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 **February 2012** 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

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

(1 Document)

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66368 / February 9, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14756

In the Matter of ROBERT C. KOELLER, 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 Robert C. Koeller ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Robert C. Koeller was a promoter with Integrity Financial AZ LLC ("IFAZ"), a limited liability corporation registered in the State of Arizona. Koeller engaged in an unregistered offering of securities, acted as an unregistered broker, and earned commissions on IFAZ investments. Koeller, 47 years old, is a resident of Poplar Grove, Illinois.

2. On January 20, 2012, a final judgment was entered by consent against Respondent, permanently enjoining him from future violations of Sections 5 and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Exchange Act Rule 10b-5, in the civil action entitled United States Securities and Exchange Commission v. Steven R. Long, et al., Civil Action Number 1:10cv00782, in the United States District Court for the Northern District of Ohio.

3. The Commission's complaint alleged, that in connection with the sale of promissory notes purportedly secured by real estate in Tonopah, Arizona, Respondent falsely told investors that they would receive 10% guaranteed interest on their investments, that principal would be returned to investors by a date certain within two years of the investment, that the investments were insured by the Federal Deposit Insurance Corporation and by homeowner's insurance, and that 100% of investors' money would be used to build homes. The complaint also alleged that Respondent engaged in an unregistered offering of securities and acted as an unregistered broker, and otherwise engaged in a variety of conduct that operated as a fraud and deceit on investors.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, July 21, 2010, 124 Stat. 1376, Respondent 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 barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, with the right to apply for reentry after five years to the appropriate self-regulatory organization, or, if there is none, to the Commission.

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

By the Commission,

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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 **February 2012**, 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

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL L. GALLAGHER, COMMISSIONER

(83 Documents)

Commissioner Gallagher not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

April 8, 2011

In the Matter of **MaxLife Fund Corp.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MaxLife Fund Corp. ("MaxLife") because of questions that have arisen concerning representations made by MaxLife, the control of its stock, its market price, and trading in the stock. MaxLife trades on the OTCQB Market operated by the OTC Markets Group Inc. under the symbol MXFD.

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 company listed above.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the company listed above is suspended for the period from 9:30 a.m. EDT, April 8, 2011, through 11:59 p.m. EDT, on April 21, 2011.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes,
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9298 / February 1, 2012

In the Matter of **GE FUNDING CAPITAL MARKET SERVICES, INC.** Respondent.	**ORDER UNDER RULE 602(e) OF THE SECURITIES ACT OF 1933 GRANTING A WAIVER OF THE DISQUALIFICATION PROVISIONS OF RULES 602(b)(4) AND 602(c)(2)**

GE Funding Capital Market Services, Inc. ("GE Funding CMS") has submitted a letter, dated December 20, 2011, requesting a waiver of the disqualification from the exemption from registration under Regulation E arising from the settlement with the Commission of a civil injunctive action.

On December 23, 2011, the Commission filed a civil injunctive action against GE Funding CMS in the United States District Court for the District of New Jersey alleging that GE Funding CMS violated Section 17(a) of the Securities Act of 1933 ("Securities Act").

Pursuant to an Offer of Settlement from GE Funding CMS, GE Funding CMS simultaneously filed a "Consent of GE Funding Capital Market Services, Inc." in which it agreed, without admitting or denying the allegations of the Commission's complaint, to the entry of a Final Judgment against it. Among other things, the Final Judgment permanently enjoins GE Funding CMS from violating Section 17(a) of the Securities Act, and orders GE Funding CMS to pay $24,901,762 in disgorgement, penalties and interest. In its complaint, the Commission alleges that GE Funding CMS was involved a bid-rigging scheme related to tax-exempt municipal securities.

Rule 602(b)(4) of the Securities Act makes the Regulation E exemption unavailable to an issuer if, among other things, such issuer or any of its affiliates is subject to any "order, judgment, or decree of any court of competent jurisdiction, entered within five years prior to the filing of such [Regulation E] notification, temporarily or permanently restraining or enjoining such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of securities." Rule 602(c)(2) also makes the exemption unavailable to an issuer if, among other things, any principal security holder, investment adviser, or underwriter of the securities to be issued is "temporarily or permanently restrained or enjoined by any court from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer or investment adviser." Rule 602(e) provides, however, that the disqualification "shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied."

Based on the representations set forth in GE Funding CMS's December 20, 2011, request, the Commission has determined that, pursuant to Rule 602(e), a showing of good cause has been made and that it is not necessary under the circumstances that the exemption be denied as a result of the Final Judgment or as a result of any related injunction entered by a U.S. state or territorial court addressing the same activities as the settled injunctive action.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver of the disqualification provision of Rules 602(b)(4) and 602(c)(2) under the Securities Act resulting from the entry of the Final Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Paredes
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9297 / February 1, 2012

SECURITIES EXCHANGE ACT OF 1934
Release No. 66289 / February 1, 2012

In the Matter of

GE FUNDING CAPITAL MARKET SERVICES, INC.

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 OF SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF THE SECURITIES EXCHANGE ACT OF 1934

General Electric Company ("GE"), General Electric Capital Services, Inc. ("GECS"), and GE Capital Corporation ("GE Capital"), indirect parent companies of GE Funding Capital Market Services, Inc. ("GE Funding CMS"), have submitted a letter on behalf of themselves and any of their current and future affiliates, dated December 19, 2011, for a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 ("Securities Act") and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 ("Exchange Act") arising from GE Funding CMS's settlement of an injunctive action filed by the Commission.

On January 23, 2012, pursuant to a consent filed by GE Funding CMS, the Honorable William J. Martini, United States District Court Judge for the District of New Jersey in Securities and Exchange Commission v. GE Funding Capital Market Services, Inc. (Case No. 11-cv-07465-WJM-MF) entered a final judgment against GE Funding CMS (the "Final Judgment"). The Final Judgment enjoined GE Funding CMS from violating, directly or indirectly, Section 17(a) of the Securities Act and required that GE Funding CMS pay or cause to be paid disgorgement plus prejudgment interest and civil money penalties in the total amount of $24,901,762.

The safe harbor provisions of Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward looking statement that is "made with respect to the business or operations of an issuer, if the issuer . . . during the 3-year period preceding the date on which the statement was first made . . . has been made the subject of 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 and Section 21E(b)(1)(A)(ii) of the Exchange Act. The disqualifications may be waived "to the extent otherwise specifically provided by rule, regulation, or order of the Commission." Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act.

Based on the representations set forth in GE's, GECS's, and GE Capital's December 19, 2011 request, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the entry of the Final Judgment 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 GE, GECS, GE Capital, and any current and future affiliates resulting from the Final Judgment is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 2, 2012

In the Matter of **Blue Earth Refineries, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Blue Earth Refineries, Inc. because it has not filed any periodic reports since the period ended June 30, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST on February 2, 2012, through 11:59 p.m. EST on February 15, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66294 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14727

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate 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 Blue Earth Refineries, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Blue Earth Refineries, Inc. ("BUERF") (CIK No. 1299795) is a British Virgin Islands corporation located in Hong Kong, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. BUERF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F on December 19, 2007 for the period ended June 30, 2007. As of July 22, 2011, the common stock of BUERF was quoted on the OTC Link market, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

2. As described in more detail above, Respondent is delinquent in its periodic filings with the Commission, and has repeatedly failed to meet its obligations to file timely periodic reports.

3. 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.

4. As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 2, 2012

In the Matter of **American Unity Investments, Inc.,** **China Display Technologies, Inc.,** **China Wind Energy, Inc.,** **Fuda Faucet Works, Inc.,** **Greater China Media & Entertainment Corp., and** **Xechem International, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American Unity Investments, Inc. because it has not filed any periodic reports since the period ended December 31, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Display Technologies, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Wind Energy, Inc. because it has not filed any periodic reports since the period ended July 31, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Fuda Faucet Works, Inc. because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Greater China Media & Entertainment Corp., because it has not filed any periodic reports since the period ended December 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Xechem International, Inc. because it has not filed any periodic reports since the period ended March 31, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 2, 2012, through 11:59 p.m. EST on February 15, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66296 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14732

In the Matter of **American Unity Investments, Inc.,** **China Display Technologies, Inc.,** **China Wind Energy, Inc.,** **Environment Ecology Holding Company of China,** **First Capital China Corporation,** **Fuda Faucet Works, Inc.,** **Greater China Media & Entertainment Corp.,** **Xechem International, Inc., and** **Yi Xin International Copper, 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 American Unity Investments, Inc., China Display Technologies, Inc., China Wind Energy, Inc., Environment Ecology Holding Company of China, First Capital China Corporation, Fuda Faucet Works, Inc., Greater China Media & Entertainment Corp., Xechem International, Inc. and Yi Xin International Copper, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. American Unity Investments, Inc. ("AUNI") (CIK No. 1075861) is a Florida corporation located in Beijing, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. AUNI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB/A on

September 26, 2008 for the period ended December 31, 2007. As of November 17, 2011, the common stock of AUNI was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. China Display Technologies, Inc. ("CDYT") (CIK No. 59544) is a Delaware corporation located in Shenzhen, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. CDYT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on November 14, 2008 for the period ended September 30, 2008. As of November 17, 2011, the common stock of CDYT was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. China Wind Energy, Inc. ("CWEY") (CIK No. 1393109) is a Nevada corporation located in Heilongjiang Province, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. CWEY is delinquent in its periodic filings with the Commission, having not filed any periodic reports sicnce it filed a Form 10-K/A on April 28, 2011 for the period ended July 31, 2010. As of November 17, 2011, the common stock of CWEY was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Environment Ecology Holding Company of China (CIK No. 1352419) is a Florida corporation located in Xi'An City, Shaanxi Province, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Environment Ecology Holding is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A on March 23, 2009 for the period ended December 31, 2008. Environment Ecology Holding is not publicly quoted or traded.

5. First Capital China Corporation f/k/a Artcraft V, Inc. (CIK No. 1294614) is a Delaware corporation located in Shenzhen City, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. First Capital China Corp. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on November 10, 2009 for the period ended September 30, 2009. First Capital China Corp. is not publicly quoted or traded.

6. Fuda Faucet Works, Inc. ("FUFW") (CIK No. 61500) is a Delaware corporation located in Jiangxi Province, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. FUFW is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-K on April 14, 2009 for the period ended December 31, 2008. As of November 17, 2011, the common stock of FUFW was quoted on the OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

7. Greater China Media & Entertainment Corp. ("GTCN") (CIK No. 1321366) is a Nevada corporation located in Beijing, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. GTCN is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on

February 23, 2009 for the period ended December 31, 2008. As of November 17, 2011, the common stock of GTCN was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Xechem International, Inc. ("XKEM") (CIK No. 919611) is a Delaware corporation located in Middletown, New Jersey with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. XKEM is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB on May 21, 2007 for the period ended March 31, 2007. As of November 17, 2011, the common stock of XKEM was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

9. Yi Xin International Copper, Inc. (CIK No. 1402211) is a Delaware corporation located in Yingtan City, Jiangxi Province with a class of securities registered with the Commission pursuant to Section 12(b) of the Exchange Act. Yi Xin International is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on January 8, 2009 for the period ended September 30, 2008. Yi Xin International is not publicly quoted or traded.

B. DELINQUENT PERIODIC FILINGS

10. As described in more detail above, all of the Respondents listed above 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.

11. 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, 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.

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

This Order shall be served forthwith upon Respondents personally or by certified, registered, or Express Mail, or by other means permitted by the Commission Rules of Practice.

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66290 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14736

In the Matter of **Heli Electronics Corp.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate 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 Heli Electronics Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondent Heli Electronics Corp. ("HELI") (CIK No. 1431676) is a Nevada corporation located in Guangzhou, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. HELI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on November 8, 2010 for the period ended September 30, 2010. As of November 17, 2011, HELI is traded on the over-the-counter markets, but has no market makers and is not eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. HELI is delinquent in its periodic filings with the Commission, having repeatedly failed to meet its obligations to file timely periodic reports, and failed to heed a delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

C. 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, 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.

D. 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 above are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

FEB - 2 2012

In the Matter of

Beicang Iron & Steel, Inc.

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Beicang Iron & Steel, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Beicang Iron & Steel, Inc. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Beicang Iron & Steel, Inc. is suspended for the period from 9:30 a.m. EST on February 2, 2012, through 11:59 p.m. EST on February 15, 2012.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66300 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14733

In the Matter of Beicang Iron & Steel, Inc., Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate 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 Beicang Iron & Steel, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondent Beicang Iron & Steel, Inc. ("BEIC") (CIK No. 763245) is a Nevada corporation located in Shaanxi, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. BEIC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on November 26, 2007 for the period ended September 30, 2007. As of November 17, 2011, the common stock of BEIC was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. BEIC is delinquent in its periodic filings with the Commission, having repeatedly failed to meet its obligations to file timely periodic reports, and failed to heed a delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

C. 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, 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.

D. 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 above are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

FEB - 2 2012

In the Matter of **China Agro-Technology Holdings Ltd.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Agro-Technology Holdings Ltd. because it has not filed any periodic reports since the period ended December 31, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of China Agro-Technology Holdings Ltd. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of China Agro-Technology Holdings Ltd. is suspended for the period from 9:30 a.m. EST on February 2, 2012, through 11:59 p.m. EST on February 15, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66293 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14734

In the Matter of China Agro-Technology Holdings Ltd., Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate 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 China Agro-Technology Holdings Ltd.

II.

After an investigation, the Division of Enforcement alleges that:

A. Respondent China Agro-Technology Holdings Ltd. ("CAGTF") (CIK No. 1064407) is a Belize corporation located in Singapore with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. CAGTF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F on August 14, 2008 for the period ended December 31, 2007. As of November 17, 2011, the common stock of CAGTF was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc. ("OTC Link"), had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. CAGTF is delinquent in its periodic filings with the Commission, having repeatedly failed to meet its obligations to file timely periodic reports, and failed to heed a delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

C. 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, 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.

D. 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 above are true and, in connection therewith, to afford the Respondent an opportunity to establish any defenses to such allegations; and,

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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66291/ February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14735

In the Matter of **China Ventures Limited and Chinatek, 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 China Ventures Limited and Chinatek, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. China Ventures Limited ("CVTRF") (CIK No. 1101545) is a Cayman Islands corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. CVTRF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on January 13, 2006 for the period ended September 30, 2005. As of November 17, 2011, CVTRF is not publicly quoted or traded.

2. Chinatek, Inc. ("CTAK") (CIK No. 768942) is a Washington corporation located in Hong Kong, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. CTAK is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on June 21, 1995 for the period ended March 31, 1995. CTAK is not publicly quoted or traded.

B. DELINQUENT PERIODIC FILINGS

3. As described in more detail above, all of the Respondents listed above 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.

4. Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission current and accurate information in periodic reports, 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.

5. As a result of the foregoing, Respondents 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 above 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 above, 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 above 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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66304 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14729

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate 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 China Yingxia International, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. China Yingxia International, Inc. ("CYXI")[1] (CIK No. 1113546) is a dissolved Florida corporation located in Harbin, Heilongjiang, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. CYXI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on November 14, 2008 for the period ended September 30, 2008. As of January 31, 2012, the common stock of CYXI was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1] The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. 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.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or 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 the 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 the 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 names 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 the Respondent 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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 2, 2012

In the Matter of **BluePoint Linux Software Corp.,** **China Bottles Inc.,** **Long-e International, Inc., and** **Nano Superlattice Technology, Inc.** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of BluePoint Linux Software Corp. because it has not filed any periodic reports since the period ended June 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Bottles, Inc. because it has not filed any periodic reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Long-e International, Inc. because it has not filed any periodic reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Nano Superlattice Technology, Inc. because it has not filed any periodic reports since the period ended June 30, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 2, 2012, through 11:59 p.m. EST on February 15, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66302 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14730

In the Matter of **China Convergent Corp., Ltd.** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS AND NOTICE OF HEARING PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate 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 China Convergent Corp., Ltd.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. China Convergent Corp., Ltd. ("CVNGY") (CIK No. 1002817) is a foreign private corporation with an official business address in New York, New York. CVNGY is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F/A on July 19, 2002 for the period ended December 31, 2000. As of September 23, 2011, CVNGY is not publicly quoted or traded.

B. DELINQUENT PERIODIC FILINGS

2. As described in more detail above, Respondent is delinquent in its periodic filings with the Commission, and has repeatedly failed to meet its obligations to file timely periodic reports.

3. 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.

4. As a result of the foregoing, Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 2, 2012

In the Matter of **Along Mobile Technologies, Inc., and China Yingxia International, Inc.,** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Along Mobile Technologies, Inc. because it has not filed any periodic reports since the period ended September 30, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of China Yingxia International, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 2, 2012, through 11:59 p.m. EST on February 15, 2012.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66303 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14731

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

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate 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 Along Mobile Technologies, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Along Mobile Technologies, Inc. ("AGMB")[1] (CIK No. 725752) is a revoked Nevada corporation located in Xi'An City, Shaanxi Province, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. AGMB is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB on November 9, 2007 for the period ended September 30, 2007. As of January 31, 2011, the common stock of AGMB was quoted on OTC Link (formerly "Pink Sheets") operated by OTC Markets Group Inc., had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1] The short form of the issuer's name is also its ticker symbol.

B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, has repeatedly failed to meet its obligations to file timely periodic reports, and, through its failure to maintain a valid address on file with the Commission as required by Commission rules, failed to receive the delinquency letter sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations.

3. 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.

4. As a result of the foregoing, the Respondent failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

III.

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

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

B. Whether it is necessary and appropriate for the protection of investors to suspend for a period not exceeding twelve months, or 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 the 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 the 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 names 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 the Respondent 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

Elizabeth M. Murphy
Secretary

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66298 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14728

In the Matter of BluePoint Linux Software Corp., China Bottles, Inc., China Hinon Biotech, Inc., China One Holding, Inc. China Private Equity Group, Corporation, Chinese Manufacturers Online Corp., Long-e International, Inc., and Nano Superlattice Technology, 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 BluePoint Linux Software Corp., China Bottles, Inc., China Hinon Biotech, Inc., China One Holding, Inc., China Private Equity Group, Corporation, Chinese Manufacturers Online Corp., Long-e International, Inc., and Nano Superlattice Technology, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. BluePoint Linux Software Corp. ("BLPT") (CIK No. 1081376) is an Indiana corporation located in Shenzhen, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. BLPT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB on September 11, 2008 for the period ended June 30, 2007. As of November 17, 2011, the common stock of BLPT was quoted on OTC Link, had six

market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. China Bottles Inc. ("CBTT") (CIK No. 1156833) is a Nevada corporation located in Guangdong Province, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. CBTT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A on December 3, 2008 for the period ended June 30, 2008. As of November 17, 2011, the common stock of CBTT was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. China Hinon Biotech, Inc. (CIK No. 1464370) is a Delaware corporation located in Beverly Hills, California with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. China Hinon Biotech, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10 registration statement on July 9, 2009. The company's stock is not publicly quoted or traded.

4. China One Holding, Inc. (CIK No. 1464201) is a Delaware corporation located in Beverly Hills, California with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. China One Holding, Inc. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10 registration statement on July 9, 2009. The company's stock is not publicly quoted or traded.

5. China Private Equity Group, Corporation (CIK No. 1464371) is a Delaware corporation located in Beverly Hills, California with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. China Private Equity Group, Corporation is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-12(g) on July 9, 2009; the company has not made any other filings since this initial form registering its securities and is not publicly quoted or traded.

6. Chinese Manufacturers Online Corp. (CIK No. 1353486) is a Delaware corporation located in Mountain Lakes, New Jersey with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. Chinese Manufacturers Online Corp. is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed its Form 10-Q on August 19, 2008 for the quarterly period ended June 30, 2008. Chinese Manufacturers Online Corp. is not publicly quoted or traded.

7. Long-e International, Inc. ("LOGE") (CIK No. 1082562) is a Utah corporation located in Guangdong, China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. LOGE is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on August 19, 2008 for the period ended June 30, 2008. As of November 17, 2011, the common stock of LOGE was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

8. Nano Superlattice Technology, Inc. ("NSLT") (CIK No. 1080316) is a Delaware corporation located in Taiwan, Republic of China with a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act. NSLT is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on August 19, 2008 for the period ended June 30, 2008. As of November 17, 2011, the common stock of NSLT was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

9. As described in more detail above, Respondents are delinquent in their periodic filings with the Commission, and have repeatedly failed to meet their obligations to file timely periodic reports.

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

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

III.

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

A. Whether the allegations contained in Section II 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 to revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondents, 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 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 Answer, 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 the Respondents, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66312 / February 2, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3362 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14737

In the Matter of **DALE SHAFER, 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 Dale Shafer ("Respondent" or "Shafer") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the

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

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

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section 4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, 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. Dale Bruce Shafer, age 42, is and has been a certified public accountant licensed since 1996 to practice in the State of Ohio. He served as interim Chief Financial Officer and Senior Vice President of Oak Hill Financial, Inc. ("Oak Hill") from December 2006 until May 2008.

2. Oak Hill was, at all relevant times, an Ohio corporation with its principal place of business in Jackson, Ohio. Oak Hill was a bank. At all relevant times, Oak Hill's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and traded on the NASDAQ National Market under the symbol OAKF.

3. WesBanco Inc., is a holding company incorporated in West Virginia with its principal executive offices in Wheeling, West Virginia. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act, and it trades on the Nasdaq under the ticker symbol WSBC.

4. On January 19, 2012, the Commission filed a complaint against Shafer in SEC v. Dale Shafer, et al. (Civil Action No. 1:12-CV-62 S.D. Ohio). On January 27, 2012, the court entered an order permanently enjoining Shafer, by consent, from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Shafer was also ordered to pay $33,484.08 jointly and severally in disgorgement of ill-gotten gains and $5,473.73 in prejudgment interest; and a $33,484.08 civil money penalty.

5. The Commission's complaint alleged, among other things, that Shafer owed a fiduciary duty of trust and confidence to the shareholders of Oak Hill to maintain the confidentiality of the information entrusted to him about the merger with WesBanco. Shafer knowingly or recklessly breached his duty by communicating this information to his cousin and in doing so he thereby received a personal benefit.

IV.

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

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

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

B. After five years from the date of this order, Shafer 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
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66313 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14738

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

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against David Plate ("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 Sections III.2, III.3 and III.5 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

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

1. Plate, age 36, resides in Brooklyn, New York. During the relevant time period, Plate was a registered representative and a proprietary trader at Schottenfeld Group LLC, a New York limited liability company and registered broker-dealer based in New York, New York. Plate was then a registered representative at G-2 Trading, LLC. At the relevant time, Plate held Series 7, 55 and 63 securities licenses.

2. On January 31, 2012, a judgment was entered by consent against Plate, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Arthur J. Cutillo, et al., Civil Action Number 09-CV-9208, in the United States District Court for the Southern District of New York.

3. On June 28, 2011, a judgment was entered by consent against Plate, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Galleon Management, LP, et al., Civil Action Number 09-CV-8811, in the United States District Court for the Southern District of New York.

4. The Commission's complaints alleged, inter alia, that, while working as a trader at Schottenfeld in 2007, Plate was tipped material, nonpublic information concerning the acquisitions of Axcan Pharma Inc. ("Axcan") and Kronos Inc. ("Kronos"), which had been misappropriated in violation of a duty. The complaints further allege that Plate traded in the securities of Axcan and Kronos based on that material, nonpublic information, and also tipped the material, nonpublic information concerning the Kronos acquisition to others.

5. On July 16, 2010, Plate pled guilty to one count of conspiracy to commit securities fraud and one count of securities fraud in violation of Title 18 United States Code, Section 371 and Title 15 United States Code, Sections 78j(b) and 78ff, in the District Court for the Southern District of New York, in United States v. David Plate, 10-CR-0056.

6. The counts of the criminal information to which Plate pled guilty alleged, inter alia, that Plate, and others, participated in a scheme to defraud by executing securities trades based on material, nonpublic information regarding certain inside information concerning public companies that had been misappropriated in violation of duties of trust and confidence, and that he unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and 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 Plate's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Plate be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer or transfer agent, and is barred from participating in an offering of penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

Commissioner Walter
Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66314 / February 2, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14739

In the Matter of CRAIG DRIMAL, 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 Craig Drimal ("Drimal" 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 Sections III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Drimal, age 55, resides in Weston, Connecticut. During the relevant time period, Drimal was a proprietary trader associated with RBC Professional Trader Group LLC, a registered broker-dealer based in New York, New York. Immediately prior to his arrest, Drimal was a proprietary trader associated with Echotrade LLC, a registered broker-dealer based in Phoenix, Arizona. Drimal held Series 7, 22 and 63 securities licenses.

2. On January 31, 2012, a judgment was entered by consent against Drimal, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Arthur J. Cutillo, et al., Civil Action Number 09-CV-9208, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged, inter alia, that in 2007 Drimal was tipped material, nonpublic information concerning Axcan Pharma Inc., 3Com Corp. and Avaya, Inc., which information had been conveyed in violation of a duty. The complaint further alleges that Drimal traded based on the material, nonpublic information and tipped the information to others.

4. On April 26, 2011, Drimal pled guilty to five counts of securities fraud and one count of conspiracy to commit securities fraud in violation of Title 18 United States Code, Sections 2 and 371, and Title 15 United States Code, Sections 78j(b) and 78ff, in the U.S. District Court for the Southern District of New York, in United States v. Craig Drimal, 10-CR-0056.

5. The counts of the criminal indictment to which Drimal was found guilty alleged, inter alia, that Drimal, and others, participated in a scheme to defraud by executing securities trades based on material, nonpublic information regarding certain inside information concerning public companies that had been misappropriated in violation of duties of trust and confidence, and that he unlawfully, willfully and knowingly did so, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities exchanges, in connection with the purchase and 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 Drimal's Offer.

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Drimal be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer or transfer agent, and barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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. 66317 / February 3, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14517

In the Matter of **MARGARET GREY,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**

I.

On August 29, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Margaret Grey ("Grey" or "Respondent").

II.

Respondent, pursuant to Rule 240(a) of the Commission's Rules of Practice, 17 C.F.R. § 201.240(a), has now submitted an Offer of Settlement ("Offer") in connection with these public administrative proceedings, which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Order") as set forth below.

III.

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

1. Grey became the president, CEO and secretary of Nova Gen Corp. ("Nova Gen") after the death of her husband, Harry Grey, the company's former president and CEO, in June 2009. Prior to June 2009, she was Nova Gen's secretary. Grey, age 40, is a resident of San Diego, California.

2. On August 2, 2011, a judgment of permanent injunction and other relief was entered against Grey, permanently enjoining her from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Nova Gen Corp., et al., Civil Action No. CV-09-2711-MMA-WVG, in the United States District Court for the Southern District of California.

3. The Commission's complaint alleged that, from June 2009 through October 2009, Grey, along with defendant Paul Randall Fraley ("Fraley"), raised approximately $95,000 from at least ten investors in Nova Gen by soliciting prospective investors with written offering documents including Nova Gen's business plans and an executive summary. The complaint further alleged that, in the written offering documents, Grey misrepresented Nova Gen's assets and revenues, the risk of an investment in Nova Gen, and the company's operational status, and that the business plans that Grey disseminated also contained baseless projections of Nova Gen's future revenue. As alleged in the complaint, contrary to the representations that Grey made to investors, Nova Gen never had any assets, operations, or revenues other than raising money from investors, and all of the funds raised from investors were dissipated, primarily through expenses including research, rent, consultant fees, employee salaries, and broker commissions. The complaint alleged that Grey knew or was reckless in not knowing that the representations made to Nova Gen's investors were false, and that she aided and abetted Fraley, who was acting as an unregistered broker while selling Nova Gen's securities to investors.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Grey 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
>
> barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

Commissioner Aguilar
not participating

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66319 / February 3, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14742

In the Matter of **TODD LESLIE TREADWAY,** **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 Todd Leslie Treadway ("Respondent" or "Treadway") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent

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

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

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. Treadway, age 42, is a resident of Arlington, Virginia.

2. Treadway is and has been an attorney licensed to practice in the State of New York. Treadway joined the law firm of Dewey & LeBoeuf, LLP ("Dewey & LeBoeuf") as an associate in 2007 where he continued to work as an associate until he left in November 2008.

3. On January 27, 2012, a final judgment was entered by consent against Treadway, permanently enjoining him from future violations of Sections 10b and 14(e) of the Securities Exchange Act of 1934 and Rules 10b-5 and 14e-3 thereunder, in the civil action entitled *Securities and Exchange Commission v. Todd Leslie Treadway*, Civil Action No. 11-cv-1534 (RJD)(MD), filed in the United States District Court for the Southern District of New York. The final judgment also ordered Treadway to pay disgorgement and a civil penalty.

4. The Commission's complaint alleged, *inter alia*, that Treadway, as an attorney at Dewey & LeBoeuf, had access to, and learned of, material nonpublic information concerning corporate acquisitions in which Dewey & LeBoeuf represented acquirers in the proposed acquisitions. The complaint further alleged that, in 2007 and 2008, Treadway, in breach of his fiduciary or duty of trust and confidence owed to Dewey & LeBoeuf and its clients, knowingly or recklessly purchased securities of acquisition targets on the basis of the material, nonpublic information concerning two separate corporate acquisitions involving Dewey & LeBoeuf's clients. When Treadway purchased securities of the acquisition targets substantial steps had been made toward commencing the respective tender offers.

IV.

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

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

Treadway is suspended from appearing or practicing before the Commission as an attorney.

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. 66318 / February 3, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14741

In the Matter of **ALAN LABINERI,** **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 Alan Labineri ("Respondent" or "Labineri").

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 Sections III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Labineri, also known as "Alan Labiner," and "David Alan Labiner," is 52 years old and lives in Brooklyn, New York. From June 1, 2001 through February 11, 2004 (the "relevant period"), Labineri was the president of Equity Service Associates and controlled Off World Strategic Holdings, Millenium Entertainment Group and IncredibleArt.com, Inc., companies to which proceeds from various fraudulent offerings, including OnCallContractor.com/OCC Holdings offerings, were transferred. From April 1994 to January 1997, Labineri worked as a registered representative for six registered broker-dealers. Labineri has not been registered with a broker-dealer since January 1997. During the period of the conduct underlying Labineri's criminal conviction in October 2011, Labineri was associated with a broker-dealer.

2. On December 3, 2008, a final judgment was entered against Labineri 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, and from participating in offerings of penny stock in the civil action entitled Securities and Exchange Commission v. OCC Holdings, Ltd., et al., 04 Civ.1122, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged, inter alia, that during the relevant period, Labineri raised more than $2 million from investors through three schemes: (1) selling purported private placement shares of OnCall; (2) selling promissory notes issued by MB Holdings and other entities; and (3) selling restricted shares of Savvydata, Inc., an unrelated, privately owned company. The complaint further alleged that in connection with the offerings, Labineri made false and misleading promises of imminent initial public offerings and/or substantial increases in the stock price; misrepresented to investors that the promissory notes were risk-free; misappropriated and used investor funds for personal expenses; and failed to disclose his disciplinary history.

4. On October 20, 2011, Labineri pleaded guilty to conspiracy to commit securities, mail and wire fraud, and mail fraud in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 18 United States Code Section 1341 in the criminal action entitled United States of America v. Labiner, et al., 1:09cr807, in the United States District Court for the Eastern District of New York.

5. The counts of the criminal indictment to which Labineri pleaded guilty alleged, inter alia, that, from at least March 2004 until September 2009, Labineri and his co-defendants defrauded investors in purported private offerings of securities of a number of entities, including Manhattan North Real Estate Investment Trust, Inc., Next Point USA, Inc., Grant Boxing, Inc., and Exposure Management Group, Inc. by misrepresenting to prospective investors the use of the offering proceeds, most of which they used for their own benefit.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Labineri 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.

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. 66316 / February 3, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14740

In the Matter of **KHURRAM TANWIR,** **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 Khurram Tanwir ("Respondent" or "Tanwir").

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 Sections III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Tanwir, also known as "Raja Arshad," "Cory Taylor," "Corey," and "Cori," is 34 years old and a resident of Brooklyn, New York. From June 1, 2001 through February 11, 2004 (the "relevant period"), Tanwir was the president of MB Holdings USA, Inc., an unregistered broker-dealer, and a registered representative associated with broker-dealers registered with the Commission. During the period of the conduct underlying Tanwir's criminal conviction discussed below, Tanwir was associated with Locke, Landis & Harriman, Inc., later known as Landis, Harriman & White, Inc., an unregistered broker-dealer.

