comprehensive comments to the release would benefit the Commission in its consideration of final rules. Therefore, the Commission is extending the comment period for Release No. 33-9164 "Mine Safety Disclosure" for 30 days, to Wednesday, March 2, 2011.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

January 28, 2011

Chairman Schapiro,
Commissioner Paredes
not participating

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229 and 249

[RELEASE NO. 34-63795; FILE NO. S7-42-10]

RIN 3235-AK85

DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Securities and Exchange Commission is extending the comment period for a release proposing amendments to its rules pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. [Release No. 34-63549; 75 FR 80977 (December 23, 2010)]. The original comment period for Release 34-63549 is scheduled to end on January 31, 2011. The Commission is extending the time period in which to provide the Commission with comments on that release for 30 days until Wednesday, March 2, 2011. This action will allow interested persons additional time to analyze the issues and prepare their comments.

DATES: Comments should be received on or before March 2, 2011.

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-42-10 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, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-42-10. 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 website (http://www.sec.gov/rules/proposed.shtml). Comments also are available for website viewing and printing 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: Tamara Brightwell, Senior Special Counsel, Division of Corporation Finance, or Elliot Staffin, Special Counsel in the Office of International Corporate Finance, Division of Corporation Finance, at (202) 551-3290, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission has requested comment on a release proposing amendments to its rules to implement Section 1504 of the Dodd-Frank

Wall Street Reform and Consumer Protection Act. Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which requires the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, or by a subsidiary or another entity controlled by the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide certain information regarding those payments in an interactive data format, as specified by the Commission. This release was published in the Federal Register on December 23, 2010.

The Commission originally requested that comments on the release be received by January 31, 2011. The nature of the proposed disclosure requirements differs from the disclosure traditionally required by the Exchange Act, and the proposal requested comment on a variety of significant aspects of the proposed rules. The Commission has received requests for an extension of time for public comment on the proposal to, among other things, allow for the collection of information and to improve the quality of responses.[1] The Commission believes that providing the public additional time to consider thoroughly the matters addressed by the release and to submit comprehensive

[1] See, e.g., letters from National Mining Association (January 3, 2011); National Stone, Sand & Gravel Association (January 13, 2011); and World Gold Council (January 7, 2011). Comments are available on the Commission's Internet website at http://www.sec.gov/comments/s7-42-10/s74210.shtml.

responses to the release would benefit the Commission in its consideration of final rules. Therefore, the Commission is extending the comment period for Release No. 34-63549 "Disclosure of Payments by Resource Extraction Issuers" for 30 days, to Wednesday, March 2, 2011.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: January 28, 2011

COMMODITY FUTURES TRADING COMMISSION

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63798; File No. 265-26]

Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues

AGENCY: Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC").

ACTION: Notice of Meeting of Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues.

SUMMARY: The Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues will hold a public meeting on February 18, 2011, from 9:30 am to 12:00 pm, at the CFTC's Washington, DC headquarters. At the meeting, the committee will discuss matters relating to its recommendations regarding the market events of May 6, 2010, and other matters relating to the on-going work of the committee.

DATES: The meeting will be held on February 18, 2011 from 9:30 am to 12:00 pm. Members of the public who wish to submit written statements in connection with the meeting should submit them by February 17, 2011.

ADDRESSES: The meeting will take place in the first floor hearing room at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

Written statements may be may be submitted to either the CFTC or the SEC; all submissions will be reviewed jointly by the two agencies. Please use the title "Joint CFTC-SEC Advisory Committee" in any written statement you may submit. Statements may be submitted to any of the addresses listed below. Please submit your statement to only one address.

E-mail

Jointcommittee@cftc.gov

or

rule-comments@sec.gov. If e-mailing to this address, please refer to "File No. 265-26" on the subject line.

SEC's Internet Submission Form

http://www.sec.gov/rules/other.shtml

Regular Mail

Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, attention Office of the Secretary

or

Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549-1090. Comments mailed to this address should be submitted in triplicate and should refer to File No. 265-26.