2. On December 3, 2008, a final judgment was entered against Tanwir 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, and from participating in offerings of penny stock, in the civil action entitled Securities and Exchange Commission v. OCC Holdings, Ltd., et al., 04 Civ.1122, in the United States District Court for the Southern District of New York.

3. The Commission's complaint alleged, inter alia, that during the relevant period, Tanwir raised more than $2 million from investors through three schemes: (1) selling purported private placement shares of OnCallContractor.com; (2) selling promissory notes issued by MB Holdings and other entities; and (3) selling restricted shares of Savvydata, Inc., an unrelated, privately owned company. The complaint further alleged that in connection with the offerings, Tanwir made false and misleading promises of imminent initial public offerings and/or substantial increases in the stock price; misrepresented to investors that the promissory notes were risk-free because they were guaranteed by a broker-dealer Tanwir worked for, which was false because the broker-dealer did not have the intention or ability to honor the guarantees and its purported president did not exist; misappropriated and used investor funds for personal expenses; and failed to disclose his disciplinary history.

4. On March 22, 2010, Tanwir pleaded guilty to conspiracy to commit securities, mail and wire fraud, and mail fraud, in violation of Title 15 United States Code, Sections 78j(b) and 78ff, and Title 18 United States Code, Sections 1341 and 1343 before the United States District Court for the Eastern District of New York in United States of America v. Labiner, et al., 1:09cr807. Tanwir also pleaded guilty to criminal contempt for violating the antifraud injunction imposed on him in SEC v. OCC Holdings, in violation of Title 18 United States Code, Section 402.

5. The counts of the criminal indictment to which Tanwir pleaded guilty alleged, inter alia, that from at least March 2004 until September 2009, Tanwir and his co-defendants defrauded investors in purported private offerings of securities of a number of entities, including Manhattan North Real Estate Investment Trust, Inc., Next Point USA, Inc., Grant Boxing, Inc., and Exposure Management Group, Inc. by misrepresenting to prospective investors the use of the offering proceeds, most of which they used for their own benefit.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Tanwir 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.

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. 66323 / February 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14743

In the Matter of **PPOL, Inc.,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against PPOL, Inc. ("PPOL" or "Respondent").

II.

In anticipation of the institution of these proceedings, PPOL 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, PPOL consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), and to the findings as set forth below.

III.

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

1. PPOL (CIK No. 1202507) is a California corporation located in Costa Mesa, California with a class of securities registered with the Commission

under Exchange Act Section 12. As of September 30, 2009, the common stock of PPOL was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. (symbol "PPLI"), had four market makers, and was eligible for the piggyback exception of Exchange Act Rule 15c2-11(f)(3).

2. PPOL has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder while its securities were registered with the Commission in that it has not filed any periodic reports for any fiscal period subsequent to the period ended March 31, 2007.

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 deems it 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 PPOL's securities registered pursuant to Section 12 of the Exchange Act be, and hereby is, revoked.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66330 / February 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14663

In the Matter of **STEVEN R. LONG,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

On December 14, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Steven R. Long ("Respondent").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order 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. Long is the president, co-founder and 51% owner of Integrity Financial AZ LLC ("IFAZ"), a limited liability corporation registered in the state of Arizona. Long and IFAZ sold unregistered securities, acted as unregistered brokers, and engaged in a variety of conduct that operated as a fraud and deceit on investors. Long, 51 years old, is a resident of Sacramento, California.

2. On November 23, 2011, a final judgment was entered against Long, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Exchange Act and Exchange Act Rule 10b-5, in the civil action entitled United States Securities and Exchange Commission v. Integrity Financial AZ, LLC, Steven R. Long, Stanley M. Paulic, Walter W. Knitter, and Robert C. Koeller, Civil Action Number 10-CV-782 (SO), in the United States District Court for the Northern District of Ohio.

3. The Commission's complaint alleged that in connection with the sale of promissory notes purportedly secured by real estate in Tonopah, Arizona, Long fraudulently offered and sold unregistered securities in the form of promissory notes purportedly secured by real estate. Long made multiple fraudulent misrepresentations and omissions regarding the company's performance, status and personnel, the use and handling of investors' funds, and the security of the investments, engaging in a variety of conduct that operated as a fraud and deceit on investors. The complaint also alleged that Long acted as an unregistered broker.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Long be, and hereby is:

(a) barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

(b) barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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. 66329 / February 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14662

In the Matter of **STANLEY M. PAULIC,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

On December 14, 2011, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Stanley M. Paulic ("Respondent").

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order 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. Paulic was the chief executive officer, co-founder and 49% owner of Integrity Financial AZ LLC ("IFAZ"), a limited liability corporation registered in the state of Arizona. Paulic and IFAZ sold unregistered securities and acted as unregistered brokers. Paulic, 38 years old, is a resident of Aurora, Ohio and Lakeland, Florida.

2. On November 23, 2011, a final judgment was entered against Stanley M. Paulic, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), Sections 10(b) and 15(a) of the Exchange Act and Exchange Act Rule 10b-5, in the civil action entitled <u>United States Securities and Exchange Commission v. Integrity Financial AZ, LLC, Steven R. Long, Stanley M. Paulic, Walter W. Knitter, and Robert C. Koeller</u>, Civil Action Number 10-CV-782 (SO), in the United States District Court for the Northern District of Ohio.

3. The Commission's Complaint alleged that in connection with the sale of promissory notes purportedly secured by real estate in Tonopah, Arizona, Paulic fraudulently offered and sold unregistered securities in the form of promissory notes purportedly secured by real estate. The Commission's Complaint further alleged that Paulic made multiple fraudulent misrepresentations and omissions regarding the company's performance, status and personnel, the use and handling of investors' funds, and the security of the investments, engaging in a variety of conduct that operated as a fraud and deceit on investors.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Paulic be, and hereby is:

(a) barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and

(b) barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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. 66331 / February 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14744

In the Matter of Telos, Inc., Tianrong Internet Products and Services, Inc. (f/k/a MAS Acquisition XVII Corp.), Tianrong Building Material Holdings, Ltd. (f/k/a MAS Acquisition XVIII Corp.), TSS Ltd., Tuff Coat Manufacturing, Inc. (f/k/a Osage Acquisition Corp.), Tultex Corp., TVA, Inc., Tyger Holding, Inc., and U.S. Energy Systems, 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 Telos, Inc., Tianrong Internet Products and Services, Inc. (f/k/a MAS Acquisition XVII Corp.), Tianrong Building Material Holdings, Ltd. (f/k/a MAS Acquisition XVIII Corp.), TSS Ltd., Tuff Coat Manufacturing, Inc. (f/k/a Osage Acquisition Corp.), Tultex Corp., TVA, Inc., Tyger Holding, Inc., and U.S. Energy Systems, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Telos, Inc. (CIK No. 1387000) is a void Delaware corporation located in Fort Myers, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Telos is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2007, which reported a net loss of over $33,000 for the prior six months.

2. Tianrong Internet Products and Services, Inc. (f/k/a MAS Acquisition XVII Corp.) (CIK No. 1093987) is a New Jersey corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tianrong Internet Products and Services is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 1999, which reported a net loss of $5 for the prior three months. As of January 30, 2012, the company's stock (symbol "TIPS") was traded on the over-the-counter markets.

3. Tianrong Building Material Holdings, Ltd. (f/k/a MAS Acquisition XVIII Corp.) (CIK No. 1093988) is an expired Utah corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tianrong Building Material Holdings is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 1999, which reported a net loss of $5 for the prior three months. On November 25, 1996, a permanent injunction was entered against Tianrong Building Material Holdings, enjoining the company from violations of the Exchange Act, including Section 13(a). As of January 30, 2012, the company's stock (symbol "TNRG") was traded on the over-the-counter markets.

4. TSS Ltd. (CIK No. 848013) is a Delaware corporation located in Westport, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TSS 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 February 28, 1994, which reported a net loss of over $4.6 million for the prior nine months.

5. Tuff Coat Manufacturing, Inc. (f/k/a Osage Acquisition Corp.) (CIK No. 1119179) is a revoked Nevada corporation located in Willow Grove, Pennsylvania with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tuff Coat Manufacturing is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended May 22, 2001.

6. Tultex Corp. (CIK No. 100166) is a purged Virginia corporation located in Martinsville, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tultex is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the

period ended October 2, 1999, which reported a net loss of over $35 million for the prior three months.

7. TVA, Inc. (CIK No. 1198714) is a permanently revoked Nevada corporation located in Great Neck, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). TVA is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on December 2, 2002, which reported a net loss of over $7,000 for the period between the company's June 18, 2002 inception and July 31, 2002.

8. Tyger Holding, Inc. (CIK No. 1374069) is a void Delaware corporation located in New York, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tyger Holding is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-SB registration statement on September 28, 2006, which reported a net loss of $421 for the period between its inception on March 28, 2006 and June 30, 2006.

9. U.S. Energy Systems, Inc. (CIK No. 351917) is a Delaware corporation located in Avon, Connecticut with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). US Energy Systems 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, 2006, which reported a net loss of over $27.5 million for the prior twelve months. On January 9, 2008, US Energy Systems filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York, and the case was still pending as of January 30, 2012.

B. DELINQUENT PERIODIC FILINGS

10. 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.

11. 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.

12. 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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66332 / February 6, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3367 / February 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14745

In the Matter of **Arthur Lin,** **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 Arthur Lin ("Lin" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") 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 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. Lin, 47 years old, is a resident of Barrington, Illinois. From October 4, 2006 to April 8, 2010, Lin was a registered representative and investment adviser representative associated with LPL Financial, LLC ("LPL"), a broker-dealer and investment adviser registered with the Commission. From July 23, 2001 to September 29, 2006, Lin was a registered representative associated with another broker-dealer and investment adviser registered with the Commission.

2. On January 25, 2012, a final judgment was entered by consent against Lin, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Arthur Lin, et al., Civil Action Number 11-cv-08803, in the United States District Court for the Northern District of Illinois.

3. The Commission's complaint alleges, among other things, that between September 2006 and December 2008, Lin, acting as an unregistered broker, sold at least $5,360,000 in unregistered promissory notes issued by Malarz Equity Investments, LLC to at least 20 investors, including 15 LPL customers. The complaint further alleges that Lin knowingly or recklessly made material misrepresentations or omitted to state material facts to investors regarding the risks of the investments and the use of investor funds.

IV.

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

Respondent be, and hereby is, barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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. 66333 / February 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14747

In the Matter of **GERALD E. PATERA,** **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 Gerald E. Patera ("Patera" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Patera, age 70, is a resident of Pinehurst, North Carolina. Patera is the founder and control person of Capital Bankers Group Ltd. and Third Securities Corp. Patera has never registered with the Commission or any other regulatory agency in any capacity. In connection with the events set forth below, Patera acted as an unregistered broker since at least December 2006.

2. On September 23, 2011, a final judgment was entered by consent against Patera, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. David Ronald Allen, et al., Civil Action Number 3:11-CV-882-O, in the United States District Court for the Northern District of Texas.

3. The Commission's complaint alleged that Patera acted as an unregistered broker by actively soliciting investors to transfer shares of China Voice Holding Corp. ("China Voice") to his control on the basis of his purported experience in working with market makers and that he received transaction-based compensation for effecting the sales of investors' shares of China Voice.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Patera 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.

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

INVESTMENT ADVISERS ACT OF 1940
Release No. 3368 / February 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14746

In the Matter of **CHRISTOPHER T. VULLIEZ,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Christopher T. Vulliez ("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, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

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

1. Vulliez, age 38, resides in New York, New York. Vulliez is the President and Managing Member and controlling person of Amphor Advisors, LLC ("Amphor"), an unregistered investment adviser. Vulliez has never been registered with the Commission.

2. Amphor is a Delaware limited liability company located in New York, New York. Amphor is the managing member of Amphor Oncology LLC, as well as similar entities established to pool investments in private companies. Amphor is not registered with the Commission in any capacity.

3. On January 30, 2012, a final judgment was entered by consent against Vulliez, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. Christopher T. Vulliez, et al., Civil Action Number 11-CV-3458, in the United States District Court for the Southern District of New York.

4. The Commission's complaint alleged that Vulliez solicited investments from family and friends under false pretenses and misappropriated the funds for his own use between approximately July 2010 and December 2010. Vulliez primarily solicited family members and friends to invest in a biotech company developing a cancer drug through an investment vehicle managed by Amphor.

5. On December 7, 2011, Vulliez pled guilty to, inter alia, one count of Scheme to Defraud in the First Degree in violation of Penal Law §190.65(1)(b) and ten counts of Securities Fraud in violation of General Business Law §352-C(6), before the Supreme Court of the State of New York for the County of New York in The People of the State of New York v. Christopher T. Vulliez, Superior Court Information No. 5556/2011, Docket No. 2011NY087021. Pursuant to the plea agreement, Vulliez will receive a sentence of six months incarceration followed by five years of probation and be ordered to pay restitution in the amount of $2,176,755.48.

6. The counts of the criminal information to which Vulliez pled guilty alleged, inter alia, that Vulliez intentionally engaged in fraud by means of materially false representations and statements with intent to deceive and defraud and thereby wrongfully obtained property from them.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Vulliez be, and hereby is:

> barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization.

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. 66339 / February 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14751

In the Matter of EVERGREENBANCORP, INC., Respondent.	ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against EvergreenBancorp, Inc. ("EvergreenBancorp" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

1. EvergreenBancorp (CIK No. 1143566) is an inactive Washington corporation located in Seattle, Washington. At all times relevant to this proceeding, the

securities of EvergreenBancorp have been registered under Exchange Act Section 12(g). On May 28, 2010, the company filed a Chapter 7 petition in the U.S. Bankruptcy Court for the Western District of Washington, and the case was still pending as of August 24, 2011. As of August 23, 2011, the company's stock (symbol "EVGGQ") was traded on the over-the-counter markets, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. EvergreenBancorp has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended September 30, 2009.

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 Respondent'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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66338 / February 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14750

In the Matter of **BROADCASTER, INC.,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Broadcaster, Inc. ("Broadcaster" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

1. Broadcaster (CIK No. 814929) is a void Delaware corporation located in Novato, California. At all times relevant to this proceeding, the securities of Broadcaster

have been registered under Exchange Act Section 12(g). As of May 4, 2011, the company's stock (symbol "BCAS") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group Inc., had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Broadcaster has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended December 31, 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 Respondent'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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66336 / February 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14748

In the Matter of **CROWN NORTHCORP, INC.,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Crown Northcorp, Inc. ("Crown Northcorp" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

1. Crown Northcorp (CIK No. 915338) is a Delaware corporation located in Columbus, Ohio. At all times relevant to this proceeding, the securities of Crown

Northcorp have been registered under Exchange Act Section 12(g). As of October 19, 2011, the company's securities (symbol "CWNH") were traded on the over-the-counter markets.

2. Crown Northcorp has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended March 31, 2007.

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 Respondent'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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66337 / February 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14749

In the Matter of **Advanced Mineral Technologies, Inc.,** **Respondent.**	**ORDER INSTITUTING PROCEEDINGS, MAKING FINDINGS, AND REVOKING REGISTRATION OF SECURITIES 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 proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Advanced Mineral Technologies, Inc. ("Advanced Mineral" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Proceedings, Making Findings, and Revoking Registration of Securities Pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

1. Advanced Mineral (CIK No. 830821) is a Nevada corporation located in Fairfield, Idaho. At all times relevant to this proceeding, the securities of Advanced Mineral have been registered under Exchange Act Section 12(g).

2. Advanced Mineral has failed to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder because it has not filed any periodic reports with the Commission since the period ended October 31, 2010.

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 Respondent'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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66351 / February 7, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3364 / February 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14752

In the Matter of **MATTHEW BELL, ACA,** **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 Matthew Bell ("Respondent" or "Bell") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the

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

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

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over 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. Symmetry Medical, Inc. ("Symmetry"), is a Delaware corporation headquartered in Warsaw, Indiana. A manufacturer of medical implants and instruments as well as aerospace industry products, Symmetry's subsidiaries include Symmetry Medical Sheffield LTD, f/k/a Thornton Precision Components, Limited ("TPC"). Since 2003, TPC's financial data has been consolidated into Symmetry's financial statements filed with the Commission. Since December 2004, Symmetry's common stock has been registered with the Commission pursuant to Section 12(b) of the Exchange act and listed on the New York Stock Exchange.

2. Bell, age 52 and a citizen of the United Kingdom, was employed as TPC's Financial Director from 2002 to February 2007, when he resigned. Bell also served as Financial Director of Symmetry's European operations from June 2003 to 2007. Bell returned to TPC on a periodic basis through June 2007 to assist with TPC's financial close process. Bell is a UK Chartered Accountant. In September 2010, the Institute of Chartered Accountants of England and Wales (ICAEW) excluded Bell from the ICAEW, with the right to apply for reinstatement after one year. The exclusion order was entered after a hearing on Bell's role with respect to the accounting irregularities at TPC.

3. On February 1, 2012, a final judgment was entered by consent against Bell, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13, in the civil action styled, Securities and Exchange Commission v. Matthew Bell, et al. ("SEC v. Bell") (Civil Action No. 3:12cv60), in the United States District Court for the Northern District of Indiana.

4. The Commission's complaint in SEC v. Bell alleged, among other things, that as the Financial Director of TPC, Bell was responsible for reporting TPC's financial accounts to Symmetry for inclusion in Symmetry's consolidated financial statements; that shortly after becoming TPC's Financial Director, Bell learned that TPC was manipulating its financial accounts; that, after initially objecting to these manipulations, Bell participated directly in, and in some cases, augmented them; that these manipulations included pre-booking sales revenues, booking fictitious sales revenues, engaging in sales-buyback arrangements, understating cost of revenues and creating fictitious work-in-process inventories, and overstating

amounts for capitalized tool and die; that Bell knew (i) that the foregoing manipulations did not conform to US Generally Accepted Accounting Principles, (i) that the foregoing manipulations materially impacted TPC's financial statements, (iii) that TPC's financial statements were consolidated into Symmetry's financial statements and (iv) that Symmetry was a US publicly traded company; that Bell made serial misrepresentations to Symmetry's top management as well as its internal and external auditors concerning the foregoing manipulations; and that, notwithstanding all of the foregoing, Bell repeatedly and falsely attested in writing to the accuracy of TPC's financial statements. The complaint further alleged that during the period of the foregoing manipulations, Bell sold Symmetry securities for illegal profits totaling $22,409 and also received bonuses totaling $113,801.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Bell is suspended from appearing or practicing before the Commission as an accountant.

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. 66352 / February 7, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3365 / February 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14753

In the Matter of **LYNNE NORMAN,** **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 Lynne Norman ("Respondent" or "Norman") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the

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

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

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Symmetry Medical, Inc. ("Symmetry"), is a Delaware corporation headquartered in Warsaw, Indiana. A manufacturer of medical implants and instruments as well as aerospace industry products, Symmetry's subsidiaries include Symmetry Medical Sheffield LTD, f/k/a Thornton Precision Components, Limited ("TPC"). Since 2003, TPC's financial data has been consolidated into Symmetry's financial statements filed with the Commission. Since December 2004, Symmetry's common stock has been registered with the Commission pursuant to Section 12(b) of the Exchange act and listed on the New York Stock Exchange.

2. Norman, age 50 and a citizen of the United Kingdom, was employed as TPC's controller from approximately 1989 to 2008. Norman holds a B.A. in business studies from Sheffield University, but is not a UK Chartered Accountant and holds no other accounting licenses or certifications. She was allowed to resign by Symmetry after disclosing her role in TPC's accounting irregularities and assisting the company with its restatement of prior year financials.

3. On February 1, 2012, a final judgment was entered by consent against Norman, permanently enjoining her from future violations of Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5, 13b2-1 and 13b2-2 thereunder, and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13, in the civil action styled, Securities and Exchange Commission v. Lynne Norman, et al. ("SEC v. Norman") (Civil Action No. 3:12cv60), in the United States District Court for the Northern District of Indiana.

4. The Commission's complaint in SEC v. Norman alleged, among other things, that as the controller of TPC, Norman bore responsibility for ensuring the accuracy of TPC's financial accounts on a monthly and quarterly basis and assisting TPC's Finance Director in reporting TPC's financial accounts to Symmetry for inclusion in Symmetry's consolidated financial statements; that, between at least 2003 and September 2007, Norman knowingly participated in TPC's manipulation of its financial accounts; that these manipulations included pre-booking sales revenues, booking fictitious sales revenues, engaging in sales-buyback arrangements, understating cost of revenues and creating fictitious work-in-process inventories, and overstating amounts for capitalized tool and die; that Norman knew (i) that the foregoing manipulations did not conform to US Generally Accepted Accounting Principles, (i) that the foregoing manipulations materially impacted TPC's financial statements, (iii) that TPC's

financial statements were consolidated into Symmetry's financial statements and (iv) that Symmetry was a US publicly traded company; that Norman made serial misrepresentations to Symmetry's internal and external auditors concerning the foregoing manipulations; and that, notwithstanding all of the foregoing, Norman falsely attested in writing to the accuracy of TPC's financial statements in 2007 after the departure of TPC's Financial Director.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Norman is suspended from appearing or practicing before the Commission as an accountant.

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. 66353 / February 7, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3366 / February 7, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14754

In the Matter of **SHAUN P. WHITELEY,** **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 Shaun Whiteley ("Respondent" or "Whiteley") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the

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

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

purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over 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. Symmetry Medical, Inc. ("Symmetry"), is a Delaware corporation headquartered in Warsaw, Indiana. A manufacturer of medical implants and instruments as well as aerospace industry products, Symmetry's subsidiaries include Symmetry Medical Sheffield LTD, f/k/a Thornton Precision Components, Limited ("TPC"). Since 2003, TPC's financial data has been consolidated into Symmetry's financial statements filed with the Commission. Since December 2004, Symmetry's common stock has been registered with the Commission pursuant to Section 12(b) of the Exchange act and listed on the New York Stock Exchange.

2. Whiteley, age 45 and a citizen of the United Kingdom, was employed as a management accountant at TPC from 1997 to October 2006. Whiteley returned to TPC to assist with TPC's quarterly inventories in December 2006, March 2007 and June 2007.

3. On February 1, 2012, a final judgment was entered by consent against Whiteley, permanently enjoining him from future violations of Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and Rules 10b-5 and 13b2-1 thereunder, and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1 and 13a-13, in the civil action styled, Securities and Exchange Commission v. Shaun Whiteley, et al. ("SEC v. Whiteley") (Civil Action No. 3:12cv60), in the United States District Court for the Northern District of Indiana.

4. The Commission's complaint in SEC v. Whiteley alleged, among other things, that as a management accountant at TPC, Whiteley was responsible for TPC's stock valuations and oversaw TPC's physical inventories; that, between at least 2003 and June 2007, Whiteley knowingly participated in TPC's manipulation of its financial accounts; that these manipulations included pre-booking sales revenues, booking fictitious sales revenues, understating cost of revenues, and creating fictitious work-in-process inventories; that Whiteley knew (i) that the foregoing manipulations did not conform to US Generally Accepted Accounting Principles, (i) that the foregoing manipulations materially impacted TPC's financial statements, (iii) that TPC's financial statements were consolidated into Symmetry's financial statements and (iv) that Symmetry was a US publicly traded company; and that Whiteley took significant steps to deceive Symmetry's internal and external auditors concerning the foregoing manipulations, including (i) falsification of TPC's inventory listing to provide apparent support

for TPC's manipulated inventory counts and (ii) falsely stating that certain documents were not available.

IV.

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

Accordingly, it is hereby ORDERED, effective immediately, that Whiteley is suspended from appearing or practicing before the Commission as an accountant.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34-66355]

Reporting Line for the Commission's Inspector General

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is amending its rules to conform them to amendments made to the Inspector General Act of 1978 that require the Commission's Inspector General to report to and be under the general supervision of the full Commission.

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

FOR FURTHER INFORMATION CONTACT: Mary Beth Sullivan, Counsel, Office of the Inspector General, at (202) 551-6039, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION

I. Discussion

Section 8G(d)(1) of the Inspector General Act of 1978 ("IG Act")[1] provides: "Each Inspector General shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee of such designated Federal entity." Prior to the Dodd-

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[1] Pub. L. 95-452; 92 Stat. 1101 (1978), as amended.

Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),[2] section 8G(a)(4) of the IG Act defined the "head of the designated Federal entity" to mean, unless specifically designated by statute, the chief policymaking officer or board of the designated Federal entity as identified in a list published annually by the Director of the Office of Management and Budget ("OMB"). OMB's annual lists identified the "Chairperson" as the head of the SEC. Section 989B of the Dodd-Frank Act amended the IG Act to provide that the "head of the designated Federal entity" with a board or commission (such as the SEC) means "the board or commission of the designated Federal entity . . . ." Accordingly, the Inspector General must now report to, and be under the general supervision of, the full Commission.

These amendments conform the Commission's rules that address the reporting line of the Commission's Inspector General to the amendments made by the Dodd-Frank Act to the IG Act by replacing references to the "Chairman" in these rules with references to the "Commission".

II. Related Matters

A. Administrative Procedure Act and Other Administrative Laws

The Commission has determined that these amendments to its rules relate solely to the agency's organization, procedure, or practice. Accordingly, the provisions of the Administrative Procedure Act regarding notice of proposed rulemaking and opportunity for public participation are not applicable.[3] The Regulatory Flexibility Act, therefore,

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[2] Pub. L. 111-203; 124 Stat. 1376 (2010).

[3] 5 U.S.C. 553(b).

does not apply.[4] Because these rules relate solely to the agency's organization, procedure, or practice and do not substantially affect the rights or obligations of non-agency parties, they are not subject to the Small Business Regulatory Enforcement Fairness Act.[5] Finally, these amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended.[6]

B. Cost-Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. The amendments adopted today are procedural in nature and will produce the benefit of conforming the Commission's rules to amendments made to the IG Act that require the Commission's Inspector General to report to and be under the general supervision of the full Commission. The Commission also believes that these amendments will not impose any costs on non-agency parties, or that if there are any such costs, they are negligible.

C. Consideration of Burden on Competition

Section 23(a)(2) of the Exchange Act requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition. The Commission does not believe that the amendments that the Commission is adopting today will have any impact on competition.

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[4] 5 U.S.C. 601 - 612.

[5] 5 U.S.C. 804.

[6] 44 U.S.C. 3501 - 3520.

STATUTORY AUTHORITY

The amendments to the Commission's rules are adopted pursuant to 15 U.S.C. 77s, 78d, 78d-1, 78d-2, 78w, 78mm, 80a-37, 80b-11, and 7202; 5 U.S.C. App. (Inspector General Act of 1978) § 8G; and § 989B of Pub. L. No. 111-203 (2010).

List of Subjects in 17 CFR Part 200

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

TEXT OF AMENDMENTS

In accordance with the preamble, the Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations as follows:

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

SUBPART A – ORGANIZATION AND PROGRAM MANAGEMENT

1. The authority citation for Part 200, Subpart A, is revised by adding the following citation, in numerical order, to read as follows:

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

* * * * *

Section 200.16a is also issued under Sec. 989B of Pub. L. 111-203 (2010), 124 Stat. 1376; and 5 U.S.C. App. (Inspector General Act of 1978) Sec. 8G.

* * * * *

2. § 200.16a is amended by removing the word "Chairman" and adding in its place the word "Commission" in paragraphs (b) and (c) wherever it appears.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: February 8, 2012

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66361 / February 8, 2012

Admin. Proc. File No. 3-14556

In the Matter of

SHARON ENERGY, LTD., *ET AL.*
c/o Mr. Jack S. Steinhauser, CEO
9700 East Villasur Court
Parker CO 80134-5540

ORDER DISMISSING PROCEEDING

On September 20, 2011, the Commission instituted an administrative proceeding against Sharon Energy, Ltd. ("Sharon Energy") and two other respondents under Section 12(j) of the Securities Exchange Act of 1934.[1] The Order Instituting Proceedings alleged that Sharon Energy had violated periodic reporting requirements under Exchange Act Section 13(a), and sought to determine, based on those allegations, whether it was "necessary and appropriate for the protection of investors to suspend . . . or revoke" the registration of Sharon Energy's securities.

On September 30, 2011, Sharon Energy filed with the Commission a Form 15-12G, pursuant to Exchange Act Rule 12(g)-4(a),[2] to terminate voluntarily the registration of its securities under Exchange Act Section 12(g). Under Rule 12g-4(a), an issuer's registration is terminated ninety days after filing, in this case, December 29, 2011. Also on December 29, 2011, the Division of Enforcement filed a motion to dismiss its proceeding against Sharon Energy. Sharon Energy has not responded.

1 15 U.S.C. § 781(j). The remaining respondents either defaulted or settled, resulting in the revocation of the registration of their securities.

2 17 C.F.R. § 240.12g-4(a) (certification of termination of registration under Section 12(g)).

We have determined to grant the Division's motion. Sharon Energy no longer has a class of securities registered under Section 12 of the Exchange Act. Because revocation or suspension of registration are the only remedies available in a proceeding instituted under Section 12(j) of the Exchange Act, we find that it is appropriate to dismiss these proceedings against Sharon Energy.[3]

Accordingly, it is ORDERED that this proceeding be, and it hereby is, dismissed with respect to Sharon Energy, Ltd.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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[3] *See, e.g.*, *Enamelon, Inc.*, Securities Exchange Act Rel. No. 52956 (Dec. 15, 2005), 86 SEC Docket 2944.

Commissioner Aguilar not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66365 / February 9, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14755

In the Matter of GREGG M.S. BERGER, 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 Gregg M.S. Berger ("Berger" 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 Sections III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Berger, age 47, resides in Yonkers, New York. From January 2002 to May 2006, he was a registered representative associated with Gilford Securities, Inc. From June 2006 to February 2008, he was a registered representative at Capital Growth Financial, LLC. Berger has been in the securities industry since 1992. He holds Series 3, 7, 31, and 63 securities licenses.

2. On January 27, 2012, a final judgment was entered by consent against Berger, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Gregg M.S. Berger, et al. Civil Action Number 2:11-CV-10403, in the United States District Court for the Eastern District of Michigan.

3. The Commission's complaint alleged that Berger, along with ten other individuals and entities, engaged in schemes to pump and dump the securities of at least eight U.S. microcap stocks of issuers, primarily headquartered in the People's Republic of China, and facilitated unregistered sales of millions of shares of these issuers stock that generated proceeds in excess of $33 million. Berger also organized and arranged the pump and dump of one of the issuer's stocks.

4. On April 21, 2011, Berger pled guilty to one count of conspiracy to commit wire fraud and securities fraud in violation of Title 18 United States Code, Sections 1343, 1348, and 1349 before the United States District Court for the Eastern District of Michigan, in United States v. Gregg M.S. Berger, 2:07-CR-20627. On September 9, 2011, Berger was sentenced to a term of 24 months in prison and ordered to forfeit $600,000.

5. The factual basis for Berger's guilty plea states, among other things, that between January 2005 and December 2007 Berger knowingly and willing entered in an unlawful agreement with several other individuals to create and execute a fraudulent stock "pump-and-dump" market manipulation scheme. The factual basis in the guilty plea also states that the scheme used spam e-mails to lure investors into purchasing the securities of six penny stocks through advertisements claiming non-existent Initial Public Offerings and acquisitions, presenting unrealistic pictures of the companies' business prospects, exaggerated share price projections, and false and misleading disclaimers.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Berger be, and hereby is barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

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. 66374 / February 10, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14757

In the Matter of

MARC J. RIVIELLO,

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 Marc J. Riviello ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Riviello was the majority owner of AIS Financial, Inc. ("AIS"), a broker-dealer registered with the Commission and located in Irvine, California. From May 1, 2006

through June 30, 2008, Riviello was also a registered representative associated with AIS. Riviello, 52 years old, is a resident of Redwood City, California.

2. On February 3, 2012, a final judgment was entered by consent against Riviello, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in the civil action entitled *Securities and Exchange Commission v. Pawel Dynkowski, et al.,* Civil Action Number 1:09-CV-361, in the United States District Court for the District of Delaware.

3. The Commission's complaint alleged that, in connection with a fraudulent scheme involving the stock of Asia Global Holdings, Inc. ("Asia Global"), Riviello:

a) Arranged for AIS to open a series of nominee accounts for the purpose of selling unregistered shares of Asia Global into the public markets;

b) executed orders to sell millions of shares of Asia Global stock held in these accounts; and

c) knew (or was reckless in not knowing) that these actions were for the purpose of furthering the fraudulent scheme.

4. On April 27, 2010, Riviello pleaded guilty to one count of conspiracy to engage in monetary transactions in property derived from specified unlawful activity in violation of Title 18 United States Code, Sections 1957 and 1956(h) before the United States District Court for the District of Delaware, in *United States v. Marc Riviello*, Crim. Action No. 09-23-SLR. On August 11, 2011, a judgment in the criminal case was entered against Riviello. He was sentenced to eight months in prison and ordered to pay a criminal forfeiture of $107,000.

5. The count of the criminal information to which Riviello pleaded guilty alleged, *inter alia,* that:

a) Riviello agreed to receive certain funds from one member of a scheme to commit securities fraud and transport them to another member of the scheme;

b) Riviello did in fact transport the funds in this manner;

c) these funds represented a portion of the proceeds of the sale of a security in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

d) these funds constituted property derived from a conspiracy to commit securities fraud; and

e) Riviello engaged in these actions knowingly.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Riviello 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 barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

INVESTMENT COMPANY ACT OF 1940
Rel. No. 29948 / February 10, 2012

Admin. Proc. File No. 3-14055

In the Matter of DAXOR CORPORATION	CORRECTED ORDER GRANTING REQUEST TO WITHDRAW PETITION FOR REVIEW AND NOTICE OF FINALITY

On August 31, 2011, an administrative law judge issued an initial decision pursuant to Section 9(f) of the Investment Company Act of 1940[1] finding that Daxor Corporation ("'Daxor'"), a public company, was operating as an unregistered investment company in violation of Section 7(a) of the Act.[2] The law judge's order required Daxor to cease and desist from violating Section 7(a) of the Investment Company Act and to either register as an investment company under Section 8 of the Act,[3] or otherwise come into compliance with the Act.[4]

On October 26, 2011, our Office of the General Counsel, acting pursuant to delegated authority, issued an order granting Daxor's petition for review of the law judge's initial decision and determining, under Rule of Practice 411(d), to review upon the Commission's own motion what sanctions, if any, are appropriate in this matter.[5] On November 22, 2011, Daxor requested that its petition for review be withdrawn. We have determined to grant Daxor's request and to dismiss review of the sanctions that we took up on our own motion.

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1 15 U.S.C. § 80a-9(f).

2 15 U.S.C. § 80a-7(a).

3 15 U.S.C. § 80a-8.

4 Daxor Corp., Initial Decision Rel. No. 428 (Aug. 31, 2011), 101 SEC Docket 45430

5 17 C.F.R. § 201.411(d).

Accordingly, IT IS ORDERED that Daxor's request to withdraw its petition for review of the law judge's August 31, 2011 initial decision in this matter be, and it hereby is, GRANTED; and it is further

ORDERED that our review of the sanctions to be imposed in this matter, taken in accordance with Rule of Practice 411(d), be, and it hereby is, DISMISSED.

We also hereby give notice that the August 31, 2011 initial decision of the administrative law judge has become the final decision of the Commission. Therefore, the order in that decision requiring Daxor to cease and desist from violating Section 7(a) of the Investment Company Act and to register as an investment company under Section 8 of the Act, or otherwise come into compliance with the Act, is hereby declared effective.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

Chairman Schapiro
Commissioner Walter
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66373 / February 10, 2012

Admin. Proc. File No. 3-14302

In the Matter of the Application of

JOHN EDWARD MULLINS
and
KATHLEEN MARIA MULLINS

510 North Thurlow Avenue
Margate, NJ 08402

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDINGS

Conversion of Customer Property

Breach of Fiduciary Duty to Customer

Borrowing Funds from a Client Without Member Firm Notice or Approval

Failure to Disclose Information on Member Firm Compliance Questionnaire

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered representative of member firm of registered securities association converted customer property, violated his fiduciary obligations to customer, and, as a result, engaged in conduct inconsistent with just and equitable principles of trade. Registered representative and his wife, also a registered representative of the same member firm, each failed to secure approval from member firm before accepting a loan from customer and failed to disclose information on annual compliance questionnaires regarding that loan and regarding positions they held with a charitable foundation that was the member firm's customer. *Held*, association's findings of violation are *sustained in part*, and the sanctions imposed are *modified*.

APPEARANCES:

John Edward Mullins, pro se, and *Kathleen Maria Mullins, pro se*.

Marc Menchel, Alan Lawhead, James Wrona, and *Andrew J. Love,* for FINRA.

Appeal filed: March 21, 2011
Last brief received: Sept. 7, 2011[1]

I.

John Edward Mullins ("J. Mullins") and Kathleen Maria Mullins ("K. Mullins"), former general securities representatives formerly associated with FINRA member firm Morgan Stanley DW Inc. ("Morgan Stanley" or "the Firm"), appeal from FINRA disciplinary action against them.[2] FINRA found that: (1) J. Mullins converted customer property and breached fiduciary obligations he owed as an officer and trustee of a corporate customer, in violation of NASD Rule 2110, and misused customer funds, in violation of NASD Rules 2330(a) and 2110; (2) both J. Mullins and K. Mullins made material misstatements to the Firm on annual compliance questionnaires, in violation of NASD Rules 3110 and 2110; and (3) both J. Mullins and K. Mullins borrowed funds from a customer without approval of the Firm, in violation of NASD Rules 2370 and 2110.[3]

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[1] J. Mullins filed a timely opening brief and then requested and received two substantial extensions of time to file a reply brief. His third request for an extension was denied, and J. Mullins never filed his reply brief. K. Mullins timely filed opening and reply briefs.

[2] On July 26, 2007, we approved a proposed rule change filed by National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and certain member-regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Although the investigation into this matter was initiated before the consolidation, the complaint was filed afterwards.

[3] As part of the effort to consolidate and reorganize NASD's and NYSE's rules into one FINRA rulebook, NASD Rule 2110 (which was otherwise unchanged) was codified as

(continued...)

FINRA barred J. Mullins in all capacities for the violations involving conversion and misuse of customer funds and the breach of his fiduciary obligations as an officer and trustee of a corporate customer.[4] For the violations involving material misstatements on firm questionnaires, FINRA suspended K. Mullins in all capacities for six months, fined her $15,000, and ordered that she re-qualify; FINRA further suspended K. Mullins in all capacities for an additional three months (to be served consecutively) and fined her $5,000 for borrowing funds from a customer without prior firm approval.[5] We base our findings on an independent review of the record.

II.

A. Introduction

This case primarily concerns J. Mullins's handling of funds held by a charitable foundation established by one of his clients, Esther Weil, and related disclosures that J. Mullins and his wife, K. Mullins, failed to make on Morgan Stanley's internal compliance questionnaires.

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[3] (...continued)
FINRA Rule 2010, effective December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). NASD Rule 2330(a) was codified as FINRA Rule 2150(a), effective December 14, 2009. *See* FINRA Regulatory Notice 09-60 (Oct. 2009). NASD Rule 2370 was codified as FINRA Rule 3240, effective June 14, 2010. *See* FINRA Regulatory Notice 10-21 (Apr. 2010). NASD Rule 3110 has not been codified as a FINRA Rule. *See generally Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), 97 SEC Docket 23299, 23300 n.4 (describing rules consolidation). Because the conduct at issue here occurred before the consolidation, we will continue to refer to the NASD Rules.

NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade. NASD Rule 2330(a) prohibits persons associated with members from making improper use of a customer's securities or funds. NASD Rule 2370 prohibits associated persons of member firms from borrowing money from or lending money to a customer without receiving prior approval from the member firm. NASD Rule 3110 requires member firms to maintain books and records as required by applicable law.

[4] In light of the bar it imposed for these violations, FINRA declined to impose additional sanctions for the other violations it found J. Mullins to have committed. However, it stated that, in the absence of the bar, it would have imposed a one-year suspension in all capacities, a $25,000 fine, and an order that he re-qualify for his misstatements on firm questionnaires, and a three-month suspension, a $5,000 fine, and an order that he re-qualify for his acceptance of a loan from his customer without approval.

[5] FINRA also ordered respondents to pay, jointly and severally, hearing and appeal costs totaling $17,565.

Mrs. Weil and her husband, Paul, became clients of J. Mullins in 1981 when J. Mullins, then a salesman with Prudential Securities, Inc., solicited Mr. Weil through a "cold call." Eventually, the Mullinses began to socialize regularly with the Weils, often attending concerts and dining out together in Philadelphia and in Ocean City, New Jersey, where the Weils owned condominiums. According to testimony from several witnesses and other evidence in the record, it appears that, over time, the Weils, who did not have children of their own, came to regard the Mullinses as family members.

Shortly after her husband's death in 1999, Mrs. Weil established a non-profit corporation, at J. Mullins's urging, named the Esther C. and Paul H. Weil Foundation (the "Foundation") to further the long-standing interest that she and her husband had shared in supporting the musical arts. As they had done with so many other aspects of Mrs. Weil's life, the Mullinses assisted her in running her foundation. J. Mullins, whom Mrs. Weil named as the Foundation's vice president, frequently made purchases using Foundation funds on Mrs. Weil's behalf, ostensibly for the benefit of the Foundation. In the years following Mr. Weil's death in 1999, the Mullinses became even closer to Mrs. Weil, frequently visiting and socializing with her, and assisting her daily with personal needs such as grocery shopping, running errands, and getting to doctor's appointments. Mrs. Weil ultimately included the Mullinses in her will, bequeathing to them her Philadelphia condominium (or its value if it was sold before she died) and an additional $25,000 in cash. Mrs. Weil also appointed the Mullinses as co-executors of her estate.

As a further indication of her trust and affection for the Mullinses, on March 1, 2005, Mrs. Weil lent to the Mullinses $100,000 when the Mullinses' bank unexpectedly balked at approving their mortgage application. Neither the terms of the loan nor its repayment were documented in any way. The Mullinses immediately deposited the loan proceeds in their jointly held bank account; however, they repaid the full amount to Mrs. Weil a few days later, when their bank mortgage was approved.

B. J. Mullins makes purchases for the Foundation

The most serious allegations against J. Mullins focus on several instances when, shortly after Mrs. Weil became seriously ill, J. Mullins used Foundation funds for his own personal benefit, repaying the Foundation only after FINRA and New Jersey state securities regulators began investigating his involvement with Mrs. Weil's accounts.

Mrs. Weil opened an account for the Foundation at Morgan Stanley when the Mullinses moved from Prudential to Morgan Stanley in 2002. Account opening documents name Mrs. Weil as the only account owner and grant her sole authority to write checks against the Foundation account, and only she was authorized to use the debit card that Morgan Stanley had issued to access funds in the account.[6] Nevertheless, J. Mullins often assisted Mrs. Weil in

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[6] Statements for the Foundation account were sent to the offices of Mrs. Weil's attorney, Raymond Beebe. Beebe testified, however, that he did not review the statements,

(continued...)

making purchases for the Foundation. He would sometimes use the Foundation's debit card, or blank checks that Mrs. Weil had pre-signed, to pay for Foundation expenses, which J. Mullins testified he always did with Mrs. Weil's knowledge and permission.

Among the items J. Mullins purchased with Foundation funds were gift certificates that, he testified, were intended to be donated to charities for their use as items to sell in silent auctions. J. Mullins testified that he had Mrs. Weil's permission to buy the gift certificates for the Foundation. He stated that "silent auctions . . . confused her a little bit," and that he "explained to her that any certificates that we didn't use or that if she changed her mind and we were not going to go forward with that type of silent auction, that I would buy them from the foundation and use them. She was like, 'Fine,' that's – you know, 'that's fine with me.'" Although the Foundation did donate some gift certificates to charities, few of the gift certificates at issue here were ever donated, as discussed below.

C. Mrs. Weil becomes ill, and J. Mullins begins using Foundation purchases for his own benefit

By early 2006, Mrs. Weil was ninety-five years old and had moved into an assisted living facility. She suffered from various chronic and serious health conditions, and, in April 2006, Mrs. Weil's condition declined significantly, requiring her to be admitted to the hospital on April 3, 2006 for eight days. When she was released on April 11, 2006, Mrs. Weil was too ill to return to her apartment at the facility, so she was moved to the nursing home's hospital wing, where she remained for the following month.[7]

On April 12, 2006, one day after Mrs. Weil went into the hospital wing, J. Mullins attempted to purchase $11,000 worth of gift certificates at the Four Seasons Hotel in Philadelphia using the Foundation debit card.[8] However, according to the hotel's security records, when the hotel staff asked whether J. Mullins was authorized to use the card, J. Mullins "began yelling and quickly left the hotel . . . carrying a stack of [Four Seasons] gift cards." The hotel staff then called the debit card's issuing bank. The bank stated that J. Mullins was not authorized to use the debit card, so the hotel staff placed a hold on the gift cards.

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[6] (...continued)
instead giving them unopened to J. Mullins to give to Mrs. Weil, or sending them to the independent accountant who prepared the Foundation's annual tax returns.

[7] J. Mullins testified during the investigation that the hospital wing of the nursing home was where the residents went "on [their] way out the door in a pine box."

[8] J. Mullins testified that he wished to buy these gift certificates for donation to charities, "in part, because that's one of [Mrs. Weil's] favorite places up here."

On April 14, 2006, J. Mullins returned to the Four Seasons with an $11,000 check drawn on the Foundation's Morgan Stanley account, which he had prepared but which was signed by Mrs. Weil, to pay for the gift cards.[9] The following month, the Mullinses went on vacation to London, where they stayed at a Four Seasons Hotel. J. Mullins redeemed $4,000 of the Four Seasons gift certificates he had purchased for the Foundation to pay the hotel bill.

During the following weeks, with Mrs. Weil continuing in poor health, J. Mullins made additional questionable purchases with Foundation funds. On April 15, 2006, four days after Mrs. Weil was admitted to the nursing facility's hospital wing, J. Mullins used the Foundation's debit card to purchase gift certificates totaling $3,000 from Boyds of Philadelphia, a men's clothing store that J. Mullins frequented and at which he had a personal credit account. A few days later, on April 19, 2006, J. Mullins used $2,500 worth of these gift certificates to pay off his account at Boyds. The record shows that the Foundation donated a total of only $500 in Four Seasons gift certificates and $450 in Boyds gift certificates to a non-profit organization for an auction it held on April 22, 2006.[10]

On June 26, 2006, J. Mullins purchased an additional $2,500 gift certificate at Boyds using the Foundation debit card. Two weeks later, on July 12, 2006, J. Mullins used this gift certificate to pay for more of his personal clothing purchases.

On May 8, 2006, J. Mullins purchased twenty-three bottles of wine at the Morton's Steakhouse in Atlantic City, New Jersey, using the Foundation's debit card, at a cost of $1,656.47. J. Mullins testified that the restaurant "had a special offer of a very good wine that they were discounting," and that Mrs. Weil said, "'[L]et's definitely do it.'" The wine, however, was stored in J. Mullins's personal wine locker at the restaurant, to which he alone had access. Although J. Mullins testified that he had intended to drink the wine during Foundation business dinners, he never did so—consuming four bottles on three separate occasions when, he conceded, no Foundation business was conducted and it appears that Mrs. Weil was not present. J. Mullins drank one of the bottles on August 15, 2006, another bottle on October 19, 2006, and two more of the bottles on May 3, 2007.[11]

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[9] As noted above, evidence indicates that Mrs. Weil often signed blank checks drawn on the Foundation account for J. Mullins.

[10] On April 25, 2006, J. Mullins redeemed another $500 gift certificate to pay for more of his clothing purchases at Boyds. Although J. Mullins stipulated that this gift certificate had been purchased with Foundation funds, receipts of the transactions in the record do not establish that this gift certificate was purchased with Foundation funds. We do not, therefore, consider this transaction as a basis for liability.

[11] The unconsumed bottles remained in his personal locker until New Jersey state regulators began their investigation, and J. Mullins provided reimbursement to Mrs. Weil's attorney in late 2007.

D. Morgan Stanley terminates the Mullinses' employment and they become estranged from Mrs. Weil

At the end of July 2006, Morgan Stanley commenced an investigation of activity in the accounts of Mrs. Weil and the Foundation. On August 14, 2006, the Mullinses were escorted from their offices as a result of this investigation and placed on administrative leave. Morgan Stanley contacted Mrs. Weil's attorney, Raymond Beebe, informed him the Firm was investigating the activity in Mrs. Weil's accounts, and asked him some questions about the accounts and J. Mullins's involvement with them. The next day, on August 15, 2006, Beebe visited Mrs. Weil in her apartment and questioned her briefly about her knowledge of debit card and check transfers out of her accounts. Beebe advised Mrs. Weil to retain a different attorney to represent her with this matter because Beebe was a friend to both Mrs. Weil and to J. Mullins, creating the potential for a conflict of interest. Beebe recalled telling Mrs. Weil, "Based on what I am seeing here, John could go to jail for something like this. And her response was, '[W]ell, that may be true, but I am not going to lie for him.'"

Later that day, J. Mullins visited Mrs. Weil and explained that he was upset because Morgan Stanley was investigating the Mullinses' conduct with respect to her accounts. Mrs. Weil then purportedly wrote a letter in defense of the Mullinses.[12] However, the letter makes no mention of the conduct at issue here, i.e., J. Mullins's personal use of the Four Seasons or Boyds gift certificates or the wine stored in his personal locker at Morton's.

On August 16, 2006, Morgan Stanley terminated the Mullinses. On August 17, 2006, Mrs. Weil retained a new attorney, at Beebe's suggestion, and he immediately sent a letter to the Mullinses' attorneys. In this letter, Mrs. Weil's attorney demanded the "immediate unconditional repayment" of $375,000 of Mrs. Weil's money that had recently been transferred to the Mullinses. Mr. Mullins testified that Mrs. Weil had given the Mullinses the $375,000 because it represented the value of a condominium she bequeathed to the Mullinses in her will, and that she wished for the Mullinses to have the benefit of that asset while she was still living. However, Mrs. Weil's attorney, in his August 17 letter, requested a "full and complete explanation" regarding the transfers and stated in the letter that it was Mrs. Weil's "wish that . . . beginning immediately your clients should not have any contact with Esther Weil either directly or indirectly in any way whatsoever."[13] According to a letter written in May 2007 to state securities investigators, Mrs. Weil's attorney explained that "the events surrounding the $375,000 withdrawal as well as the August 15, 2006 document that [Mrs. Weil] signed at the request of Mr. and Mrs. Mullins prompted a reconsideration of her previous will," which Mrs. Weil

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[12] As discussed later in this opinion, the Hearing Panel and the National Adjudicatory Council ("NAC") declined to admit the letter into evidence.

[13] J. Mullins returned the money following the attorney's demand letter.

amended to delete all references to the Mullinses.[14] Evidence indicates that the Mullinses had no further direct contact with Mrs. Weil, who died in 2008.[15]

E. J. Mullins reimburses the Foundation after FINRA begins its investigation

FINRA launched an investigation of the events at issue in this proceeding after Morgan Stanley filed a Form U5 with FINRA when it terminated the Mullinses.[16] In the spring of 2007, FINRA began contacting J. Mullins to request information and documents about his handling of Mrs. Weil's money. J. Mullins ultimately returned to Mrs. Weil, through her attorney, the value of the gift certificates he used for his own personal expenses, as well as the cost of the wine that he purchased, but not until after FINRA's Department of Enforcement ("Enforcement") questioned him specifically about these items, as discussed below.

On May 1, 2007, J. Mullins gave on-the-record testimony to Enforcement regarding his handling of Mrs. Weil's accounts.[17] He was asked about the $11,000 check given to the Four Seasons but did not mention that he used for himself some of the gift certificates purchased with that check. He was also asked about a May 10, 2006 purchase at Morton's for $1,634 (for the wine) but claimed not to recall the transaction. Two days after J. Mullins gave this testimony, however, he consumed two of the bottles of wine he had purchased with Foundation funds.[18]

On May 14, 2007, Enforcement sent J. Mullins a letter asking whether J. Mullins used any gift certificates purchased with Foundation funds for his own personal use, and specifically requesting information about the Boyds purchases and the Four Seasons gift certificates. On June 15, 2007, J. Mullins responded by letter and stated that he was "still trying to reconstruct"

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[14] Although FINRA had originally charged the Mullinses with wrongdoing in connection with this $375,000 transfer, FINRA ultimately dropped that charge for reasons that are not explained in the record. *See infra* text accompanying notes 62-63 and 73.

[15] The record shows that J. Mullins had contact with Mrs. Weil's attorneys at various times, but only for the purpose of returning to Mrs. Weil some personal items and, as described below, to reimburse her for the gift certificates and wine that J. Mullins personally used.

[16] Morgan Stanley reported on Form U5 that K. Mullins was terminated for "failure to comply with Firm policies, including acting as a fiduciary for a client without prior approval in writing from the Firm." J. Mullins was reported to have been terminated for the same reason, as well as for "withdrawing funds for his own benefit from a client's account."

[17] J. Mullins also gave on-the-record testimony on April 3, 2007, but was not specifically questioned about his purchases of gift certificates or wine with Foundation funds.

[18] *See supra* text accompanying note 11.

information responsive to Enforcement's questions about the gift certificates and other transactions.

On or about June 23, 2007, J. Mullins purchased $4,000 in Four Seasons gift certificates and $5,500 in Boyds gift certificates, equaling the amounts that he had purchased with Foundation funds that he could not "fully account for." J. Mullins shortly thereafter turned these certificates over to Beebe along with other unused Boyds and Four Seasons gift certificates. J. Mullins testified that he found the remaining certificates in his possession while searching for a piano bench pad that belonged to Mrs. Weil.[19]

On June 29, 2007, Enforcement contacted J. Mullins again, noting that J. Mullins had, as of that date, made only a partial response to its request for information and specifically requesting that he provide a response regarding whether he "utilized any gift certificate(s) purchased with Ms. Weil's funds for his personal use." Enforcement reiterated its request in an e-mail to J. Mullins's attorney on July 16, 2007 and once more by letter dated August 9, 2007.

On August 28, 2007, J. Mullins explained in a letter to FINRA that he used the Foundation's Four Seasons gift certificates to pay for his own vacation but did so because the hotel advised him that he could avoid credit card fees if he paid for his stay with gift certificates. "Since I did not have time before I departed to stop at the Philadelphia Four Seasons, I took a few of the ones I had in the Weil Foundation file," he wrote.[20] J. Mullins further stated, "It was my intention that I would replace them the next time I got up to Philadelphia after my return from London. Unfortunately, before I could replace them I was fired from Morgan Stanley and . . . [i]n all the confusion from the firing it totally slipped my mind until late June of 2007." He did not claim that Mrs. Weil had given him permission to use the certificates. In this letter, J. Mullins also admitted that he "personally used Boyds certificates" but had just replaced them, along with the Four Seasons gift certificates he used, and that he thereby made "sure there was [sic] no losses for Esther Weil or her Foundation that had come within my responsibility."

J. Mullins did not mention in this letter that he had drunk four bottles of wine purchased with Foundation funds. J. Mullins testified that he did not recall that he had consumed the Foundation's wine until investigators from the New Jersey Board of Securities "painted me into a

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19 J. Mullins testified that he was looking for the piano bench pad because Mrs. Weil's attorney had requested the return of a piano that she had been keeping at the Mullinses' home.

20 The explanation J. Mullins offered during the hearing for his use of the Four Seasons gift certificates differed somewhat from the explanation he gave in his August 28 letter. During his testimony at the hearing, J. Mullins claimed that, the day before the Mullinses left for their London vacation, an unidentified person at a Foundation lunch told him that using gift certificates to pay for his stay would lead to savings on the exchange rate, and that Mrs. Weil had then given him permission to use the Foundation's gift certificates.

corner" during a September 2007 interview and asked, "Did you drink the wine?" According to his testimony, "a thunderbolt hit me," and he realized that "I was wrong. I[t] just absolutely had gone out of my mind."[21] As noted, J. Mullins thereafter sent a check for the cost of all the wine purchased for the Foundation to Mrs. Weil's attorney.

Ultimately, J. Mullins pleaded guilty in New Jersey state court to a criminal charge of misapplication of entrusted funds in the third degree. During his plea hearing, J. Mullins admitted that he knowingly used $7,134 of Foundation funds for personal purposes – i.e., by using the Boyds gift certificates and wine for himself – without the necessary authorization from the Foundation.[22]

F. The Mullinses' positions with the Foundation and the Firm's awareness of these positions

The remaining allegations at issue involve inaccurate responses that the Mullinses gave between 2003 and 2006 on a series of routine Morgan Stanley compliance questionnaires. Their inaccurate responses relate to the positions they held in Mrs. Weil's Foundation and to the substantial loan they received from Mrs. Weil in 2005, as discussed below.

When the Foundation was created in 1999, it was established as a non-profit corporation under the laws of New Jersey and organized under Section 501(c)(3) of the Internal Revenue Code. Consistent with New Jersey state law, the Foundation's Certificate of Incorporation specified that the Foundation would be managed by a "Board of Trustees" (the apparent functional equivalent of a board of directors),[23] and it identified Mrs. Weil and the Mullinses as those "trustees." However, neither the Articles of Incorporation nor any other document in the

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21 By late 2007, New Jersey had launched its own investigation into J. Mullins's activities.

22 The New Jersey proceedings did not include any charges related to J. Mullins's use of the Four Seasons gift certificates. J. Mullins successfully satisfied the terms of the pre-trial intervention program into which he was diverted after pleading guilty (essentially, six months' probation), with the result that no conviction was ultimately entered against him.

23 *See* N.J. Stat. 15A:1-2 (defining the "board" of a non-profit corporation as "the board of trustees of the group of persons vested with management of the business and affairs of the corporation irrespective of the name by which the group is designated" and defining "trustee" as "any member of the board of a corporation, whether designated as a trustee, director, manager, governor, or by any other title").

record suggests that the Foundation was a true legal trust, with identifiable trust property or designated beneficiaries.[24]

When Mrs. Weil opened an account for the Foundation with Morgan Stanley in 2002, the Foundation account was opened as a corporate account. Although the Morgan Stanley new account form provided for classification of an account as a trust account, the Foundation account was not characterized as such on the form.[25] The account generally held cash in a money market fund to cover donations to charities and other Foundation expenses but did not generally hold securities.[26]

When the Foundation was formed, Mrs. Weil became its president, J. Mullins was named vice president, and K. Mullins was named secretary and treasurer, with duties as identified in the Foundation's by-laws. In practice, however, the Foundation observed few corporate formalities. K. Mullins testified that the Foundation was "Esther's baby"; she decided which charities to support and how much to donate to them, and the Foundation was funded exclusively with Mrs. Weil's own money.[27] Although K. Mullins saw Mrs. Weil nearly every day and often assisted her in organizing events sponsored by the Foundation, she denied performing for the Foundation any of the traditional or formal functions of a corporate secretary or treasurer, such as keeping the books, records, and meeting minutes of the Foundation.[28]

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24 *See infra* note 59 (discussing the distinctions between corporations and trusts).

25 Morgan Stanley's account application form offered several options for classifying a new account, including an "individual," "custodian," "trust," joint accounts of several types, "partnership," "guardian," or "other." The Foundation account was classified as "other," and then specified as a "CO," or corporate account. Had the account been classified as a trust, the form required that more information be provided, including the full title of the trust, names of the grantors of the trust, and certifications by individuals authorized to act on behalf of the trust regarding their powers to enter into transactions for the trust. None of this information was provided on the account application for the Foundation.

26 Neither of the Mullinses exercised discretionary authority over the Foundation's account or any of Mrs. Weil's other personal accounts at Morgan Stanley, but the Mullinses had authority to transfer money from Mrs. Weil's personal accounts to the Foundation account in order to cover the checks that Mrs. Weil would write and give to charities. There is no evidence, nor any allegation, that the Mullinses abused this authority.

27 J. Mullins testified that the Foundation was simply a "conduit" for Mrs. Weil's charitable giving, providing her with a better way to organize and manage the charitable donations she had already been making independently over the years.

28 Although Enforcement points out that K. Mullins's "activity with the Foundation generally increased beginning in 2004 and 2005 and that she performed various functions for the

(continued...)

Some of the employees at the Morgan Stanley branch office where the Mullinses worked had at least a general awareness of the Mullinses' involvement with the Foundation. Mrs. Weil, who was described as having a "strong personality" and as "the life of the party," was widely known to the office. She attended annual client appreciation events that the Mullinses organized and often visited the office on business and to make social calls (once appearing at the office on Halloween dressed as a pumpkin). Some Firm employees, including two branch managers, attended events outside the office that Mrs. Weil hosted, such as dinners, her ninety-fifth birthday party, and various concerts that Mrs. Weil organized and supported.

However, the extent of Morgan Stanley personnel's understanding of the Mullinses' involvement with the Foundation is unclear. There is evidence that J. Mullins disclosed his position as Foundation vice president to his branch manager in 2003. The branch manager, Todd Monastero, directed J. Mullins to the Firm's compliance department to obtain its permission to hold that position. The compliance department granted permission for him to serve as the Foundation's vice president but required as a condition of that approval that, among other things, J. Mullins not serve as the Foundation's financial advisor ("FA") of record on any accounts it had with Morgan Stanley. As a result, K. Mullins was designated as the account's FA, despite her own official positions with the Foundation. K. Mullins testified that Monastero "was a billion percent aware" that she was an officer of the Foundation and, in a "two-second conversation," nevertheless approved her to assume the role of FA of record for the Foundation account. She also testified that the branch's operations manager, Linda Cohen, knew K. Mullins was a Foundation officer and, by virtue of Cohen's duty to review branch correspondence, must have seen documents flowing into and out of the branch that mentioned K. Mullins's titles. Monastero and Cohen consistently testified, however, that they were unaware that K. Mullins was a Foundation officer, and the Hearing Panel credited their testimony.[29] K. Mullins concedes that she did not disclose her Foundation positions to anyone in Morgan Stanley's compliance department.

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[28] (...continued)
Foundation," Enforcement does not dispute K. Mullins's assertions that she did not perform any of the functions assigned to the Foundation's secretary or treasurer in its by-laws. From the record, it appears that no one performed these functions. The attorney for the Foundation testified that, as far as he was aware, the Foundation had no formal meetings, created no meeting agendas, and prepared no meeting minutes. The only formal financial records for the Foundation appear to have been in the form of monthly account statements from Morgan Stanley, which were sent to Beebe and then forwarded periodically to Mrs. Weil's tax accountant for use in compiling tax returns for the Foundation.

[29] Monastero's two successors as branch manager also testified that they were unaware that K. Mullins was an officer of the Foundation, as noted in the NAC's opinion, though the Hearing Panel did not mention their testimony or make a credibility determination as to them.

G. The Mullinses give incomplete responses on Firm compliance questionnaires

J. Mullins held the title of Foundation vice president, and K. Mullins held the titles of Foundation secretary and treasurer, for the duration of their employment at Morgan Stanley. Nevertheless, the Mullinses concede that they did not disclose these positions or their nominal designations as "trustees" in the Foundation's organizing documents on most of their annual compliance forms in 2003, 2004, 2005, and 2006.

Specifically, the 2003 and 2004 questionnaires each included the following requests:

> (3) List account numbers and positions for any Morgan Stanley accounts in which you are named as a trustee, successor trustee, guardian, executor and/or beneficiary. . . .
>
> (6a) List all profit and non-profit organizations, companies and/or corporations in which you are a director, officer, employee, or representative and identify position. . . .

J. Mullins did not disclose his nominal position as trustee of the Foundation in response to these questions, but he did disclose his position as vice president of the Foundation on both forms. K. Mullins did not list the Foundation in response to any of these questions in 2003 and 2004.

The 2005 Morgan Stanley Financial Advisor Questionnaire framed the disclosure questions slightly differently from the 2003 and 2004 versions. The 2005 questionnaire stated:

> (10) List or attach account numbers and fiduciary relationships for any Morgan Stanley accounts in which you are named as a trustee, successor trustee, guardian, executor and/ or beneficiary (except beneficiary of parent, siblings, and/ or spouse accounts).

J. Mullins replied "none" to this item. K. Mullins did not list the Foundation in response to this item.[30] The 2005 questionnaire also requested that financial advisors provide the names of any profit and non-profit organizations, companies and/or corporations in which the advisor was a director, officer, employee, or representative. Neither of the Mullinses listed the Foundation in response to this item.[31]

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[30] K. Mullins did, however, list four accounts related to a George Seeger Trust, for which she had applied to compliance for (and was later denied) permission to serve as co-executor.