Fax

(202) 418-5521

Any statements submitted in connection with the committee meeting will be made available to the public.

FOR FURTHER INFORMATION CONTACT: Martin White, Committee Management Officer, at (202) 418-5129, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; Ronesha Butler, Special Counsel, at (202) 551-5629, Division of Trading and Markets, Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549-1090; or Elizabeth M. Murphy, Committee Management Officer, at (202) 551-5400, Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549

SUPPLEMENTARY INFORMATION:

The meeting will be webcast on the CFTC's website, www.cftc.gov. Members of the public also can listen to the meeting by telephone. The public access call-in numbers will be announced at a later date.

AUTHORITY: 5 U.S.C. app. 2 § 10(a)(2)

By the Commodity Futures Trading Commission.

Martin White
Committee Management Officer

By the Securities and Exchange Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Committee Management Officer

Dated: January 31, 2011

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63800 / January 31, 2011

INVESTMENT ADVISERS ACT OF 1940
Release No. 3146 / January 31, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14212

In the Matter of **GREGORY J. BUCHHOLZ,** **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 Gregory J. Buchholz ("Respondent").

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II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 and III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From at least 1998 to August 2010, Buchholz was a registered representative affiliated with Raymond James Financial, Inc., a broker-dealer and investment adviser registered with the Commission. Buchholz managed and was located in Raymond James' Southbury, Connecticut office. Throughout this period, Buchholz was associated with a broker-dealer and investment adviser registered with the Commission. Buchholz, 46 years old, is a resident of Bridgewater, Connecticut.

2. On November 12, 2010, Buchholz pled guilty to single-count information for wire fraud in violation of Title 18 of the United States Code, Section 1343, before the United States District Court for the District of Connecticut, in *United States v. Gregory J. Buchholz*, Criminal No. 10-229-JCH.

3. The Stipulation of Offense conduct contained in Buchholz's Plea Agreement, to which he has admitted, and the count of the criminal information to which he pled guilty alleged, *inter alia*, that between 2001 and 2010, Buchholz engaged in a scheme to defraud his investment clients of more than $1.3 million. He embezzled the money by, among other things, forging his clients' signatures, depositing client funds into personal accounts, misrepresenting that his clients' had authorized a redemption when he knew they had not, and misrepresenting to his clients that the funds would be placed into their investment accounts when those funds were actually placed into his personal accounts.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Buchholz'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 Buchholz be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal adviser, transfer agent, or nationally recognized statistical rating organization ("NRSO"), and from participating in any offering of penny stock.

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 63801/January 31, 2011

ADMINISTRATIVE PROCEEDING
File No. 3-14001

In the Matter of **RICHARD JONATHAN BLECH,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Richard Jonathan Blech ("Respondent" or "Blech").

II.

Following the institution of these proceedings on August 11, 2010, Respondent has submitted an Offer of Settlement ("Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in III.B.2 below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

A. RESPONDENT

1. Blech is the Chief Executive Officer of Credit Bancorp, N.V., a Netherlands Antilles Corp. ("Credit Bancorp"). Blech was a registered representative with Credit Bancorp & Co., a Credit Bancorp affiliate, during the time it was registered as a broker-dealer with the Commission.

B. CRIMINAL CONVICTION

2. Blech pleaded guilty to three counts of securities fraud and fraud by wire, radio or television in violation of 15 U.S.C. §§ 78(j),1343 and 1346 before the United States District Court for the Southern District of New York, United States v. Blech, et al., 1:02-CR-122. On June 24, 2005, a criminal judgment was entered against Blech. He was sentenced to a prison term of 72 months followed by three years of supervised release and ordered to make restitution in the amount of $18,128,599.40, an amount deemed satisfied on January 19, 2008.

3. The counts for which Blech was convicted alleged, inter alia, that Blech defrauded investors and obtained money and property by means of materially false and misleading statements, using the United States mails and telephone in furtherance of the scheme. The misconduct underlying the criminal charges occurred during the period in which Blech was associated with a broker-dealer.

III.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, Respondent Blech 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