[31] J. Mullins, however, listed the organization "Crimestoppers of Atlantic County" in response to this item.

The 2005 questionnaire, which was signed by each of the Mullinses on March 8, 2005, one week after the date of Mrs. Weil's $100,000 loan to them, also asked, "Have you within the past twelve months made loans to, or received loans from any of your clients or family members while they maintained accounts at Morgan Stanley?" Both of the Mullinses answered "no" to this question.

In January 2006, the Mullinses each completed an Internal Audit Branch Financial Advisor Questionnaire. The 2006 questionnaire, which was completed by the Mullinses nine months after receiving (and quickly returning) the $100,000 loan, again asked whether the advisor had made or received loans from clients within the prior twelve months. Both of the Mullinses responded "no" to this question.[32]

III.

A. J. Mullins's conversion of Foundation property and breach of fiduciary duty

We turn first to FINRA's findings that J. Mullins converted Foundation funds in violation of NASD Rule 2110 and that, in so doing, he also breached his fiduciary duties to the Foundation as a corporate officer.[33]

FINRA Sanctions Guidelines state that "[c]onversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the

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[32] The 2006 questionnaire also asked whether the FA was an officer or director of any outside business, and whether the FA maintained "fiduciary relationships for any Morgan Stanley accounts in which you are named as a trustee . . . ." The Mullinses both responded "no" to these questions; however, the amended complaint did not identify these omissions as a basis for liability, and the NAC did not find liability for these omissions.

[33] The amended complaint charges that J. Mullins, by "wrongfully using Foundation funds to purchase gift certificates and wine that he subsequently used for his own purposes," made improper use of customer funds in violation of NASD Rules 2330(a) and 2110. As an "alternative to [the] first cause of action," the amended complaint charges that J. Mullins "engaged in conduct inconsistent with high standards of commercial honor and just and equitable principles of trade by wrongfully converting property" from his customer, thereby violating NASD Rule 2110. The NAC appears to have found that J. Mullins's personal use of Foundation property constituted two violations: one of improper use of customer funds for his initial purchase of the gift certificates and wine with Foundation funds, and another of conversion for his subsequent use of the same gift certificates and wine. Because we find that J. Mullins's use of the gift certificates and wine constituted conversion, we need not reach the basis for liability charged as an alternative in the complaint.

property nor is entitled to possess it."[34] We find that the record supports a finding that J. Mullins's conduct satisfies the charge of conversion and conclude that J. Mullins thereby violated NASD Rule 2110. We also find, as charged in the amended complaint, that J. Mullins's misconduct constituted a breach of the fiduciary duty he owed to the Foundation, in further violation of Rule 2110.

It is undisputed that J. Mullins used gift certificates and wine, purchased with Foundation funds, for his own personal benefit and not in connection with Foundation business. J. Mullins also concedes that he engaged in this misconduct while serving in a fiduciary capacity as the Foundation's vice president. J. Mullins concedes that he "did not act correctly" and "committed serious wrongs." J. Mullins argues, however, that his use of the gift certificates was authorized because Mrs. Weil gave him oral permission to use them. He also argues that his use of the gift certificates does not amount to intentional conversion because he always intended to reimburse the Foundation. These arguments do not relieve J. Mullins of liability.

As an initial matter, J. Mullins has not produced any evidence, other than his own testimony, to support his statement that Mrs. Weil gave him permission to use the gift certificates, and it is his burden to do so.[35] To the contrary, the record contains evidence that contradicts his statement that Mrs. Weil gave the permission he claims. For example, Mrs. Weil told a Morgan Stanley investigator, who interviewed her briefly just after the Mullinses were terminated in August 2007, that she had no knowledge of charges to the Foundation account made at Boyds.[36] Mrs. Weil's abrupt severance of ties from the Mullinses after more than twenty-five years of friendship, precipitated by her retention of a new attorney to advise her in matters relating to their handling of her accounts, also suggests that she did not give J. Mullins the permission to use the Foundation account that he claims to have had.

Moreover, inconsistencies in J. Mullins's own testimony undermine his argument that he had Mrs. Weil's permission to use the gift certificates. For example, Enforcement asked J. Mullins about his use of Foundation gift certificates several different times during its

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[34] FINRA Sanction Guidelines 38 (2007).

[35] *See Kirlin Sec.*, 97 SEC Docket at 23324 n.87 ("[A]s we have stated previously, the applicant bears the burden of producing evidence to support his claimed defenses."); *Husky Trading LLC*, Exchange Act Rel. No. 60180 (June 26, 2009), 96 SEC Docket 18128, 18140 & n.31 ("Applicants had the burden going forward to establish any affirmative defense.") (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *Donald T. Sheldon*, 51 S.E.C. 59, 77 n.70 (1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995)).

[36] J. Mullins appears to lay the blame for this evidence on Mrs. Weil's hearing aids, which he states could be "temperamental" at times, and suggests that Mrs. Weil therefore may have misheard the investigator's question. The investigator does not appear to have asked Mrs. Weil about the purchases of the Four Seasons gift certificates or the wine.

investigation in 2007, but he did not profess to have Mrs. Weil's permission to use them until the hearing was conducted, two years later. Further, J. Mullins claimed during FINRA's investigation that he was given the idea to use gift certificates to pay for his Four Seasons stay by an acquaintance during a luncheon attended by Mrs. Weil; yet, during the hearing he testified that the Four Seasons staff suggested he use the gift certificates in order to avoid a credit card surcharge. When his attorney pointed out the inconsistency, J. Mullins reconciled the two versions of events by claiming both were true. The Hearing Panel specifically found that J. Mullins's differing descriptions of how he came to use the Four Seasons gift certificates were not credible, and we see no basis in the record for overturning that finding.[37]

More significantly, J. Mullins did not fulfill his claimed promise to Mrs. Weil to repay the Foundation for his purportedly approved personal use of its property until FINRA and state regulators began investigating his misconduct. His failure to repay the funds until forced to do so undermines J. Mullins's claims that he had permission to temporarily "borrow" the property, and it also serves as evidence that his conversion of the property was intentional and designed to deprive the Foundation permanently of its property.[38]

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[37] *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8984 & nn.14-15 ("We give great weight and deference to credibility determinations by a Hearing Panel, which can only be overcome by substantial record evidence.").

Even if we accepted, arguendo, that Mrs. Weil had given J. Mullins oral permission to use the gift certificates and wine for himself with the understanding that he would reimburse the Foundation, J. Mullins conceded in New Jersey state criminal proceedings that only a formal resolution of the Foundation's board could have authorized such an expenditure, and there is no evidence to suggest that ever occurred.

We note that, while claiming that he had Mrs. Weil's permission to purchase the wine with Foundation funds, J. Mullins has not argued that he ever had Mrs. Weil's permission to consume that wine on his own. Instead, he dismisses the purchase as merely something that had "gone out of his mind." Her permission to purchase the wine for Foundation use is not equivalent to permission to consume it himself, and J. Mullins has not offered any other evidence of his authority to unilaterally consume the Foundation's wine or otherwise use the Foundation's property for his personal use.

[38] *See Mission Sec. Corp.*, Exchange Act Rel. No. 63453 (Dec. 7, 2010), 99 SEC Docket 35510 A1, A9-A10 (finding applicants converted customer property where applicants "not only intended to permanently deprive their customers of their property, but did, in fact, deprive their customers of their property," notwithstanding applicants' attempts to return the property after FINRA began investigating the misconduct).

Other circumstantial evidence in the record lends further support to our conclusion that J. Mullins acted with intent. For example, J. Mullins claims he encouraged Mrs. Weil to allow him to purchase Boyds gift certificates for donation to charities and that he told her he would buy from the Foundation any that could not be used, effectively insulating the Foundation from any loss on the purchases. But J. Mullins began redeeming the Boyds certificates to cover his own personal retail purchases a mere four days after buying the certificates with Foundation money, hardly enough time for the Foundation to determine that the certificates could never be donated to charity.

Similarly consistent with a finding of intent is J. Mullins's consumption of the Foundation's wine at a non-Foundation function shortly after Morgan Stanley escorted him from his office and placed him on administrative leave, and again immediately after Enforcement took his investigative testimony. Apparently aware that Morgan Stanley was concerned about his handling of Mrs. Weil's account, J. Mullins nonetheless began consuming this wine on his own without ever even claiming to have Mrs. Weil's permission to do so.

J. Mullins asserts that he chose Four Seasons gift certificates to purchase for donation to charities "in part" because the hotel was one of Mrs. Weil's favorite places. However, he has not offered any explanation for why he chose to purchase for the Foundation gift certificates to his own favorite clothing store. As FINRA found, the timing of J. Mullins's misconduct—beginning just after Mrs. Weil's health seriously declined—"suggests that J. Mullins concluded that he could misuse his customer's funds and property with impunity." J. Mullins claims that the timing of his gift certificate purchases had nothing to do with Mrs. Weil's hospitalization but was instead driven by the needs of charities. However, although the record shows that one charity received a small number of gift certificates from the Foundation while Mrs. Weil was hospitalized, there is no evidence that this charity was in immediate need of the donations. More significantly, its need, even if proven, would not excuse his conversion of the gift certificates that were never donated to the charities that were supposedly in immediate need of them.

J. Mullins makes several other arguments in his defense that are similarly unavailing. He argues that he intended to pay the Foundation for his use of the Four Seasons gift certificates when he returned from his trip in May 2006 but that it "slipped" his mind because of the confusion and disruption during his termination by Morgan Stanley. The Hearing Panel found this explanation not credible, and we see no basis to reverse that finding.[39]

J. Mullins objects that the evidence necessary to support his defense and overturn FINRA's adverse credibility determinations would have been supplied by Mrs. Weil herself, had Enforcement taken her testimony. However, we find no fault with the record's lack of testimony from Mrs. Weil, as our decisions have long preserved the discretion of prosecutors in conducting

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[39] *Ortiz, supra* note 37.

their investigations, particularly with regard to their decisions on which witnesses to interview.[40] Moreover, as discussed above, there is sufficient evidence in the record, irrespective of Mrs. Weil's testimony, to support a finding that J. Mullins did not act with permission and that he intentionally converted the Foundation's property.

We have previously stated that conversion "is extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade' that the NASD seeks to promote."[41] We find, therefore, that J. Mullins's conversion of the Foundation's property was a violation of NASD Rule 2110. We find that his conversion was also a clear breach of the fiduciary duty that he, as its vice president, owed to the Foundation,[42] and that this breach constitutes another violation of Rule 2110.[43]

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40 *Thomas E. Warren III*, 51 S.E.C. 1015, 1020 (1994) (rejecting argument that NASD conducted an inadequate investigation by failing to interview persons whom the applicant claimed would have assisted in his defense). We further note that, because Mrs. Weil was not associated with a FINRA member, FINRA had no authority to compel her testimony or cooperation.

We also take note of the lack of evidence in the record that the Mullinses made any attempt to reach out to Mrs. Weil, through her attorney, to ask her to provide an exonerating statement. The evidence that does appear in the record suggests her testimony would not have supported J. Mullins's arguments. As noted, when her lawyer speculated that J. Mullins could end up in prison because of his actions, Mrs. Weil responded, "'[W]ell, that may be true, but I am not going to lie for him.'" Mrs. Weil's decision to sever all ties with the Mullinses—including removing them from her will—after a lengthy friendship also appears to contradict J. Mullins's claim that Mrs. Weil would have provided testimony favorable to the Mullinses.

41 *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976).

42 *See Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (noting that officers and directors of a corporation are prohibited by their fiduciary duties from using corporate funds for personal ends).

43 *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) (affirming Commission's finding that registered representative violated just and equitable principles of trade by misappropriating funds belonging to a political club while serving as that organization's treasurer), *aff'g*, 52 S.E.C. 339, 342 (1995) (holding that "Vail commingled his and the Club's funds for the sake of his own personal convenience" and, in doing so, "make[s] us doubt his commitment to the high fiduciary standards demanded by the securities industry"); *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002) ("Conduct Rule 2110 applies when the misconduct reflects on the associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money.").

B. The Mullinses' acceptance of a loan from a client without the required pre-approval and their failure to disclose the transaction

NASD Rule 2370 prohibited associated persons from borrowing funds from a customer unless that person's firm has a written procedure allowing such borrowing and the arrangement meets certain conditions.[44] One of those conditions was that "the lending arrangement is based on a personal relationship with the customer, such that the loan would not have been solicited, offered, or given had the customer and the associated person not maintained a relationship outside of the broker/customer relationship." The rule further required that the member firm pre-approve such lending arrangements in writing. It is undisputed that the Mullinses accepted a \$100,000 loan from Mrs. Weil, and that they did so without seeking or securing approval from the Firm.

K. Mullins argues that she "mistakenly" did not consider the transaction a loan because the Mullinses returned the funds within a few days without using them for their intended purpose, i.e., to help the Mullinses finance their home purchase. However, nothing in Rule 2370 suggests that the duration of repayment of a loan impacts the prohibition on borrowing from customers without complying with the rule's requirements. Applicants also argue that Rule 2370 "does not apply" to this loan because the loan was "based on a personal relationship with" Mrs. Weil. Although, as noted, personal relationships can provide a basis for an exception to the general prohibition on lending arrangements with customers, they can do so only if the member firm gives its prior written approval, which, the Mullinses admit, Morgan Stanley did not give here. Thus, in borrowing money from Mrs. Weil, the Mullinses violated NASD Rules 2370 and 2110.[45]

In addition to violating the prohibition on unapproved lending arrangements with customers, the Mullinses also failed to disclose the loan on internal Morgan Stanley compliance questionnaires that asked for information about lending arrangements with clients.[46] We have

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[44] As noted *supra* note 3, NASD Rule 2370 was recodified as FINRA Rule 3240 after this proceeding was instituted. The new rule is substantially similar to retains all the requirements and prohibitions discussed here.

[45] Because a violation of an NASD rule is inconsistent with just and equitable principles of trade, the Mullinses' acceptance of the loan also violated Rule 2110. *See, e.g., Kirlin Sec.*, 97 SEC Docket at 23322 n.81 ("It is well established that a violation of a Commission or NASD rule or regulation is inconsistent with just and equitable principles of trade, and is therefore also a violation of Rule 2110.") (citing *Frank Thomas Devine*, 55 S.E.C. 1180, 1192 n.30 (2002)).

[46] K. Mullins now disputes the authenticity of the questionnaire she completed in 2006 because the form (which, according to testimony at the hearing, was likely automatically

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stated that it is a basic duty of all securities professionals to respond truthfully and accurately to their firm's requests for information,[47] and that the failure to do so can be inconsistent with just and equitable principles of trade, especially when the purpose of the information request is to help ensure that the associated person is in compliance with applicable laws, rules, and policies.[48] Here, the Mullinses' failure to provide truthful and accurate information prevented the Firm from properly overseeing its salespersons' compliance with NASD Rule 2370 and from identifying potentially exploitative relationships between its customers and its salespersons. This is especially troubling here because the transaction about which the Firm sought information—a sizeable loan from an elderly customer with a fixed income—carried a significant potential for conflicts of interest and misconduct.[49]

The Mullinses do not offer an explanation as to why they failed to disclose the loan on their 2005 and 2006 compliance questionnaires, except to argue generally that they do not believe the loan was improper.[50] As noted above, acceptance of the loan without approval violated both

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[46] (...continued)
dated by computer at the time it was printed for discovery) is dated December 2006, several months after she had been terminated by Morgan Stanley. However, K. Mullins stipulated in proceedings before the Hearing Panel that she completed this form on January 19, 2006, and she has never argued that the answers on the form were not hers. As noted, K. Mullins concedes that she did not disclose the loan from Mrs. Weil on her 2006 questionnaire.

[47] *Ortiz*, 93 SEC Docket at 8986 & n.20 ("[T]he 'entry of accurate information on firm records is a predicate to the NASD's regulatory oversight of its members' and a predicate for any firm's internal compliance program . . . .") (quoting *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996)).

[48] *Ortiz*, 93 SEC Docket at 8986 & n.19 ("[C]onduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade.") (citing *James A. Goetz*, 53 S.E.C. 472, 477-78 (1998)).

[49] *See* NASD Notice to Members 03-62 (October 2003) ("Loans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct.").

[50] The Mullinses argued before the NAC that their failure to disclose the loan was the result of an oversight because it was a very hectic time in their lives, and also that the loan did not need to be disclosed because it was an "aborted loan" that was never used for its intended purpose and repaid within a few days. The NAC rejected these arguments, noting the Hearing Panel's determination that the explanations offered by the Mullinses for their failures to disclose the loan were not credible, and concluding that the questionnaires "unambiguously" directed the

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NASD Rule 2370 and Firm policy. Moreover, whether the loan was proper is irrelevant to the issue of whether it needed to be disclosed in response to a direct and unambiguous question on Morgan Stanley's compliance questionnaire. We conclude, therefore, that the Mullinses' failure to disclose the loan from Mrs. Weil on internal Morgan Stanley compliance questionnaires constituted a violation of NASD Rule 2110.

C. The Mullinses' failures to disclose their Foundation positions on compliance questionnaires

We also find that the Mullinses failed to make required disclosures regarding their positions as officers of the Foundation, in further violation of Rule 2110.[51] As noted, an associated person's failure to provide accurate information to his or her member firm is especially problematic when that failure interferes with the firm's compliance efforts.[52] Here, the Mullinses withheld information that would have enabled Morgan Stanley to identify any conflicts of interest that their officer positions created with respect to the Foundation or Mrs. Weil—conflicts that were symptomatic of what J. Mullins himself characterized as a relationship with his client that was "too informal."[53] The Mullinses do not dispute their failure to make the requisite

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50 (...continued)
disclosure of all loans from customers within the last twelve months. The Mullinses have not renewed these arguments on appeal to us.

51 In the amended complaint and the NAC decision, the Mullinses' Rule 3110 violations were premised on a finding that their lack of disclosure prevented the Firm from maintaining the books and records required by Exchange Act Rule 17a-3, but that rule, which applies to records of securities purchases and sales, account ledgers, customer orders, margin accounts, associated persons' employment histories, customer complaints, and the like, does not appear to cover the records at issue here. We therefore are setting aside FINRA's finding that the Mullinses violated Rule 3110. *See supra* text accompanying note 60.

52 *See supra* notes 47 & 48 and accompanying text.

53 *Cf.* NASD Conduct Rule 3030, now codified as FINRA Rule 3270 (prohibiting registered persons from serving as an officer of an outside business without providing prior written notice to his or her firm); Order Approving Proposed Rule Change Relating to Outside Business Activities of Associated Persons of Member Firms, Exchange Act Rel. No. 26178 (Oct. 13, 1988), 41 SEC Docket 1775, 1775 (approving NASD's enactment of Rule 3030 to address the securities industry's growing concern about preventing harm to the investing public or a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities); Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Outside Business Activities of Associated Persons, Exchange Act Rel. No. 26063 (Sept. 6, 1988), 41 SEC Docket 1254, 1254 ("[I]t was appropriate for member firms to receive prompt

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disclosures. We conclude, therefore, that this conduct was inconsistent with just and equitable principles of trade and thus violated Rule 2110.

J. Mullins claims that his branch management was apprised of his role in the Foundation. However, the branch manager who had originally advised J. Mullins to apply to the compliance department for approval to serve in the Foundation, Todd Monastero, had left the Firm in mid-2004. Monastero's replacement testified that he was not aware that either of the Mullinses served as Foundation officers. But, even if the new branch management knew about J. Mullins's role in the Foundation, that would not excuse his failure to disclose his role to the compliance department. J. Mullins was aware that approval for his Foundation activities came from compliance, not his local managers. The branch's awareness of an activity could not substitute for making full disclosure of his activities—activities which J. Mullins knew concerned compliance because of the potential for conflicts of interest with his customer—to those in the compliance department charged with monitoring employees' compliance with applicable rules.

J. Mullins also asserts that, because he had applied to the compliance department for permission to serve as the Foundation's vice president in 2003 and disclosed this role on his compliance forms in 2003 and 2004, compliance was effectively informed of his role in 2005.[54] If the compliance department failed to notice that his form did not contain the same disclosure in 2005 as it had in 2003 and 2004, J. Mullins argues, this demonstrates that the Firm either did not care or did not really need the information. However, J. Mullins's silence on the form could have indicated that he simply no longer held that position, not that he still held it and was not reporting it. More importantly, it is well established that an associated person cannot excuse his own misconduct by shifting the onus of compliance to his managers or to his firm.[55] As J. Mullins conceded in testimony, the responsibility for making the necessary disclosures to member firms rests with the associated person: "[T]he buck stops with me, I am responsible."

K. Mullins has "acknowledged she was wrong" in not disclosing her officer positions on her Firm questionnaires. She asserts that she "based her incorrect answers on a short conversation with [branch manager Todd Monastero]" who advised her that she did not need to

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53 (...continued)
notification of all outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.").

54 J. Mullins also claims that he disclosed his vice presidency on his 2006 questionnaire, but the questionnaire J. Mullins completed in January 2006, as it appears in the record before us, does not contain any disclosure of his position with the Foundation.

55 *See, e.g., John D. Audifferen*, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8141 (holding that an applicant "cannot shift the blame for his violations to his firm").

disclose her positions, which were simply a "technicality to facilitate the organizations' [sic] creation." K. Mullins concedes in her brief that Monastero "denied this conversation" and that she was "unable to definitely prove at the hearing the content of a 5 year old 5 minute conversation." But K. Mullins points to evidence that the branch received Foundation-related correspondence that identified her as an officer of the Foundation, providing effective notice to the Firm of her status; yet the Firm "declined," K. Mullins argues, "to question the conflicting answer on her annual questionnaires."

Although the evidence supports K. Mullins's claim that she had little real responsibility or authority as a Foundation officer,[56] this does not justify her non-disclosure. She deprived the Firm of the ability to determine her fitness to handle the Foundation account, based on a full understanding of her relationship with the client. The Hearing Panel credited the testimony of branch management when they testified that, branch correspondence review policies notwithstanding, they were unaware that K. Mullins was an officer of the Foundation, and we generally defer to such credibility determinations in the absence of substantial evidence to support overturning them.[57]

Even if we were to credit K. Mullins's assertion that certain branch personnel informally learned of her official positions, it was still incumbent upon K. Mullins to bring this information in a formal way to the Firm's compliance department, which was responsible for identifying and addressing conflict situations. Although K. Mullins seeks to lay part of the blame for her lack of disclosure on what she believes is the branch's lax review of correspondence, we reiterate that applicants cannot shift to others the responsibility for their own compliance with applicable rules.[58]

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56 Enforcement has not offered evidence to challenge K. Mullins's assertion that she did not perform the formal duties of a secretary or treasurer as outlined in the Foundation's incorporating documents, although it supports the NAC's conclusion that her dealings with the Foundation were "more than merely ceremonial." *See supra* note 28.

57 *See Ortiz*, *supra* note 37. We note, in addition, that there is no evidence that K. Mullins sought to confirm the advice Monastero allegedly gave her (in what K. Mullins testified was a "two-second conversation" and calls in her brief a "5 minute conversation") with the two branch managers who later replaced Monastero. Yet she continued to omit her officer status from Firm questionnaires in 2005 and 2006, after Monastero left the Firm.

58 *John F. Lebens*, 52 S.E.C. 606, 608 (1996) (finding that broker violated the Chicago Board Options Exchange's equivalent to Rule 2110 by improperly allocating losing personal trades to proprietary accounts of his firm, which had lax internal controls, and noting that "[i]t is important that broker-dealers conduct their business operations with regularity and that their records accurately reflect those operations; it is unethical conduct for their employees to take advantage of loose internal controls to prevent achievement of these principles").

We therefore find that the Mullinses failed to observe just and equitable principles of trade when they did not disclose to the Firm their positions as Foundation officers. However, we find that the evidence does not support a conclusion that the Mullinses should be held liable for failing to disclose that they served as "trustees" of the Foundation. The record indicates that, although the Mullinses were designated as "trustees" of the Foundation in its incorporating documents, they were trustees in name but not in fact; the Foundation was not a true legal trust but a non-profit corporation, and the Mullinses possessed none of the attributes or powers of true trustees of either the Foundation or of the Foundation's account at Morgan Stanley.[59]

* * *

In summary, we affirm FINRA's findings that (1) J. Mullins converted customer property and breached his fiduciary duty to a customer in violation of Rule 2110; (2) the Mullinses violated Rule 2370 and 2110 by accepting a loan from a customer without prior Firm approval; (3) the Mullinses violated Rule 2110 by failing to disclose their acceptance of that loan on their 2005 and 2006 compliance questionnaires; (4) J. Mullins violated Rule 2110 by failing to disclose his Foundation vice presidency in 2005; and (5) K. Mullins violated Rule 2110 by failing to disclose her roles as Foundation secretary and treasurer from 2003 through 2006. We set aside FINRA's findings that (1) J. Mullins made improper use of customer funds in violation of Rule 2330; (2) the Mullinses violated Rule 3110 by failing to disclose their positions as

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[59] We note in this regard that the Foundation was a non-profit corporation and that, as a general matter, corporations are not trusts. RESTATEMENT (THIRD) OF TRUSTS § 5. Although the Mullinses were nominated as "trustees" of the Foundation in its certificate of incorporation, they were not trustees "in the strict sense" because "they [did] not hold title to the corporation's property." SCOTT AND ASCHER ON TRUSTS § 2.3.12 (5th ed.). *See also* RESTATEMENT (THIRD) OF TRUSTS § 5 ("[U]se of the word 'trust' or 'trustee' does not necessarily mean that a trust relationship is involved."); AUSTIN WAKEMAN SCOTT AND WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS (4th ed.) § 16A ("Even in the case of a charitable corporation the members of the board of management, whether called directors or trustees, are not trustees in the strict sense. The title to the property is in the corporate entity and not in the individuals who constitute the board."); *Bovay v. H.M. Byllesby & Co.*, 29 A.2d 801, 804 (Ct. Ch. Del. 1943) (holding that stockholder that "controlled the actions of a majority of the officers and agents" of a company was "in the position of a fiduciary, but it does not follow that it was a trustee of an express trust. The officers and directors of a corporation are fiduciaries; but they are not real trustees.") (internal citations omitted). Moreover, according to Morgan Stanley account opening documentation, the account opened by Esther Weil for the Foundation was opened as a corporate account, not a trust account, and only Mrs. Weil had authorized access to the funds in that account. The Mullinses cannot fairly be said to have served as "trustees" of an account that was not established as a trust and over which they had none of the authorities normally vested in a trustee of funds.

officers of the Foundation; and (3) the Mullinses violated Rules 3110 and 2110 by failing to disclose their status as Foundation trustees.[60]

IV.

The Mullinses argue that the FINRA proceedings against them were flawed and unfair for several reasons.

Exclusion from evidence of Mrs. Weil's letter. J. Mullins argues that FINRA improperly excluded from evidence the letter purportedly written by Mrs. Weil on August 16, 2006 in support of the Mullinses. Because Mrs. Weil did not herself testify on the record before her death, her letter, J. Mullins argues, is highly relevant to the issues being tried because it "addressed specific transactions [and] the flavor and the tone of a letter helps to explain how one might wrongly blur the line between the high standards of reporting expected in a more formal client relationship." After our own de novo review, we conclude that FINRA appropriately excluded the letter.[61]

NASD Rule 9263 directs that the hearing officer "shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial." The hearing officer found, and the NAC agreed, that the letter was not relevant to the issues

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[60] K. Mullins appended numerous exhibits to her briefs in support of her arguments, several of which do not appear to have been introduced before FINRA. K. Mullins has not moved the Commission for leave to adduce this additional evidence as required by Commission Rule of Practice 452, 17 C.F.R. § 201.452, which states that motions for leave to adduce additional evidence "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." K. Mullins has not explained why these documents were not introduced at earlier stages in this proceeding. More significantly, these documents are not material to K. Mullins's case: several deal with Morgan Stanley's internal policies on document retention and review (the Firm's compliance with which is not on review here); others purport to show that the branch received correspondence relating to Mrs. Weil's personal care at her nursing facility (which are duplicative of other evidence in the record, as they show only that branch management knew the Mullinses were close friends of Mrs. Weil); and others deal with client accounts unrelated to Mrs. Weil's. We therefore decline to admit this new evidence. *See, e.g., CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 95 SEC Docket 13802, 13809 n.20 (Jan. 30, 2009) (declining to admit evidence under Rule 452 where applicants failed to show that the evidence was material and that there were reasonable grounds for failing to adduce the evidence previously).

[61] Although excluded from evidence, the letter was included in the record pursuant to FINRA procedural rules as a supplemental document, *see* FINRA Rules 9263 & 9267, and it (or a reproduction of its contents) appears in numerous pleadings submitted by the parties at several stages of this proceeding, permitting us an opportunity to review the letter in its entirety.

being litigated. Addressing questions that had initially been raised concerning a "gift" of $375,000 from Mrs. Weil to the Mullinses, the letter states that Mrs. Weil wanted the Mullinses to receive the benefit of the value of her Philadelphia condominium (which she bequeathed to them in her will) while she was alive and that she believed the Mullinses had handled her accounts properly.[62] Mrs. Weil apologizes in the letter for getting the Mullinses "in trouble" by giving them the $375,000 and clearly expresses her affection for the couple, referring to them as her "grandkids."[63] The legitimacy of the $375,000 gift, however, is not at issue in this proceeding. Moreover, the record already contains substantial amounts of uncontroverted evidence, including testimony from the Mullinses and from several other Enforcement witnesses, establishing that the Mullinses' relationship with Mrs. Weil was very close and even familial, rendering statements in the letter repetitious.

We also take note of the fact that J. Mullins has never explained his failure to identify the letter as evidence prior to the hearing.[64] J. Mullins, represented by counsel at the time, did not comply with the hearing officer's scheduling order in this case, which required the parties to provide the hearing officer and each other with a list of proposed exhibits and witnesses upon which they intended to rely at the hearing. When J. Mullins's attorney missed the order's deadline, the hearing officer stated, during a prehearing conference, that J. Mullins could still file his list of proposed exhibits and witnesses. J. Mullins again failed to make any filing. Instead, through counsel, J. Mullins attempted to introduce the letter repeatedly during the hearing—beginning with opening arguments—with apparent disregard for the scheduling order. J. Mullins's counsel then attempted to justify his failure to introduce the letter earlier by characterizing the letter as "rebuttal evidence," an argument that is inconsistent with both his

62 When Mrs. Weil wrote this letter, four checks withdrawing a total of $375,000 had recently been signed by her and used by J. Mullins to pay down his home loan. The circumstances of this supposed gift are not clear. Although this $375,000 transaction was originally a basis for FINRA's complaint against J. Mullins, Enforcement ultimately dropped this charge from the complaint for reasons that are not explained in the record before us.

63 The circumstances of the drafting of the letter are disputed. According to J. Mullins, Mrs. Weil volunteered to write the letter and drafted it herself. According to an affidavit completed by the attorney Mrs. Weil hired to represent her in dealing with the Mullinses, J. Mullins wrote out the letter himself, and Mrs. Weil copied it onto different stationery and signed it "without thinking of its contents . . . because of her implicit trust in the Mullins[es]." When J. Mullins gave Beebe the letter later that day, Beebe refused to give it to Morgan Stanley, believing it to be "very self-serving[,] and," he testified, "I didn't have a lot of confidence in the letter."

64 *See* NASD Rule 9280 (providing that a hearing officer may exclude from evidence exhibits that respondents, without substantial justification, fail to disclose pursuant to a scheduling order).

attempt to introduce the letter before Enforcement opened its own case and the supposed fundamental importance to his defense that J. Mullins now attaches to the letter.[65]

Even if we were to admit the letter, we find that its contents do not mitigate J. Mullins's misconduct or excuse his violations. Rather, the letter supports a finding of the considerable trust Mrs. Weil had in J. Mullins, and there is no indication in the letter that she was aware of, or condoned, his personal use of the Foundation property at issue here. We find, therefore, that the record demonstrates that the Hearing Panel did not abuse its discretion in excluding the letter, and we affirm the NAC's decision to exclude the letter.[66]

Denial of leave to file a post-hearing brief. J. Mullins also argues that the hearing officer was wrong to deny him the opportunity to file a post-hearing brief at the conclusion of the hearing. He takes issue with Enforcement's characterization of certain facts during its closing arguments and believes Enforcement's statements needed "clarification" but "went unanswered" because his request to file a post-hearing brief was denied by the hearing officer. However, J. Mullins's counsel had ample opportunity at closing arguments to provide his own characterization of the facts, and he did, in fact, respond to some of the Division's statements that J. Mullins now finds objectionable.

Moreover, FINRA rules do not grant hearing participants a right to file post-hearing briefs; instead, the hearing officer is given discretion to determine whether to order the filing of such documents.[67] In concluding that the deliberations of the Hearing Panel—whose members participated actively in the hearing and asked many of their own questions—would not be assisted by further briefing, the hearing officer noted that the parties had stipulated to many of the salient facts in this case and that the issues raised in the matter were not unduly complex. We find no basis in the record to conclude that the hearing officer thereby abused his discretion.

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[65] Admitting the letter at that late stage would have effectively denied Enforcement any opportunity to marshal evidence to controvert the letter's authenticity, which was already questionable. *See supra* note 63. We share the hearing officer's stated concern that counsel's failure to submit the letter as evidence prior to the hearing "appears to have been a pretty calculated disregard" for the terms of the scheduling order.

[66] *Robert J. Prager*, 58 S.E.C. 634, 664-65 (2005) (holding that NASD hearing officer did not abuse his discretion by excluding evidence that was submitted by applicant after the deadline set by the pre-hearing order had passed and that was not shown to have been relevant to the issues raised in the proceeding).

[67] See FINRA Rule 9266(a) ("At the discretion of the Hearing Officer, the Parties may be ordered to file proposed findings of facts and conclusions of law, or post-hearing briefs, or both.").

Severance of K. Mullins's case from J. Mullins's. K. Mullins argues that FINRA's refusal to sever her case from her husband's denied her the opportunity to settle her case and also caused FINRA decisionmakers to draw negative inferences against her because of the alleged misconduct of her husband. Her husband's use of Foundation property, K. Mullins argues, was not related to the charges against her, which focus on a loan made from Mrs. Weil's personal funds and disclosures related to her own involvement with the Foundation. She objects to what she describes as FINRA's assignment to her of "guilt by association" with her husband.

As an initial matter, we are unable to conclude from the record that K. Mullins made any settlement attempts that were thwarted by the posture of the case. Moreover, FINRA rules provide that applicants may make offers of settlement even if Enforcement is opposed to the offer, which will be considered by a hearing panel.[68] We do not find on this record, therefore, that K. Mullins suffered some procedural prejudice because she was prevented from settling her case.

Although K. Mullins takes issue with some statements in the Hearing Panel's decision that she believes unfairly merge her case with her husband's, the NAC's opinion is the only one on appeal before us.[69] The record before us indicates that the NAC "judged each Applicant solely on the record evidence pertaining to that Applicant."[70] Given the substantial overlap in the charges, documentary evidence, and witness testimony relevant to both the Mullinses' cases, we affirm the NAC's finding that the hearing officer committed no error in concluding that trying the cases together would conserve resources and not unfairly prejudice K. Mullins.[71]

Morgan Stanley's alleged failure to produce documents helpful to their case. The Mullinses both argue that Morgan Stanley "withheld essential evidence directly related to charges held against" them, namely, the discovery requested in a motion made before the hearing officer, such as dayplanner calendars, client files, and correspondence files, "and that behavior was

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[68] *See* FINRA Rule 9270(e).

[69] *Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17 ("[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review.").

[70] *Donner Corp. Int'l*, Exchange Act Rel. No. 55313 (Feb. 20, 2007), 90 SEC Docket 11, 39.

[71] *See* FINRA Rule 9214 (providing that, in determining whether to grant a request for severance, the hearing officer will consider "(1) whether the same or similar evidence reasonably would be expected to be offered at each of the possible hearings; (2) whether the severance would conserve the time and resources of the Parties; and (3) whether any unfair prejudice would be suffered by one or more Parties if the severance is (not) ordered."); *Donner Corp. Int'l*, 90 SEC Docket at 39.

endorsed by FINRA." The record shows that both the Hearing Panel and the NAC carefully reviewed these allegations and determined that the Firm had produced everything it possessed that was responsive to the Mullinses' document requests, and we have found no evidence that Morgan Stanley withheld responsive or exculpatory information from the Mullinses.

Moreover, the Mullinses have not shown that the documents they sought, even if produced, would have had any material impact on this case. K. Mullins states that the correspondence files "contained numerous additional examples of management signed and verified legal documents and correspondence clearly highlighting KM's officer status and detailing F[oundation] business." However, as we have already noted, even if the documents K. Mullins identified showed that branch management was fully aware that K. Mullins was an officer of the Foundation, that would not have eliminated the requirement for her to comply with Firm requests for information about those roles—information that the Firm's compliance department needed to approve and monitor the outside business relationships of its associated persons.

J. Mullins contends that these documents contain evidence regarding the use of gift certificates purchased for the Foundation, including "logs with the gift certificate numbers, their amounts, their intended projects and actual use." That some of the gift certificates he purchased for the Foundation might have been legitimately used for Foundation purposes does not mitigate the illegitimate use to which J. Mullins admittedly put the gift certificates at issue. Similarly, his contention that Morgan Stanley branch files contained "detailed information on the wine, invoices for functions held, and proposals for future events under discussion at Morton's and other venues" is of no relevance to the bottles of Foundation wine that J. Mullins admittedly consumed with no connection to Foundation business.[72]

FINRA allegedly acted in bad faith. The Mullinses both argue that FINRA acted improperly by publicizing "charges that they knew could not be sustained and which were subsequently dropped" without equally publicizing the fact that FINRA later reduced the charges against them. In particular, the Mullinses object to the fact that FINRA stated in a press release that J. Mullins had misappropriated $375,000 from a customer and used it to pay his home equity loan while her health deteriorated.

Although the record does not contain much evidence regarding the reasons why FINRA ultimately dropped this charge against J. Mullins, it does contain evidence strongly suggesting that the circumstances surrounding Mrs. Weil's $375,000 gift to the Mullinses warranted scrutiny. As noted, Mrs. Weil's newly retained attorney submitted an affidavit in which he

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[72] J. Mullins also argues that, if Morgan Stanley truly could not locate the files the Mullinses requested in discovery, this constitutes proof that they were violating their own procedures as well as document retention policies required by the securities laws. As we have previously noted, misconduct by others at his Firm (a conclusion we need not and do not make here) would not excuse or mitigate J. Mullins's own violations. *See supra* note 58.

claimed that Mrs. Weil never intended to give the Mullinses that money.[73] The Mullinses returned the funds in response to his written demand shortly after their termination from Morgan Stanley. Mrs. Weil subsequently amended her will to remove all bequests to the Mullinses, including the bequest of her Philadelphia condominium or the value thereof, which J. Mullins claims was the basis for the $375,000 "gift." We cannot conclude, therefore, that FINRA pressed this charge without basis.

Nor can we conclude that FINRA's press release was unfair to the Mullinses. FINRA is required to release to the public information about disciplinary complaints alleging violations of its rules.[74] The press release accurately recounts the charges FINRA filed against the Mullinses at the time; it also included, as required, a discussion of the fact that the Mullinses had an opportunity to respond to the charges and request a hearing, and stated that no adjudicated decision as to the allegations in the complaint had yet been made.[75] The press release as posted on FINRA's web site prominently directs visitors to "See Amended Complaint, withdrawing the $375k conversion charge against John Mullins" and contains a link thereto.[76] We cannot find, therefore, that FINRA treated the Mullinses unfairly or differently than it does other subjects of disciplinary action.[77]

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We find, in sum, that the record does not support any of the Mullinses' various allegations that the proceedings conducted against them were flawed or unfair.

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73 *See supra* note 63.

74 *See* NASD Interpretive Material 8310-3 (IM-8310-3) ("NASD shall release to the public information with respect to any disciplinary complaint initiated by the Department of Enforcement . . . containing an allegation of a violation of a designated statute, rule or regulation of the Commission, NASD, or Municipal Securities Rulemaking Board . . . .").

75 *Id.*

76 *See* http://www.finra.org/Newsroom/NewsReleases/2008/P037994.

77 *Robert E. Strong*, Exchange Act Rel. No. 57426 (Mar. 4, 2008), 92 SEC Docket 2875, 2892 (rejecting applicant's argument that NASD press release "was an unfair punitive measure" and holding that the "press release accurately depicted the nature of the complaint against Strong and noted that Strong could respond to the complaint and request a hearing on the charges against him").

V.

Exchange Act Section 19(e)(2) directs us to sustain the sanctions imposed by FINRA unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[78] Because we have modified the findings of violation with respect to the Mullinses' disclosures of their trustee status, we modify the sanctions accordingly, as discussed below.

A. J. Mullins's conversion of Foundation property and breach of fiduciary duty

FINRA's Sanction Guidelines provide that a bar is the standard sanction for conversion, regardless of the amount converted.[79] The Guidelines do not provide a specific sanction recommendation for J. Mullins's related breach of fiduciary duty, but we, as did the NAC, consider these two violations together for purposes of our sanctions review because the violations arise from the same misconduct.

As an initial matter, we observe that conversion is generally among the most grave violations committed by a registered representative. We have stated that, by its very nature, conversion of customer assets "is extremely serious and patently antithetical to the 'high standards of commercial honor and just and equitable principles of trade'" that underpin the self-regulation of the securities markets.[80] Indeed, only three (out of approximately eighty) NASD rule violations carry a standard sanction of a bar, and as we have previously noted in this regard, "the misconduct (absent mitigating factors) poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry, and a bar is therefore an appropriate remedy."[81] We have also recently reiterated our view that "misconduct

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[78] 15 U.S.C. § 78s(e)(2). Applicants do not allege, and the record does not show, that FINRA's action imposed an undue burden on competition.

[79] FINRA Sanction Guidelines 38 (2007). Although the Commission is not bound by FINRA's guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (April 11, 2008), 93 SEC Docket 5122, 5125, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[80] *Wheaton D. Blanchard*, 46 S.E.C. 365, 366 (1976).

[81] *Charles C. Fawcett IV*, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157 n.27. The other two violations for which a bar is standard are the failure to respond in any manner to information requests from FINRA (*see* Sanction Guidelines at 35) and cheating during broker-dealer qualification examinations (*see id.* at 43).

involving a breach of fiduciary duty or dishonest conduct on the part of a fiduciary . . . [is] egregious."[82]

The specific circumstances of J. Mullins's misconduct serve only to aggravate the seriousness of these violations. As the NAC pointed out, J. Mullins acted with intent when he used the Foundation's property for himself.[83] He knew the gift certificates and wine were not his property, but he used them for his own purposes on seven separate occasions over a period of thirteen months.[84] We find, as did the NAC, that the timing of his misconduct, beginning as it did when Mrs. Weil was hospitalized, is also an aggravating circumstance. Also significant is that J. Mullins appears to have given incomplete and at times evasive answers and information to FINRA as it conducted its investigation in the summer of 2007 and began to ask pointed and specific questions about his personal use of Foundation property.[85]

J. Mullins now appears to argue before us that he tried to repay the Foundation quickly and claims that there were "issues with combining the different amounts (Boyd's vs wine vs Four Seasons) and multiple checks were held and not cashed for close to a year until details were decided." To the extent J. Mullins is suggesting that he tried to repay the Foundation immediately after he used the gift certificates and wine, the record—including his own testimony—contradicts this claim.[86] J. Mullins testified at the hearing that he did not remember

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[82] *James C. Dawson*, Investment Advisers Act Rel. No. 3057 (July 23, 2010), 98 SEC Docket 30697, 30703.

[83] *See* FINRA Sanction Guidelines at 7 (Principal Consideration 13 ("Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.")).

[84] *See* FINRA Sanction Guidelines at 6 (Principal Considerations 8 ("Whether the respondent engaged in numerous acts and/or a pattern of misconduct.") and 9 ("Whether the respondent engaged in the misconduct over an extended period of time.")).

[85] *See* FINRA Sanction Guidelines at 6-7 (Principal Considerations 10 ("Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.") and 12 ("whether the respondent attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA"); *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19053 (affirming imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct).

[86] J. Mullins claims that "[t]here is a definitive explanation for the timeline of the repayment which cannot be found in the record because the question was not asked of any party

(continued...)

that he owed the Foundation for the used gift certificates until the summer of 2007, more than a year after he had used them. And, as noted, he testified that he did not even realize that he needed to reimburse the Foundation for the wine he had drunk until he was "painted into a corner" by New Jersey regulators in September 2007. Although J. Mullins ultimately returned the funds he converted from the Foundation,[87] the fact that this reimbursement was delayed by more than a year and prompted by regulatory interest all but eliminates any mitigative effect J. Mullins's reimbursement has on his sanction.[88]

J. Mullins argues that the NAC was wrong to assign any significance to the fact that he began using the Foundation's gift certificates while Mrs. Weil was hospitalized, claiming that Foundation events scheduled prior to her hospitalization required him to purchase the gift certificates. However, the record shows the Foundation donated only a small amount of gift certificates to charity during this period. Moreover, even if we accept for the sake of argument that the Foundation needed to purchase the gift certificates when it did, this would not permit or excuse his conversion of those assets at any time, and far less so when Mrs. Weil was hospitalized and then recovering from illness.

Finally, J. Mullins points to his heretofore clean disciplinary history, and he asserts that his misconduct will not be repeated because the informal nature of the Foundation caused him to "mistakenly relax[] the more formal conduct normally associated with foundations" and the

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[86] (...continued)
during the hearing and only entered as an 'issue' into the record during closing arguments after testimony had been concluded." We reject this claim. J. Mullins himself testified extensively about the circumstances surrounding his return of the gift certificates, as did Beebe. J. Mullins's own failure to raise defenses and introduce evidence supporting those defenses despite clear notice of the charges against him does not render this proceeding unfair. *KPMG Peat Marwick*, 55 S.E.C. 1, 4 (2001) ("As long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, notice is sufficient."), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *see also supra* note 35. Moreover, the issue of J. Mullins's repayment was raised in pre-hearing briefing by FINRA. J. Mullins's tardy repayment was discussed as an aggravating factor in the Hearing Panel decision, as well, yet J. Mullins made no mention of this in his two briefs on appeal to the NAC.

[87] *See* FINRA Sanction Guidelines at 11 ("(a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury").

[88] *See* FINRA Sanction Guidelines at 6 (Principal Considerations 4 ("Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct."); *Arthur Lipper Corp.*, 46 S.E.C. 78, 98 (1975) (holding that repayment made after commencement of investigation into violative conduct has minimal mitigative weight), *aff'd*, 547 F.2d 171 (2d Cir. 1976).

character of his unique relationship with Mrs. Weil "contributed to the serious lapse in judgment." These arguments fail to mitigate the severity of J. Mullins's misconduct. As we have often noted, an applicant's "lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional."[89] And J. Mullins's claims that his misconduct will not be repeated because his relationship with Mrs. Weil will not be duplicated suggest a failure on his part to take responsibility for his actions.[90]

We support the NAC's conclusion that J. Mullins's misconduct "reveals a troubling disregard for fundamental principles of the securities industry" and that a bar is "necessary to deter him and others similarly situated from engaging in similar misconduct." We therefore affirm FINRA's imposition of a bar against J. Mullins for conversion and breach of fiduciary duty, finding that this sanction is neither excessive nor oppressive under the circumstances.[91]

B. K. Mullins's acceptance of a loan from Mrs. Weil without Firm approval

The NAC imposed upon K. Mullins a three-month suspension and $5,000 fine for borrowing funds from a customer without Firm approval.[92] In making its determination, the NAC noted that its Sanction Guidelines do not specifically address the acceptance of a customer loan without approval as a distinct violation, but it noted that the Guidelines' Principal Considerations apply to all sanctions determinations.

We note that K. Mullins's acceptance of the loan appears to have been an isolated violation, that the loan was received and then repaid in a matter of days, and that Mrs. Weil suffered no apparent financial harm from the transaction. However, $100,000 is a significant amount of money and represented a substantial benefit to the Mullinses, who needed the loan (at least temporarily) to help finance their new home. We find it troubling, as did the NAC, that no

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89 *Scott Epstein*, Exchange Act Rel. No. 59329 (Jan. 30, 2009), 95 SEC Docket 13833, 13865 (quoting *Keyes*, 89 SEC Docket at 801 n.20), *petition denied*, 416 F. App'x 142 (3d Cir. 2010) (unpub.).

90 *Epstein*, 95 SEC Docket at 13865 (rejecting applicant's "efforts to blame his conduct on his working environment" and noting that these efforts only served to "demonstrate his failure to accept responsibility for his own actions").

91 Although, as noted above, we have not included misuse of customer funds as a basis for J. Mullins's liability in this case, we conclude that the facts of this case still provide ample support for a bar based only on J. Mullins's conversion of Foundation property and his breach of fiduciary duties as an officer of the Foundation.

92 The NAC also concluded that J. Mullins's identical misconduct merited the same sanction but declined to impose additional sanctions in light of the bar already assessed against him. These sanctions against J. Mullins are therefore not on review before us.

documentation was created to memorialize this substantial loan or its terms of repayment, which left Mrs. Weil—and her estate, should she and her knowledge of the loan have passed away before the Mullinses fulfilled their obligation to repay her—extremely vulnerable. For these reasons, the potential for conflict of interest was great, and the failure to notify the Firm prevented it from assessing that conflict.[93] In light of the need to impress upon K. Mullins and other associated persons the need to prevent serious conflicts of interest with their clients by observing the restrictions on borrowing from customers, we conclude that FINRA's sanctions are appropriately remedial. We find the suspension, fine, and order to requalify neither excessive nor oppressive, and we affirm them.[94]

C. K. Mullins's failures to disclose information on compliance questionnaires

There is no FINRA sanction guideline for violations of Rule 2110 that involve associated persons' failures to disclose information to their member firms. Therefore, the NAC looked to the Guidelines' recommendation for sanctioning violations of the recordkeeping requirements in NASD Rule 3110. This guideline suggests a suspension of up to thirty business days and a fine of $1,000 to $10,000 or, in egregious cases, a suspension of up to two years or a bar as well as a fine of $10,000 to $100,000.[95] It also directs adjudicators to consider the nature and materiality of the inaccurate or missing information. Using this guidance, the NAC imposed upon K. Mullins a six-month suspension, a $15,000 fine, and an order to requalify for her failure to disclose her status as an officer and trustee of the Foundation and the loan she accepted from Mrs. Weil on Firm compliance questionnaires.[96]

In assessing the sanctions imposed on K. Mullins, we note, as did the NAC, that she failed to disclose her roles with the Foundation on three annual compliance questionnaires, and did not disclose the loan she accepted from Mrs. Weil on two different forms. The circumstances

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93 *See* NASD Notice to Members 03-62 (Oct. 2003) (discussing the Commission's approval of NASD Rule 2370 and noting that "[l]oans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct").

94 We note that K. Mullins does not make any specific arguments in mitigation of the sanctions imposed for her acceptance of a loan from Mrs. Weil, other than to argue that the loan did not violate NASD rules or Firm policy. We have rejected these arguments in our earlier discussions. *See supra* section III.B.

95 *See* FINRA Sanction Guidelines at 30.

96 It also concluded that a twelve-month suspension, $25,000 fine, and order to requalify were warranted for J. Mullins. However, because the NAC declined to impose these sanctions in light of the bar he had already received, the question of whether these sanctions are excessive or oppressive is not before us.

of her failure to disclose the loan were especially troubling, given that she had entered into the transaction with Mrs. Weil just days before she signed and submitted her compliance questionnaire in March 2005. The nature of the information withheld was serious, because K. Mullins's fiduciary role with the Foundation and the personal loan she received from her client were material and important to the Firm's ability to identify and manage real or potential conflicts of interest between its associated persons and their customers. Under the circumstances, we conclude, as did the NAC, that K. Mullins's disclosure failures were egregious.

Nevertheless, we note that some mitigating factors exist. K. Mullins asserts, as she did during sworn testimony at the hearing, that she was wrong to have failed to disclose her officer positions on disclosure forms, that she takes responsibility for her misstatements, and that "it was not intentional." The Hearing Panel noted in this regard that "K. Mullins appeared sincerely remorseful for these [disclosure] violations." Although the Hearing Panel did not credit her testimony that she had fully informed her branch management of her position as Foundation secretary and treasurer, the record does indicate that branch personnel were generally aware that K. Mullins was close to Mrs. Weil and helped her with the Foundation, lending some support to her argument that she was not engaged in a course of conduct designed to deceive Morgan Stanley about her involvement in the Foundation.[97] That K. Mullins appears to have cooperated fully with FINRA's investigation lends some further mitigative effect. We also observe that a reduction in sanctions is appropriate because we have set aside FINRA's finding that the Mullinses violated Rule 2110 by failing to disclose their roles as trustees of the Foundation. Accordingly, we reduce the sanction against K. Mullins for her disclosure failures to a four-month suspension and a $10,000 fine. We leave in place FINRA's order that she requalify upon

[97] K. Mullins also points out that she had a "pristine compliance record" until now, but, as we previously noted, this does not serve to mitigate the sanctions imposed. *See supra* note 89 and accompanying text.

her return to the industry. We affirm the NAC's decision to require K. Mullins to serve her suspensions consecutively,[98] as we concur with its determination that her failure to disclose information on compliance forms is "fundamentally different" from her failure to obtain the appropriate approval from her Firm before accepting a loan from a client,[99] and that consecutive suspensions appropriately remedy the two types of violation.

An appropriate order will issue.

By the Commission (Commissioners AGUILAR, PAREDES, and GALLAGHER; Chairman SCHAPIRO and Commissioner WALTER not participating).

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98 K. Mullins stated in her brief that her "time sanction has been satisfied" because she had already served it by the time of her appeal to the NAC. However, FINRA Rule 2370 automatically stays all sanctions (except for bars or expulsions) pending appeal, with the result that K. Mullins has not yet begun to satisfy any suspension imposed. FINRA notified K. Mullins of this in the February 24, 2011 transmittal letter accompanying the NAC's decision.

99 *Michael Patrick Siegel*, Exchange Act Rel. No. 58737 (Oct. 6, 2008), 94 SEC Docket 10501, 10520, *aff'd in rel. part*, 592 F.3d 147 (D.C. Cir. 2010).

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66373 / February 10, 2012

Admin. Proc. File No. 3-14302

In the Matter of

JOHN EDWARD MULLINS
and
KATHLEEN MARIA MULLINS

510 North Thurlow Avenue
Margate, NJ 08402

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART DISCIPLINARY ACTION

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

ORDERED that the findings of violation by FINRA against John E. Mullins and Kathleen M. Mullins be, and they hereby are, SUSTAINED, with the exception that FINRA's findings that (a) John E. Mullins violated NASD Rule 2330 by making improper use of customer funds, (b) John E. Mullins and Kathleen M. Mullins violated NASD Rule 3110 by failing to disclose information to their firm, and (c) John E. Mullins and Kathleen M. Mullins violated NASD Rules 3110 and 2110 by failing to disclose their status as trustees of the Foundation or its account be, and they hereby are, VACATED; and it is further

ORDERED that the bar imposed by FINRA on John E. Mullins be, and it hereby is, SUSTAINED, for converting customer funds and breaching his fiduciary duty to a customer in violation of NASD Rule 2110; and it is further

ORDERED that the ninety-day suspension, $5,000 fine, and order to requalify imposed upon Kathleen M. Mullins for accepting a loan from a customer without member firm approval, in violation of NASD Rules 2370 and 2110, be, and they hereby are, SUSTAINED; and it is further

ORDERED that the six-month suspension, $15,000 fine, and order to requalify imposed upon Kathleen M. Mullins for failing to disclose information to her firm, in violation of NASD Rules 3110 and 2110, be, and they hereby are, SET ASIDE; and it is further

ORDERED that Kathleen M. Mullins be suspended for four months, pay a $10,000 fine, and requalify for failing to disclose information to her firm, in violation of NASD Rule 2110; and it is further

ORDERED that Kathleen M. Mullins serve her two suspensions consecutively, not concurrently; and it is further

ORDERED that FINRA's order to pay costs, imposed jointly and severally upon John E. Mullins and Kathleen M. Mullins, be, and it hereby is, SUSTAINED.

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. 66389 / February 13, 2012

Admin. Proc. File No. 3-14555

In the Matter of

SGI INTERNATIONAL, *et al.*

SHIEGA RESOURCES CORP.
(n/k/a AFRICAN METALS CORPORATION),
Respondent

ORDER DISMISSING PROCEEDING

On September 20, 2011, the Commission instituted an administrative proceeding against Shiega Resources Corp. (n/k/a/ African Metals Corporation) ("African Metals") and seven other respondents under Section 12(j) of the Securities Exchange Act of 1934.[1] The Order Instituting Proceedings alleged that African Metals had violated periodic reporting requirements under Exchange Act Section 13(a), and sought to determine, based on those allegations, whether it was "necessary and appropriate for the protection of investors to suspend . . . or revoke" the registration of African Metals' securities.

On October 19, 2011, African Metals filed with the Commission a Form 15-12G, pursuant to Exchange Act Rule 12(g)-4(a),[2] to terminate voluntarily the registration of its securities under Exchange Act Section 12(g). Under Rule 12g-4(a), an issuer's registration is terminated ninety days after filing, in this case, January 17, 2012. Also on January 17, 2012, the Division of Enforcement filed a motion to dismiss its proceeding against African Metals. African Metals has not responded.

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[1] 15 U.S.C. § 78*l*(j). The remaining respondents defaulted, resulting in the revocation of the registration of their securities.

[2] 17 C.F.R. § 240.12g-4(a) (certification of termination of registration under Section 12(g)).

We have determined to grant the Division's motion. African Metals no longer has a class of securities registered under Section 12 of the Exchange Act. Because revocation or suspension of registration are the only remedies available in a proceeding instituted under Section 12(j) of the Exchange Act, we find that it is appropriate to dismiss these proceedings against African Metals.[3]

Accordingly, it is ORDERED that this proceeding be, and it hereby is, dismissed with respect to Shiega Resources Corp. (n/k/a African Metals Corporation).

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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3 *See, e.g.*, *Enamelon, Inc.*, Securities Exchange Act Rel. No. 52956 (Dec. 15, 2005), 86 SEC Docket 2944.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66387 / February 13, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3370 / February 13, 2012

INVESTMENT COMPANY ACT OF 1940
Rel. No. 29945 / February 13, 2012

Admin. Proc. File No. 3-14355

In the Matter of DONALD L. KOCH and KOCH ASSET MANAGEMENT LLC	ORDER GRANTING EXTENSION

I.

The Chief Administrative Law Judge, Brenda P. Murray, has moved, pursuant to Commission Rule of Practice 360(a)(3),[1] for an extension of time to issue an initial decision in this proceeding. For the reasons set forth below, we have determined to grant the law judge's motion.

On April 25, 2011, we issued an Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") against Donald L. Koch, President, Chief Compliance Officer, and founder of Koch Asset Management LLC ("Koch Asset Management"), a registered investment adviser. The OIP alleges that Koch and Koch Asset Management engaged in a scheme to "mark-the-close" of certain thinly-traded securities held in investment accounts of Koch Asset Management's clients, failed to seek "best execution" for their clients in breach of their fiduciary duty, failed to maintain communications related to the placement and execution of orders to purchase securities, and failed to implement policies and procedures reasonably designed to

1 17 C.F.R. § 201.360(a)(3).

prevent or detect certain prohibited transactions. The OIP alleges that Koch and Koch Asset Management willfully violated the antifraud provisions of the Securities Exchange Act of 1934 and of the Investment Advisers Act of 1940. The OIP also alleges that Koch Asset Management violated, and Koch willfully aided and abetted and caused the firm's violations of, Advisers Act Section 206 and Rule 206(4)-7 thereunder, which require investment advisers to implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder. The OIP further alleges that Koch Asset Management violated, and Koch willfully aided and abetted and caused the firm's violations of, Advisers Act Section 204 and Rule 204-2(a)(7) thereunder, which require the maintenance of certain books and records.

The OIP directs the presiding law judge to hold a public hearing to take evidence regarding the allegations and the appropriate sanctions, and to issue an initial decision no later than 300 days from the date of service of the OIP, *i.e.*, by February 24, 2012. On January 23, 2012, Judge Murray filed a motion pursuant to Commission Rule of Practice 360(a)(3)[2] requesting an extension of time of ninety days to issue such decision.

II.

We adopted Rules of Practice 360(a)(2) and 360(a)(3) as part of an effort to enhance the timely and efficient adjudication and disposition of Commission administrative proceedings,[3] setting mandatory deadlines for completion of administrative hearings. We further provided for the granting of extensions to those deadlines under certain circumstances, if supported by a motion from the Chief Administrative Law Judge.[4]

Judge Murray supports her extension request by stating that the law judge assigned to this proceeding informed Judge Murray that "she will not be able to issue an Initial Decision by February 24, 2012, because the proceeding was stayed for seventy days for settlement negotiations." She further states that the "hearing concluded today [*i.e.*, January 23, 2012], and briefs have yet to be filed." It is Judge Murray's "best judgment that an Initial Decision cannot be issued by the February 24, 2012 deadline." Under the circumstances, it appears appropriate in the public interest to grant the Chief Law Judge's request and to extend the deadline for issuance of a decision in this matter.

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[2] 17 C.F.R. § 201.360(a)(3).

[3] *See Adopting Release*, Securities Act Rel. No. 8240 (June 11, 2003), 80 SEC Docket 1463.

[4] While we intend to grant extensions sparingly, we may authorize an extension on the basis of the Chief Administrative Law Judge's motion, if we determine that "additional time is necessary or appropriate in the public interest." 17 C.F.R. § 201.360(a)(3).

Accordingly, IT IS ORDERED that the deadline for filing the initial decision in this matter be, and it hereby is, extended until May 24, 2012.

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. 66388 / February 13, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14758

In the Matter of	
Tempest Microsystems, Inc., Transform Logic Corp., Troy Acquisition Corp., The Troy Investment Fund, Two Way TV (US), Inc., University Real Estate Fund 12 Ltd., US Dry Cleaning Corp. (n/k/a US Dry Cleaning Services Corp.), UST Liquidating Corp., USTelematics, Inc., and Vendalux Corp., 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 Tempest Microsystems, Inc., Transform Logic Corp., Troy Acquisition Corp., The Troy Investment Fund, Two Way TV (US), Inc., University Real Estate Fund 12 Ltd., US Dry Cleaning Corp. (n/k/a US Dry Cleaning Services Corp.), UST Liquidating Corp., USTelematics, Inc., and Vendalux Corp.

II.

After an investigation, the Division of Enforcement alleges that:

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A. RESPONDENTS

1. Tempest Microsystems, Inc. (CIK No. 1122115) is a void Delaware corporation located in Poway, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tempest Microsystems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2006, which reported a net loss of $780 for the prior nine months.

2. Transform Logic Corp. (CIK No. 788176) is a Utah corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Transform Logic 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 April 30, 1993, which reported a net loss of $178,000 for the prior six months. On April 14, 1993, Transform Logic filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Arizona, and the case was terminated on July 8, 1996. As of February 7, 2012, the company's stock (symbol "TLOG") was traded on the over-the-counter markets.

3. Troy Acquisition Corp. (CIK No. 1112864) is a suspended California corporation located in Irvine, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Troy Acquisition is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001.

4. The Troy Investment Fund (CIK No. 99927) is a California limited partnership located in Costa Mesa, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). The Troy Investment Fund 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, 1997, which reported a net loss of over $24,000 for the prior three months.

5. Two Way TV (US), Inc. (CIK No. 1159041) is a void Delaware corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Two Way TV US 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, 2002, which reported a net loss of over $2.7 million for the prior nine months. As of February 7, 2012, the company's stock (symbol "TWTV") was traded on the over-the-counter markets.

6. University Real Estate Fund 12 Ltd. (CIK No. 713010) is a dissolved Colorado limited partnership located in Dallas, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). University Real Estate Fund 12 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, 1993, which reported a net loss of over $2.5 million for the prior nine months.

7. US Dry Cleaning Corp. (n/k/a US Dry Cleaning Services Corp.) (CIK No. 920317) is a forfeited Delaware corporation located in Newport Beach, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). US Dry Cleaning is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2008, which reported a net loss of over $6.5 million for the prior nine months. On March 4, 2011, US Dry Cleaning filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Central District of California, and the case was still pending as of February 8, 2012.

8. UST Liquidating Corp. (CIK No. 817820) is a suspended California corporation located in San Francisco, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). UST Liquidating 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, 2008, which reported ending net liabilities in liquidation of $17,000 as of March 31, 2008.

9. USTelematics, Inc. (CIK No. 1372175) is a void Delaware corporation located in Wood Dale, Illinois with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). USTelematics 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 February 29, 2008, which reported a net loss of over $4.1 million for the prior nine months. On April 7, 2009, USTelematics filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was terminated on May 5, 2010.

10. Vendalux Corp. (CIK No. 919601) is a void Delaware corporation located in Tempe, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Vendalux is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2006, which reported a net loss of over $6,000 for the prior six months.

B. DELINQUENT PERIODIC FILINGS

11. 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.

12. 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.

13. 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. 66395 / February 14, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14547

In the Matter of	:	
Dustin D. White,	:	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934**
Respondent.	:	

I.

On September 13, 2011, the Securities and Exchange Commission ("Commission") issued an Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Notice of Hearing against Dustin D. White ("White" or "Respondent").

In connection with these proceedings, White has submitted an Offer of Settlement ("Offer"), which the Commission has determined to accept. Solely for the purpose of settling these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, prior to a hearing pursuant to the Commission's Rules of Practice, 17 C.F.R. § 201.100 et seq., and without admitting or denying the Commission's findings contained herein, except as to the jurisdiction of the Commission over him and over the subject matter of these proceedings, and the findings contained in Section II.2 below, which are admitted, White 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.

II.

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

1. White, age 34, resides in Mesa, Arizona. He was associated with Wellco Energy L.L.C. ("Wellco") from July 2008 through June 2009. He offered and sold fractional undivided interests in oil and gas rights in two projects for which he received commissions of twenty percent

of the funds invested by investors that he solicited. He was engaged in the business of effecting transactions in securities for the account of others. However, during the time period from July 2008 through June 2009, White was not registered with the Commission as a broker or dealer and was not associated with a broker-dealer registered with the Commission.

2. On August 31, 2011, a final judgment was entered against White permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Wellco Energy L.L.C., et al., civil action number 1:09-CV-1114, in the United States District Court for the District of Colorado.

3. The Commission's complaint alleged that in connection with White's sale of fractional undivided interests in oil and gas rights, he made misrepresentations to investors that Wellco was the operator of the oil and gas projects. The complaint alleged that, in fact, Wellco did not operate the projects and instead purchased fractional undivided interests from another company, which interests it further divided and resold to investors. The complaint further alleged it was misrepresented that Wellco's principal, Justin William Rifkin, had extensive experience operating oil and gas prospects. In fact, the complaint alleged, Rifkin's experience was limited to raising money through sales of other oil and gas projects, and he had no experience operating oil and gas wells. The complaint further alleged that, in connection with White's offers and sales, misrepresentations were made about how investors' funds would be used, and investors were not told that White would receive a twenty percent commission. The complaint also alleged that White sold securities when no registration statement was in effect or filed with the Commission. The complaint further alleged White was not registered or associated with a broker or dealer during the time when he offered and sold the securities at issue in the case.

III.

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

Accordingly, it is ORDERED that pursuant to Section 15(b)(6) of the Exchange Act, Respondent White 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 barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

INVESTMENT ADVISERS ACT OF 1940
Release No. 3373 / February 15, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14550

In the Matter of **JAMES DAVIS RISHER,** **Respondent.**	**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940**

I.

James Davis Risher (the "Settling Respondent"), pursuant to Rule 240(a) of the Rules of Practice for the Securities and Exchange Commission ("Commission") [17 C.F.R. § 201.240(a)] submitted an Offer of Settlement ("Offer") in the above-captioned proceeding, which was instituted against him on September 14, 2011 by the Commission, pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act").

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party prior to a hearing pursuant to the Commission's Rules of Practice, 17 C.F.R. § 201.100 et seq., and without admitting or denying the findings contained 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, the Settling Respondent consents to the entry of an Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(f) of the Advisers Act ("Order") by the Commission containing the following findings and remedial sanctions set forth below.

III.

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

1. From no later than January 2007 through July 2010, Risher was the sole trader for a purported private equity fund operating under various names including the Safe Harbor Private Equity Fund, Managed Capital Fund, and Preservation of Principal Fund (collectively the

"Fund"). During the relevant time period, Risher acted as an unregistered investment adviser to the Fund.

2. Risher falsely represented to investors that the Fund earned annual returns ranging from 14% to 124% by investing in public equity securities through a FINRA-regulated broker-dealer. Only a fraction of the money raised was actually invested; Risher instead misappropriated a large portion for his personal use. He also misrepresented that the Fund was registered in Bermuda and that it was audited annually by a Bermudan auditor. Risher boasted to investors that he had substantial experience in trading equities and providing wealth and asset management services. In reality, Risher had no such experience but rather a lengthy criminal history, spending 11 of the last 21 years in jail instead of growing a thriving retail brokerage business as he claimed.

3. On September 9, 2011, Risher pled guilty to one count of mail fraud, one count of money laundering, and one count of engaging in an illegal monetary transaction, in violation of Title 18 United States Code, Sections 1341 and 2, Sections 1956(a)(1)(A)(i) and 2, and Sections 1957 and 2, respectively, before the United States District Court for the Middle District of Florida in the criminal case entitled United States v. James Davis Risher, Case No. 8:11-CR-343-T-23TGW.

4. Count one of the criminal information to which Risher pled guilty alleged, among other things, that Risher defrauded investors and obtained money and property by means of materially false and misleading statements which caused investors to invest their funds with him in the Fund. Count two of the criminal information alleged, among other things, that Risher knowingly conducted a financial transaction involving proceeds from the unlawful activity of mail fraud. Count three alleged, among other things, that Risher knowingly engaged in a monetary transaction involving funds that were the proceeds of his criminal activity of mail fraud.

IV.

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

Accordingly, it is hereby **ORDERED**:

Pursuant to Section 203(f) of the Advisers Act that Respondent Risher is hereby barred from association with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3371 / February 15, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14759

In the Matter of **ROBERT PINKAS,** **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 NOTICE OF HEARING**

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") against Robert Pinkas ("Respondent" or "Pinkas").

II.

After an investigation, the Division of Enforcement alleges that:

A. <u>SUMMARY</u>

1. This case involves the misappropriation of assets, material misrepresentations, and the violation of a Commission bar order by Pinkas. Pinkas misappropriated $173,000 from a fund client to pay the costs of defending himself in an unrelated Commission investigation. Pinkas subsequently made material misrepresentations to the fund's investors about the misappropriation, telling them that multiple law firms had reviewed the fund's indemnification provisions and concluded that his use of fund assets to cover his attorney's fees in the other matter was appropriate. Pinkas then misappropriated $632,000 from the same client to cover the disgorgement he agreed to pay as part of a settlement in the other matter with the Commission. After misappropriating these funds, Pinkas violated an investment adviser bar imposed in the other matter by continuing to associate with an investment adviser.

B. <u>RESPONDENT</u>

2. Pinkas, 58 years old, is a resident of Shaker Heights, Ohio. During the relevant period, Pinkas was an investment adviser to several pooled investment vehicles. Pinkas was a

defendant in *SEC v. Brantley Capital Management, LLC, et al.*, an action involving, among other things, the overvaluation of portfolio investments and misrepresentations and omissions to an advisory client. Pinkas agreed to a settlement with the Commission in September 2010, pursuant to which he was enjoined from violating various provisions of the federal securities laws, ordered to pay a $325,000 civil penalty and $632,729 in disgorgement and prejudgment interest, barred from serving as an officer or director of a publicly-traded company for five years, and barred from associating with any investment adviser with a right to reapply after one year.

C. OTHER RELEVANT ENTITIES

3. Brantley Partners IV, L.P. ("Brantley IV") is a private equity fund and Delaware limited partnership. Pinkas provided investment advisory services to Brantley IV through a now-defunct entity called Brantley Management Company, Inc. ("BMC"). Pinkas owned 100 percent of BMC, and had the final say on all investment decisions for Brantley IV and all governance issues related to BMC.

4. Brantley Equity Partners, L.P. ("BEP") is a private equity fund and Delaware limited partnership. Pinkas continued to advise BEP after he had been barred from doing so by the Commission. BEP's sole investor and limited partner is VCFA Holdings, IV, LLC. BEP's general partner and investment adviser is Brantley Management V, LLC.

5. Brantley Management V, LLC ("BMV") is an investment adviser and Delaware limited liability company. Pinkas associated with this investment adviser in violation of his bar. BMV is the investment adviser to BEP. BMV is managed by Pinkas Holdings, LLC.

6. Pinkas Holdings, LLC is a Pinkas-owned Delaware limited liability company that manages BEP. Pinkas Holdings employs BEP's functional CFO, prepares BEP's financial statements, assists in the preparation of portfolio valuations, assists the fund's independent auditors during their audit, and maintains the fund's books and records.

7. VCFA Holdings, IV, LLC ("VCFA") is a Delaware limited liability company and the sole limited partner and investor in BEP. VCFA is controlled by Venture Capital Fund of America III, Inc., a Delaware corporation.

D. ALLEGATIONS

The Brantley Capital Investigation

8. On August 13, 2009, the Commission filed a civil action against Pinkas for his conduct relating to Brantley Capital Corp. ("BCC"), a business development company.[1] Pinkas was the CEO of both BCC and the investment advisory firm that managed BCC's investments. The complaint alleged, among other things, that between 2002 and 2005, Pinkas, as BCC's CEO, materially overstated in periodic reports the value of equity and debt investments in two private companies that represented more than half of BCC's portfolio. The complaint also alleged that Pinkas, as BCC's investment adviser, misrepresented the value of the equity and debt

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1 *SEC v. Brantley Capital Management, LLC, et al.*, 1:09-cv-1906 (N.D. Ohio).

investments to BCC's board of directors. The complaint charged violations of the antifraud provisions of the Exchange and Advisers Acts, and the Exchange Act's reporting, books and records, internal controls, and lying to auditors provisions.

9. On September 28, 2010, U.S. District Court Judge James Gwin entered a final judgment, by consent, against Pinkas. Judge Gwin permanently enjoined Pinkas from violating all of the statutes and rules charged in the complaint, ordered him to pay a $325,000 civil penalty and $632,729 in disgorgement and prejudgment interest, and barred him from serving as an officer or director of a public-traded company for five years. On October 5, 2010, the Commission barred Pinkas, also by consent, from associating with any investment adviser with a right to reapply after one year.[2]

Pinkas's Misappropriation of Assets To Pay Legal Fees and Related Misrepresentations

10. During the BCC investigation and litigation described above, Pinkas was also acting as investment adviser to several private equity funds, one of which was Brantley IV.[3] Brantley IV and BCC were both invested in Flight Options, LLC, one of the two private companies whose valuations the Commission staff was investigating in the BCC matter.

11. Brantley IV's Limited Partnership Agreement ("LPA") allowed Pinkas to be indemnified for expenses incurred in connection with actions that "arise out of or in any way relate" to Brantley IV. Pinkas, however, used Brantley IV assets to pay for a portion of his legal fees throughout the BCC investigation and litigation even after he understood that the Commission's BCC investigation did not relate to Brantley IV. In March 2009, Commission staff told Pinkas's counsel that the charges it intended to pursue related to Pinkas's conduct as BCC's CEO and investment adviser. Consistent with this notice, Pinkas's March 2009 submission to the Commission arguing that he should not be charged did not discuss Brantley IV; it focuses exclusively on Pinkas's conduct with respect to BCC.

12. Although the Brantley IV LPA required Pinkas to disclose to the fund that he was using its assets to cover his SEC-related legal costs, Pinkas did not provide this disclosure until the Commission had filed an enforcement action against him in August 2009. The Brantley IV LPA states that the fund "shall pay the expenses incurred by the persons indemnified hereunder in defending a civil or criminal action, suit or proceeding, upon receipt of a written undertaking by these persons to repay the Partnership if the persons shall be determined not to be entitled to indemnification therefor as provided herein . . . ." Pinkas never provided this undertaking with respect to the fund assets he used to cover his SEC-related legal costs.

13. Pinkas only disclosed his use of fund assets for SEC-related legal costs after various Brantley IV investors questioned his calculation of the fund's management fee and the magnitude of expenses that he charged to the fund. On August 27, 2009, Pinkas told a Brantley

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2 In the Matter of Robert P. Pinkas, Investment Advisers Act Rel. No. 3097 (October 5, 2010).

3 Pinkas provided these advisory services through an entity he owned and controlled called Brantley Management Company, Inc. ("BMC").

IV investor that he had been using Brantley IV assets to help cover his legal fees in the SEC investigation relating to BCC. The investor objected, telling Pinkas that such use violated the Brantley IV LPA and that no fund assets should be used to pay legal costs associated with the SEC investigation and litigation. Between January 2009, when he became aware that the BCC investigation did not relate to Brantley IV, and his August 2009 disclosure, Pinkas used $173,128 of Brantley IV assets to fund his SEC defense.

Pinkas's Material Misrepresentations Regarding His Misappropriation

14. Following Pinkas's August 27 disclosure, the investor and other Brantley IV limited partners continued to object to Pinkas's use of fund assets to pay for SEC-related defense costs. In an apparent effort to quell their objections, on September 25, 2009, Pinkas told the investor that multiple law firms had advised that the indemnification language of Brantley IV's LPA allowed Pinkas to use Brantley IV assets to pay for the legal costs associated with the SEC investigation and litigation. Pinkas repeated this assertion during an October 19, 2009 meeting with the same, as well as another, Brantley IV investor. Pinkas knew or was extremely reckless in not knowing that these statements were false. Through his counsel, Pinkas has acknowledged that he never asked any lawyer whether he could use Brantley IV assets to pay for SEC-related defense costs, and no lawyer ever told him that he could.

Pinkas Misappropriates Additional Brantley IV Assets to Pay Disgorgement

15. In addition to his misappropriation of fund assets to pay his legal fees, Pinkas misappropriated Brantley IV assets to pay for his disgorgement and prejudgment interest in the BCC matter. On August 10, 2010, Pinkas directed the transfer of $632,000 from Brantley IV's checking account to an account he controlled. Eight days later, he executed a consent in the BCC matter, agreeing to the entry of a final judgment that, among other things, ordered him to pay disgorgement and prejudgment interest of $632,729. Pinkas has admitted that he used the $632,000 to pay the disgorgement and prejudgment interest ordered pursuant to his settlement of the BCC matter.

16. The Brantley IV LPA did not permit Pinkas to use fund assets to pay for his disgorgement. Pinkas's disgorgement payment—which represented his ill-gotten gains from his fraudulent conduct at BCC—did not "arise out of or in any way relate" to Brantley IV. Moreover, the Brantley IV LPA provides that any indemnification for settlements must be approved by the fund's Advisory Committee. Pinkas did not disclose the "indemnification" of the disgorgement amount to Brantley IV or its Advisory Committee, much less receive approval for the indemnification. Pinkas also did not provide a written undertaking to repay the fund should he not be entitled to the indemnification, as the Brantley IV LPA required.

Pinkas's Violation of the Commission's Bar Order

17. As noted above, on October 5, 2010, the Commission barred Pinkas from associating with an investment adviser with a right to reapply after one year. Pinkas has violated his bar since its imposition by associating with BMV, an unregistered investment adviser. BMV is the investment adviser to BEP, a private equity fund whose sole investor is VCFA.

18. Pinkas managed and remained the BMV point of contact for BEP's portfolio investments after October 5. On behalf of BMV, Pinkas continued to report to VCFA on the BEP portfolio companies' financial condition and liquidity prospects in calls, emails, and quarterly investment reports that he drafted.

19. Pinkas also continued to manage BEP's investments by representing the fund on the boards of four of its portfolio companies.

20. In addition, in November and December 2010, Pinkas, acting for BMV, advised VCFA about new investment opportunities involving two portfolio companies.

21. Following the imposition of the bar, Pinkas also retained sole authority to direct BEP's finances on behalf of BMV, including having final say on all expenses charged to BEP and sole control of cash receipts and disbursements.

22. In addition, during BEP's 2010 audit, Pinkas, again performing the function of a BMV partner, responded in February 2011 on behalf of BEP "management" to audit inquiries regarding management's integrity and financial controls.

23. Finally, in February 2011, Pinkas, acting for BMV, personally negotiated a one-year extension of the BEP fund with BMV as investment adviser. Pinkas continued to advise BEP and manage its investments until May 2011.

24. In addition to managing BEP's investment portfolio, Pinkas violated his bar order by controlling BMV, thus associating with an investment adviser. Pinkas controlled this investment adviser through his ownership and control of Pinkas Holdings. Pinkas Holdings receives the $250,000 per year management fee that VCFA pays quarterly for BMV's advisory services and to cover BMV's operating expenses.

25. The BEP management fee does not cover the costs of running Pinkas Holdings and without Pinkas personally funding Pinkas Holdings, BMV would not be able to serve as investment adviser to BEP.

26. Additionally, Pinkas Holdings employs BMV's CFO, who is essential to BMV's ability to advise BEP: among other tasks, he prepares BEP's financial statements, assists in the preparation of prtfolio valuations, assists the fund's independent auditors during their audit, and maintains its books and records.

27. Pinkas also controls BMV through his power, as "founder member" under BMV's LLC Agreement, to remove BMV's general partner and nominal investment adviser to BEP.

28. As compensation for its advisory services to BEP, BMV has a 20 percent "carried interest" in the fund, which provides that BMV would receive 20 percent of the proceeds from the sales of BEP's portfolio companies. Pinkas personally owns about 5 percent of BMV. Additionally, Pinkas pays himself a salary of $420,000 through Pinkas Holdings. Because

Pinkas Holdings also engages in business unrelated to BMV, Pinkas also obtained a personal benefit from BMV's $250,000 management fee. Pinkas benefited by using services the management fee paid for (at least in part), including office space, an office manager, secretary, health insurance, phones, computers, and copiers.

E. VIOLATIONS

29. As a result of the conduct described above, Pinkas willfully violated Advisers Act Section 203(f), which prohibits anyone who has been barred from being associated with an investment adviser willfully to become associated with an investment adviser without the consent of the Commission.

30. Pinkas also willfully violated, or in the alternative, willfully aided and abetted and caused violations of Advisers Act Sections 206(1), 206(2), and 206(4), which prohibit investment advisers from using the mails or any means or instrumentality of interstate commerce, directly or indirectly to, with respect to Section 206(1), employ any device, scheme, or artifice to defraud any client or prospective client; with respect to Section 206(2), engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; and with respect to Section 206(4), engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. Finally, Pinkas willfully violated, or in the alternative, willfully aided and abetted and caused violations of Rule 206(4)-8, which prohibits investment advisers to pooled investment vehicles from making any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pool investment vehicle; or otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

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 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 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 Advisers Act Sections 203(f), 206(1), 206(2), and 206(4) and Rule 206(4)-8, whether Respondent should be ordered to pay a civil penalty pursuant to Section 203(i) of the Advisers Act, and whether Respondent should be ordered to pay disgorgement pursuant to Section 203(j) 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

17 CFR Part 275

[Release No. IA-3372; File No. S7-17-11]

RIN 3235-AK71

Investment Adviser Performance Compensation

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission" or "SEC") is adopting amendments to the rule under the Investment Advisers Act of 1940 that permits investment advisers to charge performance based compensation to "qualified clients." The amendments revise the dollar amount thresholds of the rule's tests that are used to determine whether an individual or company is a qualified client. These rule amendments codify revisions that the Commission recently issued by order that adjust the dollar amount thresholds to account for the effects of inflation. In addition, the rule amendments: provide that the Commission will issue an order every five years in the future adjusting the dollar amount thresholds for inflation; exclude the value of a person's primary residence and certain associated debt from the test of whether a person has sufficient net worth to be considered a qualified client; and add certain transition provisions to the rule.

EFFECTIVE DATE: The amendments are effective on [insert date 90 days after publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Daniel K. Chang, Senior Counsel, or C. Hunter Jones, Assistant Director, at 202-551-6792, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE, Washington,

DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to rule 205-3 [17 CFR 275.205-3] under the Investment Advisers Act of 1940 ("Advisers Act" or "Act").[1]

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I. INTRODUCTION

Section 205(a)(1) of the Investment Advisers Act generally restricts an investment adviser from entering into, extending, renewing, or performing any investment advisory contract that provides for compensation to the adviser based on a share of capital gains on, or capital appreciation of, the funds of a client.[2] Congress restricted these compensation arrangements (also known as performance compensation or performance fees) in 1940 to protect advisory clients from arrangements it believed might encourage advisers to take undue risks with client

[1] 15 U.S.C. 80b. Unless otherwise noted, all references to statutory sections are to the Investment Advisers Act, and all references to rules under the Advisers Act, including rule 205-3, are to Title 17, Part 275 of the Code of Federal Regulations [17 CFR 275].

[2] 15 U.S.C. 80b-5(a)(1).

funds to increase advisory fees.[3] Congress subsequently authorized the Commission to exempt any advisory contract from the performance fee restrictions if the contract is with persons that the Commission determines do not need the protections of those restrictions.[4]

The Commission adopted rule 205-3 in 1985 to exempt an investment adviser from the restrictions against charging a client performance fees in certain circumstances.[5] The rule, when adopted, allowed an adviser to charge performance fees if the client had at least $500,000 under management with the adviser immediately after entering into the advisory contract ("assets-under-management test") or if the adviser reasonably believed the client had a net worth of more than $1 million at the time the contract was entered into ("net worth test"). The Commission stated that these standards would limit the availability of the exemption to clients who are financially experienced and able to bear the risks of performance fee arrangements.[6]

In 1998, the Commission amended rule 205-3 to, among other things, change the dollar amounts of the assets-under-management test and net worth test to adjust for the effects of

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3 H.R. Rep. No. 2639, 76th Cong., 3d Sess. 29 (1940). Performance fees were characterized as "heads I win, tails you lose" arrangements in which the adviser had everything to gain if successful and little, if anything, to lose if not. S. Rep No. 1775, 76th Cong., 3d Sess. 22 (1940).

4 Section 205(e) of the Advisers Act. Section 205(e) of the Advisers Act authorizes the Commission to exempt conditionally or unconditionally from the performance fee prohibition advisory contracts with persons that the Commission determines do not need its protections. Section 205(e) provides that the Commission may determine that persons do not need the protections of section 205(a)(1) on the basis of such factors as "financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with [section 205]."

5 Exemption To Allow Registered Investment Advisers to Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account, Investment Advisers Act Release No. 996 (Nov. 14, 1985) [50 FR 48556 (Nov. 26, 1985)] ("1985 Adopting Release"). The exemption applies to the entrance into, performance, renewal, and extension of advisory contracts. *See* rule 205-3(a).

6 *See* 1985 Adopting Release, *supra* note 5, at Sections I.C and II.B. The rule also imposed other conditions, including specific disclosure requirements and restrictions on calculation of performance fees. *See id.* at Sections II.C – E.

inflation since 1985.[7] The Commission revised the former from $500,000 to $750,000, and the latter from $1 million to $1.5 million.[8]

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[9] amended section 205(e) of the Advisers Act to require that the Commission adjust for inflation the dollar amount thresholds in rules under the section, rounded to the nearest $100,000.[10] Separately, the Dodd-Frank Act also required that we adjust the net worth standard for an "accredited investor" in rules under the Securities Act of 1933 ("Securities Act"),[11] such as Regulation D,[12] to exclude the value of a person's primary residence.[13]

In May 2011, the Commission published a notice of intent to issue an order revising the dollar amount thresholds of the assets-under-management and the net worth tests of rule 205-3 to account for the effects of inflation.[14] Our release ("Proposing Release") also proposed to amend the rule itself to reflect any inflation adjustments to the dollar amount thresholds that we might

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7 *See* Exemption To Allow Investment Advisers To Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account, Investment Advisers Act Release No. 1731 (July 15, 1998) [63 FR 39022 (July 21, 1998)] ("1998 Adopting Release").

8 *See id.* at Section II.B.1.

9 Pub. L. No. 111-203, 124 Stat. 1376 (2010).

10 *See* section 418 of the Dodd-Frank Act (requiring the Commission to issue an order every five years revising dollar amount thresholds in a rule that exempts a person or transaction from section 205(a)(1) of the Advisers Act if the dollar amount threshold was a factor in the Commission's determination that the persons do not need the protections of that section).

11 15 U.S.C. 77a - 77z-3.

12 *See* 17 CFR 230.501 - .508.

13 *See* section 413(a) of the Dodd-Frank Act.

14 *See* Investment Adviser Performance Compensation, Investment Advisers Act Release No. 3198 (May 10, 2011) [76 FR 27959 (May 13, 2011)] ("Proposing Release"). Rule 205-3 is the only exemptive rule issued under section 205(e) of the Advisers Act that includes dollar amount tests, which are the assets-under-management and net worth tests. *See supra* text accompanying note 10.

issue by order.[15] In addition, our proposed amendments (i) stated that the Commission would issue an order every five years adjusting for inflation the dollar amount thresholds, (ii) excluded the value of a person's primary residence from the test of whether a person has sufficient net worth to be considered a "qualified client," and (iii) modified certain transition provisions of the rule.

On July 12, 2011, we issued an order revising the threshold of the assets-under-management test to $1 million, and of the net worth test to $2 million.[16] We received approximately 50 comments on our proposed rule amendments.[17] Today we are adopting amendments to rule 205-3 largely as we proposed them, with modifications to address issues raised by commenters, as discussed further below.

II. DISCUSSION

A. Inflation Adjustment of Dollar Amount Thresholds

We are amending rule 205-3 in three ways to carry out the required inflation adjustment of the dollar amount thresholds of the rule. First, we are revising the dollar amount thresholds that currently apply to investment advisers, to codify the order we issued on July 12, 2011. As amended, paragraph (d) of rule 205-3 provides that the assets-under-management threshold is $1 million and that the net worth threshold is $2 million, which are the revised amounts we issued by order.[18] Although some commenters objected to raising these dollar amount thresholds,[19]

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15 *Id.*

16 *See* Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205-3 under the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3236 (July 12, 2011) [76 FR 41838 (July 15, 2011)] ("Order"). The Order is effective as of September 19, 2011. *Id.* The order applies to contractual relationships entered into on or after the effective date, and does not apply retroactively to contractual relationships previously in existence.

17 The comment letters we received on the Proposing Release are available on our website at http://www.sec.gov/comments/s7-17-11/s71711.shtml.

18 The calculation used to determine the revised dollar amounts in the tests is described below. *See*

section 205(e) of the Advisers Act requires that we adjust the amounts for inflation.[20]

Second, we are adding to rule 205-3, as proposed, a new paragraph (e) that states that the Commission will issue an order every five years adjusting for inflation the dollar amount thresholds of the assets-under-management and net worth tests of the rule.[21] These periodic adjustments are required by the Advisers Act,[22] and most commenters supported this amendment to the rule.[23]

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infra note 25. As we noted in the Proposing Release, an investment adviser can include in determining the amount of assets under management the assets that a client is contractually obligated to invest in private funds managed by the adviser. Only bona fide contractual commitments may be included, *i.e.*, those that the adviser has a reasonable belief that the investor will be able to meet. *See* Proposing Release, *supra* note 15, at n.17.

19 Some commenters maintained, for example, that raising the dollar amount thresholds would limit the investment options for those investors that fall below the new thresholds, and would harm smaller funds that rely on investments from investors with more limited resources to operate. *See, e.g.*, Comment Letter of Crescat Portfolio Management LLC (May 11, 2011) ("Crescat Portfolio Comment Letter"); Comment Letter of Hyonmyong Cho (June 8, 2011) ("H. Cho Comment Letter"); Comment Letter of Harold Clyde (June 4, 2011) ("H. Clyde Comment Letter"); Comment Letter of Douglas Estadt (June 7, 2011) ("D. Estadt Comment Letter"). Other commenters supported raising the dollar amount thresholds, noting that this change would ensure that the "qualified client" standard is limited to clients who are financially experienced and able to bear the risks of performance fee arrangements. *See, e.g.,* Comment Letter of Better Markets, Inc. (July 11, 2011) ("Better Markets Comment Letter"); Comment Letter of Certified Financial Planner Board of Standards, Inc. (July 11, 2011) ("CFP Board Comment Letter"); Comment Letter of Managed Funds Association (July 8, 2011) ("MFA Comment Letter"); Comment Letter of North American Securities Administrators Association, Inc. (July 11, 2011) ("NASAA Comment Letter").

20 *See supra* note 10.

21 Rule 205-3(e) provides that the Commission will issue an order on or about May 1, 2016 and approximately every five years thereafter adjusting the assets-under-management and net worth tests for the effects of inflation. These adjusted amounts will apply to contractual relationships entered into on or after the effective date of the order, and will not apply retroactively to contractual relationships previously in existence. *See supra* note 16. The proposed rule would have stated that the Commission's order would be *effective* on or about May 1. We have deleted the word "effective" in the final rule to reflect the fact that the effective date will likely be later than May 1. *See* Order, *supra* note 16 (setting effective date of the order approximately 60 days after the order's issuance).

22 *See supra* note 10.

23 *See* Comment Letter of Chris Barnard (May 31, 2011) ("C. Barnard Comment Letter"); Better Markets Comment Letter; CFP Board Comment Letter; Comment Letter of Investment Adviser Association (July 11, 2011) ("IAA Comment Letter"); MFA Comment Letter. One commenter

Amended rule 205-3(e) also specifies the price index on which future inflation adjustments will be based.[24] The index is the Personal Consumption Expenditures Chain-Type Price Index ("PCE Index"),[25] which is published by the Department of Commerce.[26] The dollar amount tests we adopted in 1998 will be the baseline for future calculations.[27] As we noted in the Proposing Release, the use of the PCE Index is appropriate because it is an indicator of inflation in the personal sector of the U.S. economy[28] and is used in other provisions of the

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stated that the dollar amount tests should be reevaluated more frequently. *See* NASAA Comment Letter.

24 *See* rule 205-3(e)(1).

25 The revised dollar amounts in the tests reflect inflation as of the end of 2010, and are rounded to the nearest $100,000 as required by section 418 of the Dodd-Frank Act. The 2010 PCE Index is 111.112, and the 1997 PCE Index is 85.433. These values are slightly different from those provided in the Proposing Release because of periodic adjustments issued by the Department of Commerce. *See* Proposing Release, *supra* note 15, at n.19; *see also infra* note 26. Assets-under-management test calculation to adjust for the effects of inflation: 111.112/85.433 x $750,000 = $975,431; $975,431 rounded to the nearest multiple of $100,000 = $1 million. Net worth test calculation to adjust for the effects of inflation: 111.112/85.433 x $1.5 million = $1,950,862; $1,950,862 rounded to the nearest multiple of $100,000 = $2 million.

26 The values of the PCE Index are available from the Bureau of Economic Analysis, a bureau of the Department of Commerce. *See* http://www.bea.gov. *See also* http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=64&ViewSeries=NO&Java=no&Request3Place=N&3Place=N&FromView=YES&Freq=Year&FirstYear=1997&LastYear=2010&3Place=N&Update=Update&JavaBox=no#Mid.

27 Rule 205-3(e) provides that the assets-under-management and net worth tests will be adjusted for inflation by (i) dividing the year-end value of the PCE Index for the calendar year preceding the calendar year in which the order is being issued, by the year-end value of the PCE Index for the calendar year 1997, (ii) multiplying the threshold amounts adopted in 1998 ($750,000 and $1.5 million) by that quotient, and (iii) rounding each product to the nearest multiple of $100,000. For example, for the order the Commission would issue in 2016, the Commission would (i) divide the year-end 2015 PCE Index by the year-end 1997 PCE Index, (ii) multiply the quotient by $750,000 and $1.5 million, and (iii) round each of the two products to the nearest $100,000.

28 *See* Clinton P. McCully, Brian C. Moyer, and Kenneth J. Stewart, "Comparing the Consumer Price Index and the Personal Consumption Expenditures Price Index," Survey of Current Business (Nov. 2007) at 26 n.1 (available at http://www.bea.gov/scb/pdf/2007/11%20november/1107_cpipce.pdf) (PCE Index measures changes in "prices paid for goods and services by the personal sector in the U.S. national income and product accounts" and is primarily used for macroeconomic analysis and forecasting). *See also* FEDERAL RESERVE BOARD, MONETARY POLICY REPORT TO THE CONGRESS (Feb. 17, 2000) at n.1 (available at http://www.federalreserve.gov/boarddocs/hh/2000/february/ReportSection1.htm#FN1) (noting

federal securities laws.[29] Commenters agreed that the PCE Index is an appropriate indicator of inflation[30] and that the 1998 dollar amounts are the proper baseline for future inflation adjustments.[31]

B. Exclusion of the Value of Primary Residence from Net Worth Determination

We also are amending the net worth test in the definition of "qualified client" in rule 205-3 to exclude the value of a natural person's primary residence and certain debt secured by the property.[32] This change, although not required by the Dodd-Frank Act, is similar to the change that Act requires the Commission to make to rules under the Securities Act, such as Regulation D.[33]

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the reasons for using the PCE Index rather than the consumer price index).

29 *See* Proposing Release, *supra* note 15, at n.22 and accompanying text.

30 *See* Better Markets Comment Letter; IAA Comment Letter; Comment Letter of Georg Merkl (July 11, 2011) ("G. Merkl Comment Letter"). Although two commenters asserted that inflation is not the proper unit of measure by which to adjust net worth requirements, *see* Comment Letter of David Hale (May 20, 2011) and Comment Letter of Joseph V. Delaney (undated) ("J. Delaney Comment Letter"), section 205(e) of the Advisers Act requires that we adjust the dollar amount thresholds of rule 205-3 for inflation.

31 *See* C. Barnard Comment Letter; G. Merkl Comment Letter.

32 Rule 205-3(d)(1)(ii)(A).

33 *See* section 413(a) of the Dodd-Frank Act (requiring the Commission to adjust any net worth standard for an "accredited investor" as set forth in Commission rules under the Securities Act to exclude the value of a natural person's primary residence). The Dodd-Frank Act does not require that the net worth standard for an accredited investor be adjusted periodically for the effects of inflation, although it does require the Commission at least every four years to "undertake a review of the definition, in its entirety, of the term 'accredited investor' ... [as defined in Commission rules] as such term applies to natural persons, to determine whether the requirements of the definition should be adjusted or modified for the protection of investors, in the public interest, and in light of the economy." *See* section 413(b)(2)(A) of the Dodd-Frank Act. In January 2011, we proposed rule amendments to adjust the net worth standards for accredited investors in our rules under the Securities Act. *See* Net Worth Standard for Accredited Investors, Securities Act Release No. 9177 (Jan. 25, 2011) [76 FR 5307 (Jan. 31, 2011)] ("Accredited Investor Proposing Release"). We recently adopted those amendments substantially as proposed. *See* Net Worth Standard for Accredited Investors, Securities Act Release No. 9287 (Dec. 21, 2011) [76 FR 81793 (Dec. 29, 2011)] ("Accredited Investor Adopting Release").

We proposed to exclude the value of a person's primary residence and the debt secured by the residence, up to the fair market value of the residence, from the calculation of a person's net worth.[34] A number of commenters supported the proposed exclusion.[35] Many agreed with our statement in the Proposing Release that the value of an individual's residence may have little relevance to the person's financial experience and ability to bear the risks of performance fee arrangements.[36] The Certified Financial Planner Board of Standards noted in its comment letter that the value of an individual's equity in a residence is more likely to be a function of the length of time that the investor has owned the home, than to be a function of the investor's experience or sophistication. Commenters also stated that excluding the value of the residence would promote regulatory consistency because it parallels the treatment of a person's primary residence in determinations of net worth under other securities rules.[37]

Many commenters objected to the exclusion of the value of a person's primary residence from the calculation of net worth. Commenters expressed concern that the exclusion would limit the investment options of less wealthy investors and restrict their access to advisory arrangements that include performance fees.[38] Some argued that excluding the value of a residence would harm advisers to smaller funds that rely on investments from less wealthy

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34 *See* Proposing Release, *supra* note 15, at n.28 and accompanying text.

35 *See, e.g.,* C. Barnard Comment Letter; CFP Board Comment Letter; MFA Comment Letter; NASAA Comment Letter.

36 *See, e.g.,* C. Barnard Comment Letter; CFP Board Comment Letter; NASAA Comment Letter.

37 *See, e.g.,* Better Markets Comment Letter; CFP Board Comment Letter; NASAA Comment Letter.

38 *See, e.g.,* Comment Letter of Matthew Gee (June 14, 2011); Comment Letter of Gunderson Dettmer Stough Villeneuve Franklin Hachigan LLP (July 8, 2011) ("Gunderson Dettmer Comment Letter"); Comment Letter of Alvin Suvil (July 17, 2011) ("A. Suvil Comment Letter").

investors.[39] Others argued that home ownership, compared to home rental, may in fact evidence greater rather than less financial experience on the part of individuals.[40]

We continue to believe that the value of a person's residence generally has little relevance to the individual's financial experience and ability to bear the risks of performance fee arrangements, and therefore little relevance to the individual's need for the Act's protections from performance fee arrangements.[41] Although the process of purchasing and financing a home can contribute to an individual's financial experience, the *value* of the individual's equity interest in the residence reflects the prevailing market values at the time and can be a function of time in paying down the associated debt rather than a function of deliberate investment decision-making. In addition, because of the generally illiquid nature of residential assets, the value of an individual's home equity may not help the investor to bear the risks of loss that are inherent in performance fee arrangements.

Our exclusion of the value of a person's primary residence from the net worth calculation under the rule is similar to the approach that the Commission has taken in other rules to

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39 *See, e.g.,* Comment Letter of Roger Alsop (June 16, 2011) ("R. Alsop Comment Letter"); J. Delaney Comment Letter; Comment Letter of Molly Huntsman (June 23, 2011) ("M. Huntsman Comment Letter"); Comment Letter of Greg Thornton (June 2, 2011); Comment Letter of Greg J. Wimmer (June 3, 2011).

40 *See* M. Gee Comment Letter; Comment Letter of Douglas Wood (June 13, 2011) ("D. Wood Comment Letter"). Some commenters appeared to object to excluding residence from net worth on public policy grounds because the exclusion would discourage home ownership. *See, e.g.,* Comment Letter of Ron Cuningham (June 25, 2011) ("R. Cuningham Comment Letter"); D. Wood Comment Letter.

41 For example, an individual who meets the net worth test only by including the value of his primary residence in the calculation is unlikely to be as able to bear the risks of performance fee arrangements as an individual who meets the test *without* including the value of her primary residence. We stated in 2006, when we proposed a minimum net worth threshold for establishing when an individual could invest in hedge funds pursuant to the safe harbor of Regulation D, that the value of an individual's personal residence may bear little or no relationship to that person's knowledge and financial sophistication. *See* Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles, Investment Advisers Act Release No. 2576 (Dec. 27, 2006) [72 FR 400 (Jan. 4, 2007)] at Section III.B.3.

determine the financial qualifications of investors. For example, the Commission excluded the value of a person's primary residence and associated liabilities from the determination of whether a person is a "high net worth customer" in Regulation R under the Securities Exchange Act of 1934.[42] The Commission also excluded the value of a residence from the determination of whether an individual has sufficient investments to be considered a "qualified purchaser" under the Investment Company Act of 1940 ("Investment Company Act") who can invest in certain private funds that are not registered under that Act.[43] As discussed above, this approach is also reflected in the Commission's recent amendments to the definition of "accredited investor" in rules under the Securities Act, including Regulation D, as required by the Dodd-Frank Act.[44]

Some commenters voiced particular concern about the exclusion of the residential value *at the same time* that we adjust the dollar amount thresholds for inflation, and argued that the two changes together could cause too much change at one time.[45] We note that we revised the dollar

42 *See, e.g.*, Definition of Terms and Exemptions Relating to the "Broker" Exceptions for Banks, Securities Exchange Act Release No. 56501 (Sept. 24, 2007) [72 FR 56514 (Oct. 3, 2007)] at Section II.C.1 (excluding primary residence and associated liabilities from the fixed-dollar threshold for "high net worth customers" under Rule 701 of Regulation R, which permits a bank to pay an employee certain fees for the referral of a high net worth customer or institutional customer to a broker-dealer without requiring registration of the bank as a broker-dealer).

43 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." A "qualified purchaser" under section 2(a)(51) of the Investment Company Act [15 U.S.C. 80a-2(a)(51)] includes, among others, any natural person who owns not less than $5 million in investments, as defined by the Commission. Rule 2a51-1 under the Investment Company Act includes within the meaning of "investments" real estate held for investment purposes. 17 CFR 270.2a51-1(b)(2). A personal residence is not considered an investment under rule 2a51-1, although residential property may be treated as an investment if it is not treated as a residence for tax purposes. *See* Privately Offered Investment Companies, Investment Company Act Release No. 22597 (Apr. 3, 1997) [62 FR 17512 (Apr. 9, 1997)] at text accompanying and following n.48.

44 *See supra* note 33 and accompanying text.

45 *See, e.g.*, R. Alsop Comment Letter; R. Cuningham Comment Letter; M. Huntsman Comment

amount threshold of the net worth test last July and that the revision was effective in September. Our current amendment of the net worth test to exclude the value of a residence, which will be effective in May 2012, will be effective approximately eight months after the previous change to the net worth test. Any further revisions of the dollar amount thresholds of rule 205-3 to adjust for inflation are not scheduled to occur until 2016.[46]

Some of the commenters who disagreed with the proposal to raise the dollar amount threshold of the net worth standard or to exclude the value of a residence from net worth, also disagreed that a person's net worth should be used as a measure of eligibility for the exemption from the performance fee restrictions.[47] These commenters did not recommend an alternative standard that is objective and verifiable, and that would effectively distinguish between those investors who do, and those who do not, need the protections of the Act's performance fee restrictions.[48]

Our amendment of the net worth standard of rule 205-3 differs from the proposed amendment in one respect. The approach we are adopting today will generally require any increase in the amount of debt secured by the primary residence in the 60 days before the advisory contract is entered into to be included as a liability. As discussed below, this change will prevent debt that is incurred shortly before entry into an advisory contract from being

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Letter; A. Suvil Comment Letter.

46 *See* rule 205-3(e).

47 *See, e.g.,* J. Delaney Comment Letter; Comment Letter of David Hale (May 20, 2011); Comment Letter of Tom Irvin (May 18, 2011).

48 One commenter suggested that a "qualified client" include an individual with a bachelor's degree in a finance-related major or a master's degree in any area from an accredited U.S. university. *See* Comment Letter of Troy Clark (June 23, 2011). Although the suggested finance-related major requirement would help to determine whether an individual is financially knowledgeable, the suggested master's degree requirement would not, and neither requirement would establish whether an investor has sufficient practical experience in making investment decisions or is capable of bearing the risks of loss associated with performance fee arrangements.

excluded from the calculation of net worth merely because it is secured by the individual's home.

As proposed, the amended rule would have excluded the value of a person's primary residence and the amount of *all* debt secured by the property that is no greater than the property's current market value.[49] The proposed treatment of debt secured by the primary residence was the same as we proposed for the calculation of net worth for accredited investors in our rules under the Securities Act.[50]

In the Proposing Release, we requested comment on whether the amendments to the rule should contain a timing provision to prevent investors from inflating their net worth by borrowing against their homes, effectively converting their home equity — which is excluded from the net worth calculation under the amendments adopted today — into cash or other assets that would be included in the net worth calculation.[51] In particular, we indicated that the amendments could provide that the net worth calculation must be made as of a date 30, 60, or 90

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49 Proposed rule 205-3(d)(1)(ii)(A).

50 *See* Accredited Investor Proposing Release, *supra* note 33, at text preceding n.28. One commenter recommended that *all* debt secured by the residence (not just debt up to the fair market value of the residence) be excluded from the net worth calculation. *See* G. Merkl Comment Letter. The commenter argued that excluding the debt secured by the residence up to the fair market value of the residence would require an investor to obtain a valuation of the residence from a real estate agent, which would be burdensome and costly. We note that the rule requires an estimate of the fair market value, but does not require a third party opinion on valuation for the primary residence. Furthermore, many online services provide residence valuations at no charge. In addition, if the amount of mortgage debt exceeds the value of the primary residence, excluding the entire debt would result in a higher net worth than under a conventional calculation that takes into account all assets and all liabilities. The commenter also acknowledged that, although he disagreed with the net worth test as a measure of financial sophistication, for purposes of calculating residence-related indebtedness a "close proximity between the time of taking on new debt and entering into the advisory contract could work." *Cf.* rule 205-3(d)(1)(ii)(A)(2) (requiring that all residence-related indebtedness incurred within 60 days before the advisory contract is entered into, other than as a result of the acquisition of the primary residence, be subtracted from a client's net worth for purposes of determining whether the client is a "qualified client").

51 *See* Proposing Release, *supra* note 15, at Section II.B.2.

days prior to entry into the investment advisory contract.[52] This request for comment was similar to the one we made when we proposed amendments to the net worth standard in rules under the Securities Act, including Regulation D.[53]

As in the recently adopted accredited investor rule amendments adjusting the net worth standard,[54] the rule amendments to the qualified client net worth standard include a specific provision addressing the treatment of incremental debt secured by the primary residence that is incurred in the 60 days before the advisory contract is entered into.[55] Debt secured by the primary residence generally will not be included as a liability in the net worth calculation under the rule, except to the extent it exceeds the estimated value of the primary residence. Under the final rule amendments, however, any increase in the amount of debt secured by the primary residence in the 60 days before the advisory contract is entered into generally will be included as a liability, even if the estimated value of the primary residence exceeds the aggregate amount of debt secured by such primary residence.[56] Net worth will be calculated only once, at the time the

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52 *Id.* Two commenters stated that the net worth calculation should not be required to be made on a specified date prior to the day the advisory contract is entered into. *See* C. Barnard Comment Letter; G. Merkl Comment Letter. Another commenter stated that the net worth calculation should be required to be made on a specified date prior to the day the advisory contract is entered into to assist in protecting against refinancing transactions intended solely to inflate net worth. *See* NASAA Comment Letter.

53 *See* Accredited Investor Proposing Release, *supra* note 33, at Specific Request for Comment Number 7 in Section II.A.

54 *See* Accredited Investor Adopting Release, *supra* note 33, at text following n.34.

55 *See* rule 205-3(d)(1)(ii)(A)*(2)*.

56 The fair market value of the primary residence is determined as of the time the advisory contract is entered into, even if the investor has changed his or her primary residence during the 60-day period. The rule provides an exception to the 60-day look-back provision for increases in debt secured by a primary residence where the debt results from the acquisition of the primary residence. Without this exception, an individual who acquires a new primary residence in the 60-day period before the advisory contract is entered into may have to include the full amount of the mortgage incurred in connection with the purchase of the primary residence as a liability, while excluding the full value of the primary residence, in a net worth calculation. The 60-day look-back provision is intended to address incremental debt secured against a primary residence

advisory contract is entered into. The individual's primary residence will be excluded from assets and any indebtedness secured by the primary residence, up to the estimated value of the primary residence at that time, will be excluded from liabilities, except if there is incremental debt secured by the primary residence incurred in the 60 days before the advisory contract is entered into. If any such incremental debt is incurred, net worth will be reduced by the amount of the incremental debt. In other words, the 60-day look-back provision requires investors to identify any increase in mortgage debt over the 60-day period prior to entering into an advisory contract and count that debt as a liability in calculating net worth.

This approach should significantly reduce the incentive for persons to induce potential clients to take on incremental debt secured against their homes to facilitate a near-term investment. We believe a 60-day look-back period is long enough to decrease the likelihood of circumvention of the standard by taking on new debt and waiting for the look-back period to expire. The 60-day period also is designed to be short enough to accommodate investors who may have increased their mortgage debt in the ordinary course at some point prior to entering into an advisory contract.

Another alternative to address the possibility of parties attempting to circumvent the standard would have been to provide that any debt secured by the primary residence that was incurred after the original purchase date of the primary residence would have been counted as a liability, whether or not the fair market value of the primary residence exceeded the value of the total amount of debt secured by the primary residence. We believe that such a standard would be overly restrictive and not provide for ordinary course changes to debt secured by a primary

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that is incurred for the purpose of circumventing the net worth standard of the rule. It is not intended to address debt secured by a primary residence that is incurred in connection with the acquisition of a primary residence within the 60-day period.

residence, such as refinancing and drawings on home equity lines. We believe that the approach we are adopting here will protect investors by addressing circumstances in which they may have been induced to incur new debt secured by the primary residence for the purpose of inflating net worth under the rule, while still permitting ordinary course changes to debt secured by the primary residence. This approach is similar to the approach the Commission recently adopted for accredited investor rule amendments adjusting the net worth standard, and it responds to commenters who urged the Commission to promote regulatory consistency in the treatment of primary residences in other similar contexts in order to promote fairness, facilitate enforcement, and provide clarity for both industry and regulators.[57]

C. Transition Provisions

We proposed two new transition provisions that would allow an investment adviser and its clients to maintain existing performance fee arrangements that were permissible when the advisory contract was entered into, even if the performance fees would not be permissible under the contract if it were entered into at a later date. We are adopting the two transition rules substantially as proposed, which commenters supported.[58] At the suggestion of one commenter we also are adopting an additional transition provision to address certain transfers of interest, as discussed below.[59] The amendments replace the current transition rules section of rule 205-3.

Paragraphs (1) and (2) of rule 205-3(c) are designed so that restrictions on performance fees apply only to new contractual arrangements and do not apply to new investments by clients (including equity owners of "private investment companies") who met the definition of

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57 *See* Accredited Investor Adopting Release, *supra* note 33, at text following n.46; *see, e.g.,* Better Markets Comment Letter; NASAA Comment Letter.

58 Rule 205-3(c)(1); rule 205-3(c)(2). *See, e.g.*, C. Barnard Comment Letter; Gunderson Dettmer Comment Letter; M. Huntsman Comment Letter; IAA Comment Letter; MFA Comment Letter.

59 *See* rule 205-3(c)(3).

"qualified client" when they entered into the advisory contract, even if they subsequently do not meet the dollar amount thresholds of the rule.[60] This approach minimizes the disruption of existing contractual relationships that met applicable requirements under the rule at the time the parties entered into them.

Rule 205-3(c)(1)[61] provides that, if a registered investment adviser entered into a contract and satisfied the conditions of the rule that were in effect when the contract was entered into, the adviser will be considered to satisfy the conditions of the rule.[62] If, however, a natural person or company that was not a party to the contract becomes a party, the conditions of the rule in effect at the time they become a party will apply to that person or company. This provision means, for example, that if an individual met the $1.5 million net worth test in effect before the effective date of our 2011 order and entered into an advisory contract with a registered investment adviser before that date, the client could continue to maintain assets (and invest additional assets) with the adviser under that contract even though the net worth test was subsequently raised to $2 million and he or she no longer met the new test. If, however, another person becomes a party to

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60 A "private investment company" is a company that is excluded from the definition of an "investment company" under the Investment Company Act by reason of section 3(c)(1) of that Act. Rule 205-3(d)(3). Under rule 205-3(b), the equity owner of a private investment company, or of a registered investment company or business development company, is considered a client of the adviser for purposes of rule 205-3(a). We adopted this provision in 1998, and the provision was not affected by our subsequent rule amendments and related litigation concerning the registration of certain hedge fund advisers. *See* 1998 Adopting Release, *supra* note 7; *Goldstein v. Securities and Exchange Commission*, 451 F.3d 873 (D.C. Cir. 2006).

61 Rule 205-3(c)(1), as amended, modifies the existing transition rule in rule 205-3(c)(1), which permits advisers and their clients that entered into a contract before August 20, 1998, and satisfied the eligibility criteria in effect on the date the contract was entered into, to maintain their existing performance fee arrangements.

62 One commenter supported the provisions allowing advisers to continue to provide advisory services under performance fee arrangements that were permitted at the time the contract was entered into but stated that the rule should prohibit an adviser from charging performance fees to investors that are not qualified clients with respect to money committed after the effective date for the rule amendments. *See* G. Merkl Comment Letter. We believe such an approach would be unnecessarily disruptive to advisory relationships.

that contract, the current net worth threshold will apply to the new party when he or she becomes a party to the contract.[63]

Rule 205-3(c)(2) provides that, if a registered investment adviser previously was not required to register with the Commission pursuant to section 203 of the Act and did not register, section 205(a)(1) of the Act will not apply to the contractual arrangements into which the registered adviser entered when it was not registered with the Commission.[64] This means, for example, that if an investment adviser to a private investment company with 50 individual investors was exempt from registration with the Commission in 2009, but then subsequently registered with the Commission because it was no longer exempt from registration or because it chose voluntarily to register, section 205(a)(1) will not apply to the contractual arrangements the adviser entered into before it registered, including the accounts of the 50 individual investors with the private investment company and any additional investments they make in that company. If, however, any other individuals become new investors in the private investment company or if

63 Rule 205-3(c)(1). Similarly, a person who invests in a private investment company advised by a registered investment adviser must satisfy the rule's conditions when he or she becomes an investor in the company. *See* rule 205-3(b) (equity owner of a private investment company is considered a client of a registered investment adviser for purposes of rule 205-3(a)).

64 Section 205(a)(1) will apply, however, to contractual arrangements into which the adviser enters after it is required to register with the Commission. *See* rule 205-3(c)(2). The approach of subsection (c)(2) is similar to the transition provisions we adopted for the registration of investment advisers to private funds. *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)]. We are adopting the subsection substantially as proposed, but have made minor changes to clarify that the transition provision applies only to contractual arrangements with advisers that were not required to register *and* did not register with the Commission. Our proposed subsection would have applied to contractual arrangements with any registered investment adviser that previously was "exempt" from the requirement to register with the Commission. The revised language clarifies that the transition provision applies to contractual arrangements with advisers when they were not required to register (even if they were not "exempt"), and does *not* apply to contractual arrangements entered into with advisers when they were registered (even if they were not required to register). Investment advisers that previously registered already are subject to section 205(a)(1) and rule 205-3, and therefore would not need the transition relief of rule 205-3(c)(2).

the original investors became investors in a different private investment company managed by the adviser after the adviser registers with the Commission, section 205(a)(1) will apply to the adviser's relationship with the investors with regard to their new investments.[65]

Finally, at the suggestion of one commenter, we have revised the third paragraph of rule 205-3(c), to allow for limited transfers of interests from a qualified client to a person that was not a party to the contract and is not a qualified client at the time of the transfer.[66] The approach we are taking is similar to the approach we adopted in rule 3c-6 under the Investment Company Act. Rule 3c-6 provides that, in the case of a transfer of ownership interest in a private investment company by gift or bequest, or pursuant to an agreement relating to a legal separation or divorce, the beneficial owner of the interest will be considered to be the person who transferred the interest.[67] We believe that, when those types of transfers occur, the transferee does not make a separate investment decision to enter into an advisory contract with the adviser, but is the recipient, perhaps involuntarily, of the benefits of a pre-existing contractual relationship. Because of the circumstances of these transfers, we believe the transferee is not of the type that

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65 One commenter recommended that we revise the rule to accommodate fund-of-funds purchases when the acquiring funds are private investment companies. *See* MFA Comment Letter. The commenter recommended that the rule "clarify" that an acquiring private investment company is able to pay performance fees to the adviser of an acquired private investment company even if some of the investors in the acquiring private investment company are not qualified clients at the time the investment is made in the acquired private investment company. We are not making the suggested revision to the final rule, because it would permit advisers to pool small client accounts to circumvent the eligibility standards of rule 205-3(d)(1) and would permit performance fee arrangements that currently are not permissible under rule 205-3(b). As we stated in 1998, rule 205-3(b) specifies that the requirement to look through to each investor of a private investment company applies to each tier of a funds-of-funds structure. *See* 1998 Adopting Release, *supra* note 7, at Section II.C. ("Under [Rule 205-3(b)], each 'tier' of such entities must be examined in this manner. Thus, if a private investment company seeking to enter into a performance fee contract (first tier company) is owned by another private investment company (the second tier company), the look through provision applies to the second (and any other) level private investment company, and thus the adviser must look to the ultimate client to determine whether the arrangement satisfies the requirements of the rule.").

66 *See* Gunderson Dettmer Comment Letter.

67 *See* rule 3c-6(b) under the Investment Company Act [17 CFR 270.3c-6(b)].

needs the protections of the performance fee restrictions. We are therefore amending paragraph (3) of rule 205-3(c) to provide that, if an owner of an interest in a private investment company transfers an interest by gift or bequest, or pursuant to an agreement related to a legal separation or divorce, the transfer will not cause the transferee to "become a party" to the contract and will not cause section 205(a)(1) of the Act to apply to such transferee. Thus, transfers in these circumstances will not cause the transferee to have to meet the definition of a qualified client under rule 205-3.[68]

D. Effective Date

The rule amendments we are adopting today will be effective on [insert date 90 days after publication in the Federal Register]. In addition, in order to minimize the disruption of contractual relationships that met applicable requirements at the time the parties entered into them, the Commission will not object if advisers rely or relied upon the amended transition provisions of rule 205-3(c) before that date.[69]

III. COST-BENEFIT ANALYSIS

The Commission is sensitive to the costs and benefits imposed by its rules. In the Proposing Release, we analyzed the costs and benefits of the proposed rules and sought comment on all aspects of the cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in the analysis. Only two commenters addressed the cost-benefit

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68 A gift transfer, however, would need to be a bona fide gift and could not be used as a means to avoid the protections of section 205 of the Act, for example by transferring an interest in a private fund supposedly as a gift but in reality in exchange for payment.

69 As discussed above, some advisers may have entered into contractual relationships with clients who met the requirements of the rule at the time the parties entered into them, but who no longer meet the requirements of the amended rule. *See supra* Section II.C. For example, some registered investment advisers may have entered into advisory contracts with clients who met the $1.5 million net worth test when that test was applicable, but who would not meet the $2 million net worth test of the revised rule.

analysis.[70] These commenters focused on the costs of the rule but did not provide any empirical data.

As stated above, section 205(a)(1) of the Advisers Act generally restricts an investment adviser from entering into an advisory contract that provides for performance-based compensation.[71] Congress restricted performance compensation arrangements to protect advisory clients from arrangements it believed might encourage advisers to take undue risks with client funds to increase advisory fees.[72] Congress subsequently authorized the Commission in section 205(e) of the Advisers Act to exempt any advisory contract from the performance fee restrictions if the contract is with persons that the Commission determines do not need the protections of those restrictions. Section 205(e) provides that the Commission may determine that persons do not need the protections of section 205(a)(1) on the basis of such factors as "financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with [section 205]."

The Commission adopted rule 205-3 to exempt an investment adviser from the restrictions against charging a client performance fees where a client has a specified net worth or amount of assets under management. Section 418 of the Dodd-Frank Act amended section 205(e) to require that the Commission adjust for inflation the dollar amount thresholds in rules promulgated under section 205(e) within one year of enactment of the Dodd-Frank Act and every five years thereafter. Generally an inflation adjustment is designed to help make the dollar

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70 *See* Comment Letter of Phillip Goldstein (May 24, 2011) ("P. Goldstein Comment Letter"); G. Merkl Comment Letter.

71 *See supra* Section I.

72 *Id.*

amount thresholds in a provision continue to serve the same purposes over time. The amendments to rule 205-3 providing that the Commission will issue orders every five years adjusting for inflation the dollar amount thresholds of the rule will codify the Dodd-Frank Act's amendment of section 205(e) of the Advisers Act that requires the Commission to issue these orders.[73] Also, pursuant to section 418's requirements, the Commission issued an order in July 2011 revising the threshold of the assets-under-management test to $1 million, and of the net worth test to $2 million. The rule amendments will codify in the rule the changes already made to the dollar amount thresholds in the July 2011 Order, and will have no separate economic effect.

As proposed, we are amending rule 205-3 to exclude the value of a natural person's primary residence and certain debt secured by the property from the determination of whether a person has sufficient net worth to be considered a "qualified client." We are also modifying the transition provisions of the rule to take into account performance fee arrangements that were permissible when they were entered into. We analyze the costs and benefits of these provisions below.

A. Benefits

The exclusion of the value of an individual's primary residence will benefit certain investors. As discussed above, the Act's restrictions on performance fee arrangements are designed to protect advisory clients from arrangements that encourage advisers to take undue risks with client funds to increase advisory fees, while rule 205-3 is designed to permit clients who are financially experienced and able to bear the risks of performance fee arrangements to

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[73] Section 418 of the Dodd-Frank Act.

enter into those arrangements.[74] We believe that the value of an individual's primary residence may bear little or no relationship to that person's financial experience or ability to bear the risks of performance fee arrangements. The value of the individual's equity interest in the residence reflects the prevailing market values at the time and can be a function of time in paying down the associated debt rather than a function of deliberate investment decision-making. In addition, because of the generally illiquid nature of residential assets, the value of an individual's home equity may not help the investor to bear the risks of loss that are inherent in performance fee arrangements. Therefore, some of the clients who do not meet the net worth test of rule 205-3 without including the value of their primary residence may not possess the financial experience or ability to bear the risks of performance fee arrangements. We estimate that the exclusion of the value of an individual's primary residence will result in up to 1.3 million households that no longer qualify as "qualified clients" under the revised net worth test and therefore will now be protected by the performance fee restrictions in section 205 of the Advisers Act.[75]

As discussed above, the exclusion of the value of an individual's primary residence from the calculation of net worth under the rule is similar to changes that Congress required the Commission to make to rules under the Securities Act, including Regulation D.[76] As we noted when we recently adopted those rule amendments, section 413(a) of the Dodd-Frank Act required us to adjust the "accredited investor" net worth standards of certain rules under the

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[74] *See supra* notes 3 and 6.

[75] *See infra* notes 79-81. As discussed above, the amendments to rule 205-3 also exclude from the net worth test the amount of debt secured by the primary residence that is no greater than the property's current market value. The exclusion of the debt might limit these benefits in some circumstances. For example, if a client meets the net worth test as a result of the exclusion of debt secured by the primary residence and the market value of the primary residence were to decline to the extent that the debt could not be satisfied by the sale of the residence, the client might be less able to bear the risks related to the performance fee contract and the investments that the adviser might make on behalf of the client.

[76] *See supra* note 33.

Securities Act that apply to individuals, by "excluding the value of the primary residence."[77] The amendment to rule 205-3 under the Advisers Act we are adopting today, as some commenters argued, will promote regulatory consistency in the treatment of primary residences between this rule and other rules that the Commission has adopted that distinguish high net worth individuals from less wealthy individuals.[78]

The amendments to the rule's transition provisions will allow advisory clients and investment advisers to avoid certain costs resulting from the statutory mandate to adjust for inflation and the Commission's resultant July 2011 Order. The amendments allow an investment adviser and its clients to maintain existing performance fee arrangements that were permissible when the advisory contract was entered into, even if performance fees would not be permissible under the contract if it were entered into at a later date. These transition provisions are designed so that the restrictions on the charging of performance fees apply to new contractual arrangements and do not apply retroactively to existing contractual arrangements, including investments in private investment companies. Otherwise, advisory clients and investment advisers might have to terminate contractual arrangements into which they previously entered and enter into new arrangements, which could be costly to investors and advisers.

B. Costs

The amendments exclude the value of a person's primary residence and generally exclude debt secured by the property (if no greater than the current market value of the residence) from the calculation of a person's net worth.[79] Based on data from the Federal Reserve Board,

[77] *See* Accredited Investor Adopting Release, *supra* note 33, at n.18 and accompanying text.

[78] *See supra* notes 42-44 and 57 and accompanying text.

[79] As discussed above, any increase in the amount of debt secured by the primary residence in the 60 days before the securities are purchased will be included in the net worth calculation as a liability, regardless of the estimated value of the residence. *See supra* Section II.B; rule

approximately 5.5 million households have a net worth of more than $2 million *including* the equity in the primary residence (*i.e.,* value minus debt secured by the property), and approximately 4.2 million households have a net worth of more than $2 million *excluding* the equity in the primary residence.[80] Therefore, approximately 1.3 million households will not meet a $2 million net worth test under the revised test, and will therefore not be considered "qualified clients," when the value of the primary residence is excluded from the test.[81] Excluding the value of the primary residence (and debt secured by the property up to the current market value of the residence) means that 1.3 million households that would have met the net worth threshold if the value of the residence were included, as is currently permitted, will no longer be "qualified clients" under the revised net worth test and therefore will be unable to enter into performance fee contracts unless they meet another test of rule 205-3.[82]

For purposes of this cost-benefit analysis, Commission staff assumes that 25 percent of the 1.3 million households would have entered into *new* advisory contracts that contained performance fee arrangements after the compliance date of the amendments, and therefore

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205-3(d)(1)(ii)(A)(*2*).

80 These figures are derived from the 2007 Federal Reserve Board Survey of Consumer Finances. These figures represent the net worth of households rather than individual persons who might be clients. More information regarding the survey may be obtained at http://www.federalreserve.gov/pubs/oss/oss2/scfindex.html.

81 Although some of these 1.3 million households may be grandfathered by the transition provisions of the rule, we assume for the purposes of our analysis that none of these households will be grandfathered. This assumption may therefore result in an overestimation of the costs of the rule amendments.

82 This estimate, as described in the Proposing Release, was not premised on the notion that investors would borrow against the equity in their primary residence shortly before the calculation of net worth. *See* Proposing Release, *supra* note 15, at nn. 47-48 and accompanying text. The 60-day look-back provision in rule 205-3 that we are adopting today, because it reduces the incentives to incur debt secured by residences in order to boost net worth under the rule, strengthens the accuracy of our estimate. *See supra* notes 55-57 and accompanying text.

approximately 325,000 clients will not meet the revised net worth test.[83] Commission staff estimates that about 40 percent of those 325,000 potential clients (*i.e.*, 130,000) will separately meet the "qualified client" definition under the assets-under-management test, and therefore will be able to enter into performance fee arrangements.[84] The remaining 60 percent (195,000 households) will have access only to those investment advisers (directly or through the private investment companies they manage) that charge advisory fees other than performance fees.[85] Some of these investors may be negatively affected by their inability to enter into performance-based compensation arrangements with investment advisers (which arrangements in some ways align the advisers' interests with the clients' interests). These investors also may experience differences in their investment options and returns, changes in advisory service, and the cost of being unable to enter into advisory contracts with their preferred advisers. For purposes of this cost-benefit analysis, Commission staff assumes that approximately 80 percent of the 195,000 households (*i.e.*, 156,000 households) will enter into non-performance fee arrangements, and that the other 20 percent (*i.e.*, 39,000 households) will decide not to invest

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83 The assumption that 25% of these investors would have entered into *new* performance fee arrangements is based on data compiled in a 2008 report sponsored by the Commission. *See* ANGELA A. HUNG ET AL., INVESTOR AND INDUSTRY PERSPECTIVES ON INVESTMENT ADVISERS AND BROKER-DEALERS 130 (Table C.1) (2008) (available at http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf). That report indicated that 20% of investment advisers charge performance fees. *Id.* at 105 (Table 6.13). Commission staff assumes the percentage of investment advisers charging performance fees reflects investor demand for these advisory arrangements. Although the report indicates that 20% of investment advisers charge performance fees, the use of a 25% assumption is intended to overestimate rather than underestimate costs, especially given the inherent uncertainty surrounding hypothetical events. It is also notable that an average of only 37% of investors indicated they would seek investment advisory services in the next five years. The estimate concerning 1.3 million households is derived from the 2007 Federal Reserve Board Survey of Consumer Finances. *See supra* note 80 and accompanying and following text.

84 This estimate is based on data filed by registered investment advisers on Form ADV.

85 Commission staff estimates that less than one percent of registered investment advisers are compensated solely by performance fees, based on data from filings by registered investment advisers on Form ADV.

their assets with an adviser.[86] Commission staff anticipates that the non-performance fee arrangements into which these clients will enter may contain management fees that yield advisers approximately the same amount of fees that clients would have paid under performance fee arrangements. Under these non-performance fee arrangements, if the adviser's performance is not positive or does not reach the level at which it would have accrued performance fees (*i.e.*, the "hurdle rate" of return), a client might end up paying higher overall fees than if he had paid performance fees.[87]

Commission staff estimates that the remaining 39,000 households that would have entered into advisory contracts, if the value of the client's primary residence were not excluded from the calculation of a person's net worth, will not enter into advisory contracts. Some of these households will likely seek other investment opportunities. Other households may forego professional investment management altogether because of the higher value they place on the alignment of advisers' interests with their own interests associated with the use of performance fee arrangements.

We recognize that the exclusion of the value of a person's primary residence from the calculation of a person's net worth will reduce the pool of potential qualified clients for advisers. This, in turn, might result in a reduction in the total fees collected by investment advisers. In order to replace those clients and lost revenue, some advisers may choose to market their

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[86] This assumption is based on the idea that a substantial majority of investment advisers that typically charge performance fees and that in the future would calculate a potential client's net worth and determine that it does not meet the $2 million threshold, will offer alternate compensation arrangements in order to offer their services. As noted above, Commission staff estimates that less than one percent of registered advisers charge performance fees exclusively. *See supra* note 85.

[87] Performance fee arrangements typically include a "hurdle rate," which is a minimum rate of return that must be exceeded before the performance fee can be charged. *See, e.g.*, TAMAR FRANKEL, THE REGULATION OF MONEY MANAGERS § 12.03[F] (2d ed. Supp. 2009).

services to more potential clients, which may result in increased marketing and administrative costs.[88]

Although some commenters asserted that these amendments would harm small advisers or less wealthy clients, commenters did not provide any quantitative data to support their statements.[89] As discussed above, advisers may charge advisory fees other than performance fees in order to obtain revenue from clients who do not meet the definition of "qualified clients." In addition, clients who no longer meet the net worth test as a result of the exclusion of their primary residence likely would have invested a smaller amount of assets than other clients who continue to meet the test. As a result, the revenue loss to investment advisers from the exclusion of these clients from the performance fee exemption may be mitigated. Moreover, as mentioned above, less wealthy clients can enter into non-performance based compensation arrangements and seek other investment opportunities. Therefore, for the reasons discussed above, we believe that the amendments are unlikely to impose a significant net cost on most advisers and clients.

One commenter asserted that because liabilities in excess of the value of the primary residence would be included in the net worth calculation the Commission should include in its analysis the cost to clients of obtaining valuations from real estate agents.[90] First, currently investors may include the value of their primary residence in the calculation of their net worth and, as such, those investors that choose to do so must be estimating the value of the primary residence in order to calculate their net worth. Second, the rule requires an estimate, but does not require a third party opinion on valuation either for the primary residence or for any other assets

88 Although advisers that charge performance fees typically require investment minimums of $10,000 or more, one of the steps that advisers may take to market their services to a larger number of potential clients is to reduce their investment minimums. This may result in slightly higher administrative costs for investment advisers that choose to take such action.

89 *See supra* notes 38-39 and accompanying text.

90 *See* G. Merkl Comment Letter.

or liabilities. Third, as we noted previously, many online services provide residence valuations at no charge.[91]

Some commenters argued that excluding the value of an investor's primary residence from the net worth test of the rule *at the same time* as adjusting the rule's dollar amount thresholds for inflation would cause too much change at one time.[92] Although we attribute the costs of inflation-adjusting the dollar amount thresholds of the rule to the Dodd-Frank Act and the order we issued thereunder, we have considered the relative magnitude of each of these changes to the net worth standard in determining the significance of making these changes at the same time. Based on data from the Federal Reserve Board, approximately 7 million households have a net worth of more than $1.5 million (the previous net worth threshold, including primary residence), and approximately 5.5 million households have a net worth of more than $2 million (the revised net worth threshold we established by order in July 2011, including primary residence).[93] Therefore, inflation-adjusting the dollar amount threshold of the net worth test from $1.5 to $2 million will have caused about 1.5 million households to no longer meet the net worth test of the rule. Therefore the numerical effect of the inflation adjustment of the net worth test's dollar amount threshold (1.5 million households) is slightly greater than the exclusion of primary residence from the net worth test (1.3 million households).[94] As discussed above, we are not making these two changes to the rule at the same time.[95] We revised the dollar amount threshold of the net worth test for inflation in July 2011 (as required by statute), and the revision was effective in September 2011. Our current amendment of the net worth test to exclude the

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91 *See supra* note 50.

92 *See supra* note 45 and accompanying text.

93 *See supra* note 80.

94 *See supra* text accompanying note 81.

95 *See supra* note 46 and preceding text.

value of a primary residence, which will be effective in May 2012, will be effective approximately eight months after the previous change to the net worth test.[96] We believe that what has turned out to be a two-step process (adjustment for inflation followed by exclusion of primary residence), with roughly equal results on the numbers of "qualified clients," will help to ameliorate the economic impact of the two rule revisions on investment advisers. In addition, we are concerned that delaying beyond 90 days the effective date of excluding primary residence from the net worth standard might encourage some advisers to focus their efforts on entering into performance fee arrangements with clients who will not meet the rule's net worth standards after the effective date.

The amendments to the rule's transition provisions are not likely to impose any new costs on advisory clients or investment advisers. As discussed above, the amendments allow an investment adviser and its clients to maintain existing performance fee arrangements that were permissible when the advisory contract was entered into, even if performance fees would not be permissible under the contract if it were entered into at a later date. The amendments also allow for the transfer of an ownership interest in a private investment company by gift or bequest, or pursuant to an agreement relating to a legal separation or divorce to a party that is not a qualified client.[97]

We do not expect that adjustment of the dollar amount thresholds in rule 205-3, which codifies the adjustments that the Commission effected in its July 2011 order, will impose new

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96 Any further revisions of the dollar amount thresholds of rule 205-3 to adjust for inflation are not scheduled to occur until 2016. *See* rule 205-3(e).

97 Rule 205-3(c)(3). The rule provides that for purposes of paragraphs 205-3(c)(1) (transition rule for registered investment advisers) and 205-3(c)(2) (transition rule for registered investment advisers that were previously not registered) the transfer of an equity ownership interest in a private investment company by gift or bequest, or pursuant to an agreement related to a legal separation or divorce, will not cause the transferee to become a party to the contract and will not cause section 205(a)(1) of the Act to apply to such transferee.

costs on advisory clients or investment advisers. The adjustments will have no effect on existing contractual relationships that met applicable requirements under the rule at the time the parties entered into them, because those relationships may continue under the transition provisions of the rule. Although an investment adviser could be prohibited from charging performance fees to new clients to whom it could have charged performance fees if the advisory contract had been entered into before the adjustment of the dollar thresholds, we attribute this effect to the Dodd-Frank Act rather than to this rulemaking. One commenter stated that rather than addressing the contention that the adjustment to the dollar amount thresholds is unfair to small investors, the Commission "passed the buck" back to Congress.[98] The Commission, however, is required to adjust the dollar amount thresholds for the effects of inflation. Exempting less wealthy investors from the limits would be contrary to the purpose of the dollar amount thresholds, which is to limit the availability of the exemption to clients who are financially experienced and able to bear the risks of performance fee arrangements.

Section 418 of the Dodd-Frank Act does not specify how the Commission should measure inflation in adjusting the dollar amount thresholds. We proposed, and are adopting, the PCE Index because it is widely used as a broad indicator of inflation in the economy and because the Commission has used the PCE Index in other contexts. It is possible that the use of the PCE Index to measure inflation might result in a larger or smaller dollar amount for the two thresholds than the use of a different index, but the rounding required by the Dodd-Frank Act (to the nearest $100,000) likely negates any difference between indexes.

IV. PAPERWORK REDUCTION ACT

The amendments to rule 205-3 under the Investment Advisers Act do not contain any

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[98] *See* P. Goldstein Comment Letter.

"collection of information" requirements as defined by the Paperwork Reduction Act of 1995, as amended ("PRA").[99] Accordingly, the PRA is not applicable. We received no comments on any PRA issues.

V. Regulatory Flexibility Act Certification

The Commission certified in the Proposing Release, pursuant to section 605(b) of the Regulatory Flexibility Act of 1980 ("RFA"),[100] that the proposed rule amendments would not, if adopted, have a significant impact on a substantial number of small entities.[101] As we explained in the Proposing Release, under Commission rules, for the purposes of the Advisers Act and the RFA, 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 ("small adviser").[102]

Based on information in filings submitted to the Commission, 617 of the approximately 11,888 investment advisers registered with the Commission are small entities. Only approximately 20 percent of the 617 registered investment advisers that are small entities (about 122 advisers) charge any of their clients performance fees. In addition, 24 of the 122 advisers required at the time of the Proposing Release an initial investment from their clients that would meet the then current assets-under-management threshold (\$750,000), which advisory contracts

[99] 44 U.S.C. 3501 – 3520.

[100] 5 U.S.C. 605(b).

[101] *See* Proposing Release, *supra* note 15, at Section VI.

[102] Rule 0-7(a).

will be grandfathered into the exemption provided by rule 205-3 under the amendments. Therefore, if these advisers in the future raise those minimum investment levels to the revised level that we issued by order ($1 million), those advisers could charge their clients performance fees because the clients would meet the assets-under-management test, even if they would not meet the revised net worth test that excludes the value of the client's primary residence. For these reasons, the Commission believes that the amendments to rule 205-3 will not have a significant economic impact on a substantial number of small entities. The Commission requested written comments regarding the certification. One commenter stated that the Proposing Release includes "suspicious" quantified data to support the claim as to how few advisers will be affected by the required review every five years.[103] The commenter provided no further detail about why the quantified data was suspicious, or any alternative empirical data, and did not address the number of small advisers that would be affected.[104]

VI. STATUTORY AUTHORITY

The Commission is adopting amendments to rule 205-3 pursuant to the authority set forth in section 205(e) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-5(e)].

List of Subjects in 17 CFR Part 275

Reporting and recordkeeping requirements, Securities.

TEXT OF RULES

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

PART 275 - RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The general authority citation for Part 275 continues to read as follows:

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103 *See* Comment Letter of David Flatray (May 29, 2011).

104 *Id.*

AUTHORITY: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, 80b-11, unless otherwise noted.

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2. Section 275.205-3 is amended by:

   a. Revising paragraph (c);

   b. Revising paragraphs (d)(1)(i) and (ii); and

   c. Adding paragraph (e).

The revisions and addition read as follows.

§ 275.205-3 Exemption from the compensation prohibition of section 205(a)(1) for investment advisers.

* * * * *

(c) *Transition rules*. (1) *Registered investment advisers.* If a registered investment adviser entered into a contract and satisfied the conditions of this section that were in effect when the contract was entered into, the adviser will be considered to satisfy the conditions of this section; *Provided*, however, that if a natural person or company who was not a party to the contract becomes a party (including an equity owner of a private investment company advised by the adviser), the conditions of this section in effect at that time will apply with regard to that person or company.

(2) *Registered investment advisers that were previously not registered.* If an investment adviser was not required to register with the Commission pursuant to section 203 of the Act (15 U.S.C. 80b-3) and was not registered, section 205(a)(1) of the Act will not apply to an advisory contract entered into when the adviser was not required to register and was not registered, or to an account of an equity owner of a private investment company advised by the adviser if the account was established when the adviser was not required to register and was not registered;

Provided, however, that section 205(a)(1) of the Act will apply with regard to a natural person or company who was not a party to the contract and becomes a party (including an equity owner of a private investment company advised by the adviser) when the adviser is required to register.

(3) *Certain transfers of interests.* Solely for purposes of paragraphs (c)(1) and (c)(2) of this section, a transfer of an equity ownership interest in a private investment company by gift or bequest, or pursuant to an agreement related to a legal separation or divorce, will not cause the transferee to "become a party" to the contract and will not cause section 205(a)(1) of the Act to apply to such transferee.

(d) * * *

(1) * * *

(i) A natural person who, or a company that, immediately after entering into the contract has at least $1,000,000 under the management of the investment adviser;

(ii) A natural person who, or a company that, the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, either:

(A) Has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than $2,000,000. For purposes of calculating a natural person's net worth:

(*1*) The person's primary residence must not be included as an asset;

(*2*) Indebtedness secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time the investment advisory contract is entered into may not be included as a liability (except that if the amount of such indebtedness outstanding at the time of calculation exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess must be included as a liability); and

(*3*) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the residence must be included as a liability; or

(B) Is a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(51)(A)) at the time the contract is entered into; or

*   *   *   *   *

(e) *Inflation adjustments.* Pursuant to section 205(e) of the Act, the dollar amounts specified in paragraphs (d)(1)(i) and (d)(1)(ii)(A) of this section shall be adjusted by order of the Commission, on or about May 1, 2016 and issued approximately every five years thereafter. The adjusted dollar amounts established in such orders shall be computed by:

(1) Dividing the year-end value of the Personal Consumption Expenditures Chain-Type Price Index (or any successor index thereto), as published by the United States Department of Commerce, for the calendar year preceding the calendar year in which the order is being issued, by the year-end value of such index (or successor) for the calendar year 1997;

(2) For the dollar amount in paragraph (d)(1)(i) of this section, multiplying $750,000 times the quotient obtained in paragraph (e)(1) of this section and rounding the product to the nearest multiple of $100,000; and

(3) For the dollar amount in paragraph (d)(1)(ii)(A) of this section, multiplying $1,500,000 times the quotient obtained in paragraph (e)(1) of this section and rounding the product to the nearest multiple of $100,000.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Dated: February 15, 2012

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3374 / February 16, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14760

In the Matter of **Michelle W. Palm,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over her and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From September 2007 until August 2009, Palm associated with an investment adviser, Arrowhead Capital Management, LLC ("Arrowhead LLC"), which, in turn, served as general partner of an investment adviser, Arrowhead Capital Partners II, L.P. ("Arrowhead Partners"). Arrowhead Partners purported to purchase promissory notes (the "Notes") from Petters Company, Inc. to finance inventory transactions brokered by Thomas J. Petters and Petters Company, Inc.

2. On November 17, 2011, a Judgment of Permanent Injunction and Other Relief was entered against Palm, permanently enjoining her from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 206(4) of the Advisers Act and Rule 206-4(8) thereunder in the civil action entitled Securities and Exchange Commission v. James N. Fry, Michelle W. Palm, and Arrowhead Capital Management, LLC, No. 0:11-cv-03303-RHK-JJK, in the United States District Court for the District of Minnesota.

3. The Commission's complaint alleges that from 1998 through 2008, Arrowhead LLC directed money into a Ponzi scheme operated by Thomas J. Petters by selling interests in funds operated by Arrowhead LLC to investors. Petters promised investors that their money would be used to finance the purchase of vast amounts of consumer electronics by vendors who then re-sold the merchandise to such "Big Box" retailers as Walmart and Costco. In reality, there were no inventory transactions and Petters's business was merely a Ponzi scheme. The complaint further alleges that Palm and Fry knowingly and intentionally misrepresented (and aided and abetted Arrowhead Partners in misrepresenting) numerous material facts regarding the funds operated by Arrowhead LLC. Among other things, the complaint alleges that Fry and Palm (individually and through Arrowhead LLC):

- Falsely assured investors that the inventory financing transactions in which the funds invested were structured in such a way that after the retailers received their merchandise from vendors, they would send their payments for the merchandise directly into the funds' collateral accounts to pay off the notes held by the funds. In reality, money for the repayment of notes held by the funds always came directly from Petters and never came from any retailers.

- Failed to disclose to investors and potential investors the facts that Petters was having difficulties making payments on certain of the notes held by the funds and that they engaged in a series of note extensions with Petters, beginning around February 2008, in order to hide that fact.

- Distributed pitch books to investors and potential investors that falsely represented that independent accountants were conducting quarterly examinations of the funds' transaction procedures. In reality, no such examinations were conducted.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Michelle W. Palm be, and hereby is, barred from being associated with an investment adviser, broker, dealer, municipal securities dealer, or transfer agent.

Any reapplication for association by Respondent Michelle W. Palm 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. 66415 / February 16, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14761

In the Matter of **GEORGE DAVID GORDON,** **Respondent.**	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3)(i) 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 George David Gordon ("Respondent" or "Gordon") pursuant to Rule 102(e)(3)(i)[1] of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(3)(i)].

[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, temporarily suspend from appearing or practicing before it any attorney . . . who has been by name: (A) [p]ermanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating . . . any provision of the Federal securities laws or of the rules and regulations thereunder; or (B) [f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) . . . any provision of the Federal securities laws or of the rules and regulations thereunder.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No.

ADMINISTRATIVE PROCEEDING
File No.

In the Matter of GEORGE DAVID GORDON, Respondent.	**ORDER INSTITUTING PUBLIC ADMINISTRATIVE PROCEEDINGS AND IMPOSING TEMPORARY SUSPENSION PURSUANT TO RULE 102(e)(3)(i) 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 George David Gordon ("Respondent" or "Gordon") pursuant to Rule 102(e)(3)(i)[1] of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(3)(i)].

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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, temporarily suspend from appearing or practicing before it any attorney . . . who has been by name: (A) [p]ermanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating . . . any provision of the Federal securities laws or of the rules and regulations thereunder; or (B) [f]ound by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party . . . to have violated (unless the violation was found not to have been willful) . . . any provision of the Federal securities laws or of the rules and regulations thereunder.

II.

The Commission finds that:

1. George David Gordon, 48, at all relevant times was an attorney whose office was located in Tulsa, Oklahoma.

2. On February 10, 2009, the Commission filed a complaint against Gordon in the Northern District of Oklahoma (the "Court") alleging that Gordon participated with two other defendants in a scheme to defraud the public by manipulating the share prices of three penny stocks: National Storm Management Group, Inc. (NLST), Deep Rock Oil and Gas, Inc. (DPRK), and Global Beverages Solutions, Inc. (GBVS). Securities and Exchange Commission v. George David Gordon, et al., Case No. 4:09-CV-00061-CVE (N.D. Okla.). Specifically, the complaint alleged that Gordon assisted in reverse mergers and the improper issuance/transfer of purportedly unrestricted stock; issued and caused to be issued fraudulent legal opinion letters regarding the tradability of stock; approved the content of promotional materials; used nominee brokerage and bank accounts to conceal the fraud; engaged in matched orders; and arranged with the other primary members of the scheme to engage in coordinated trading. Through his conduct, the Commission alleged that Gordon reaped millions in illegal profits.

3. On September 28, 2011, the Court issued an order and opinion concluding that Gordon violated Sections 5(a), 5(c), and 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. Id.

4. On November 18, 2011, the Court entered a Final Judgment against Gordon, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; ordering him to disgorge $40,072,806.97 in ill-gotten gains, together with $10,307,489.92 in prejudgment interest, for a total of $50,380,296.89; to pay a $130,000 civil penalty; and permanently barring "from participating in an offering of penny stock , including engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any penny stock." Id.

III.

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66416 / February 16, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14762

In the Matter of **GEORGE DAVID GORDON,** **Respondent.**	**ORDER OF SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate to issue an order of forthwith suspension of George David Gordon pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. § 200.102(e)(2)].[1]

II.

The Commission finds that:

1. George David Gordon, 48, at all relevant times was an attorney whose office was located in Tulsa, Oklahoma.

2. On May 3, 2010, a jury returned a guilty verdict against Gordon for: (1) conspiracy: 18 U.S.C. § 371; (2) wire fraud and aiding and abetting: 18 U.S.C. §§ 1343 and 2(a); (3) securities fraud and aiding and abetting: 15 U.S.C. § 78j(b) and C.F.R. Section 240.10b-5 and 18 U.S.C. § 2(a); (4) false statements: 18 U.S.C. § 1001; (5) obstruction of justice: 18 U.S.C. § 1512(c)(2); and (6) money laundering and aiding and abetting: 18 U.S.C. §§ 1957(a) and 2(a);

[1] Rule 102(e)(2) provides in pertinent part that "[a]ny attorney who has been suspended or disbarred by a court of the United States or any State;... or any person who has been convicted of a felony or a misdemeanor involving moral turpitude shall be forthwith suspended from appearing or practicing before the Commission."

before the United States District Court for the Northern District of Oklahoma, in United States v. George David Gordon, Case No. 09-CR-013-001-JHP (N.D. Okla.). On October 29, 2010, a judgment in the criminal case was entered against Gordon.

3. As a result of his conviction, Gordon was sentenced to a prison term of 188 months in a federal penitentiary and ordered to make restitution in the amount of $6,150,136.79.

4. On May 3, 2011, Gordon was disbarred from the practice of law by the State Bar of Oklahoma.

III.

In view of the foregoing, the Commission finds that Gordon has been convicted of a felony, and disbarred from the practice of law by the State Bar of Oklahoma, within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED, that George David Gordon is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

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. 66419 / February 17, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14763

In the Matter of **BIOTECH Holdings Ltd.,** **California Oil & Gas Corp.,** **Central Minera Corp.,** **Chemokine Therapeutics Corp., and** **Global Precision Medical 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 the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. BIOTECH Holdings Ltd. ("BIOHF") [1] (CIK No. 1018153) is an Alberta corporation located in New Westminster, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BIOHF 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, 2008, which reported a net loss of $1,406,163 Canadian for the prior year. As of February 15, 2012, the common shares of BIOHF were quoted on OTC Link, had six market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1] The short form of each issuer's name is also its stock symbol.

2. California Oil & Gas Corp. ("COGC") (CIK No. 1213109) is a Nevada corporation located in Calgary, Alberta with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). COGC 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 August 31, 2008, which reported a net loss of $746,923 for the prior nine months. As of February 15, 2012, the common stock of COGC was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Central Minera Corp. ("CENMF") (CIK No. 927426) is a Yukon corporation located in West Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CENMF is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended June 30, 2008, which reported a net loss of $170,093 for the prior year. As of February 15, 2012, the subordinate voting shares of CENMF were quoted on OTC Link, had seven market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Chemokine Therapeutics Corp. ("CHKT") (CIK No. 1092959) is a void Delaware corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CHKT 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, 2008, which reported a net loss of $2,046,958 for the prior nine months. On April 3, 2009, CHKT filed a Chapter 15 petition in the U.S. Bankruptcy Court for the District of Delaware, which resulted in an order granting recognition of a foreign bankrupty proceeding on April 28, 2009. As of February 15, 2012, the common stock of CHKT was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Global Precision Medical Inc. ("GBPM") (CIK No. 1095556) is a dissolved Wyoming corporation located in West Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GBPM 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, 2007, which reported a net loss of $17,300 for the prior three months. As of February 15, 2012, the common stock of GBPM was quoted on OTC Link, had three market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

6. 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.

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

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

February 17, 2012

In the Matter of **BIOTECH Holdings Ltd.,** **California Oil & Gas Corp.,** **Central Minera Corp.,** **Chemokine Therapeutics Corp., and** **Global Precision Medical Inc.,** **File No. 500-1**	**ORDER OF SUSPENSION OF TRADING**

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of BIOTECH Holdings Ltd. because it has not filed any annual reports since the period ended March 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of California Oil & Gas Corp. because it has not filed any periodic reports since the period ended August 31, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Central Minera Corp. because it has not filed any annual reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Chemokine Therapeutics Corp. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Global Precision Medical Inc. because it has not filed any periodic reports since the period ended March 31, 2007.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 17, 2012, through 11:59 p.m. EST on March 2, 2012.

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. 66423 / February 17, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14764

In the Matter of **STEPHEN E. BOWMAN,** **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 Stephen E. Bowman ("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 Sections III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Bowman, using his entity, Bowman Marketing Group, offered and sold investments in a fictitious, fraudulent prime bank instrument trading program. Bowman, 64 years old, is a resident of Omaha, Nebraska.

2. On April 16, 2010, a final judgment was entered by consent against Bowman, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933 ("Securities Act"), and Sections 10(b) and 15(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Stephen E. Bowman, et al.*, Case Number 8:09-cv-1093, in the United States District Court for the Middle District of Florida.

3. The Commission's complaint alleged that Bowman solicited funds from investors by promising that the investor was "loaning" money "to participate in investment activity" for a limited period, with a projected "Return on Investment" of 14% to 70% per month. The "loans" also included a "guarantee of principal provided by the bank, fund manager or both."

4. On June 23, 2011, Bowman pled guilty to two counts of fraud in violation of Title 18 United States Code, Sections 371 and 2314 before the United States District Court for the Middle District of Florida, in *United States v. Stephen E. Bowman*, Case Number 8:09-cr-585. On November 28, 2011, a judgment in the criminal case was entered against Bowman. He was sentenced to a prison term of 51 months followed by three years of supervised release.

5. The counts of the criminal information to which Bowman pled guilty alleged, *inter alia*, that Bowman entered into a conspiracy and a scheme to defraud investors and obtained money and property in connection with prime bank instrument trading programs by means of false and fraudulent pretenses, representations and promises relating to material facts.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act that Respondent Bowman 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

barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

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

Commissioner Walter,
Commissioner Paredes
Commissioner Gallagher
not participating

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940
Release No. 29952 / February 22, 2012

In the Matter of GE ASSET MANAGEMENT INCORPORATED GE INVESTMENT DISTRIBUTORS, INC. 1600 Summer Street Stamford, CT 06905 GE FUNDING CAPITAL MARKET SERVICES, INC. 201 High Ridge Road Stamford, CT 06905 (812-13994)	)

ORDER PURSUANT TO SECTION 9(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING A PERMANENT EXEMPTION FROM SECTION 9(a) OF THE ACT

GE Asset Management Incorporated, GE Investment Distributors, Inc. and GE Funding Capital Market Services, Inc. ("GE Funding CMS") (collectively, "Applicants") filed an application on December 23, 2011, and an amendment to the application on January 23, 2012, requesting temporary and permanent orders under section 9(c) of the Investment Company Act of 1940 ("Act") exempting Applicants and any other company of which GE Funding CMS is or hereafter becomes an affiliated person (together with Applicants, "Covered Persons") from section 9(a) of the Act with respect to an injunction entered against GE Funding CMS by the United States District Court for the District of New Jersey on January 23, 2011.

On January 24, 2012, the Commission simultaneously issued a notice of the filing of the application and a temporary conditional order exempting the Covered Persons from section 9(a) of the Act (Investment Company Act Release No. 29926) until the Commission takes final action on the application for a permanent order. The notice gave interested persons an opportunity to request a hearing and stated that an order disposing of the application would be issued unless a hearing was ordered. No request for a hearing has been filed, and the Commission has not ordered a hearing.

The matter has been considered and it is found that the conduct of the Applicants has been such as not to make it against the public interest or protection of investors to grant the permanent exemption from the provisions of section 9(a) of the Act.

Accordingly,

IT IS ORDERED, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application, as amended, filed by GE Asset Management Incorporated, et al. (File No. 812-13994) that Covered Persons be and hereby are permanently exempted from the provisions of section 9(a) of the Act, operative solely as a result of an injunction, described in the application, as amended, entered against GE Funding CMS by the United States District Court for the District of New Jersey on January 23, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES AND EXCHANGE ACT OF 1934
Release No. 66443 / February 22, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14766

In the Matter of	:	**ORDER OF FORTHWITH SUSPENSION PURSUANT TO RULE 102(e)(2) OF THE COMMISSION'S RULES OF PRACTICE**
Robert S. Brown	:	
Respondent	:	

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Robert S. Brown ("Brown") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice [17 C.F.R. 200.102(e)(2)].[1]

II.

The Commission finds that:

1. Brown was an attorney admitted to practice law in New York.

2. On June 14, 2011, the New York Supreme Court, Appellate Division, First Department entered an order, with Brown's consent, affirming Brown's automatic disbarment upon conviction of a felony.

III.

In view of the foregoing, the Commission finds that Brown is an attorney who has been disbarred from practicing law within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice. Accordingly, it is HEREBY ORDERED that Brown is forthwith suspended from appearing or practicing before the Commission pursuant to Rule 102(e)(2) of the Commission's Rules of Practice.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson
By Jill M. Peterson
Assistant Secretary

[1] Rule 102(e)(2) provides in pertinent part: "Any attorney who has been suspended or disbarred by a court of the United States or of any State . . . shall be forthwith suspended from appearing or practicing before the Commission."

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3375 / February 23, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14769

In the Matter of JON EDWARD HANKINS, Respondent.	ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Jon Edward Hankins ("Hankins" 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 Paragraph III.3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From October 2009 through April 2010, Hankins, who purported to be a successful investment professional, raised and attempted to raise investment funds from investors, brokers and others, based on false pretenses. Hankins purported to do business under the names of at least two companies he founded and controlled, Christian Financial Brotherhood ("CFB") and Banker's Trust and Annuity ("BTA"). Hankins is a resident of Knoxville, Tennessee.

2. Hankins represented, among other things, that his company, BTA, managed over $100 million in assets and that the funds were, and had been for a substantial time, maintained at the investment banking firm The Goldman Sachs Group, Inc. ("Goldman Sachs") as custodian. Hankins further represented that he was making profitable returns in what he referred to as the BTA Strategic Arbitrage Fund. Hankins represented to investors and potential investors that he would be compensated by receiving a percentage of fund profits. Hankins helped create and utilized solicitation materials for the BTA Strategic Arbitrage Fund, including a brochure claiming that the fund as of approximately November 2009 had assets under management of approximately $32 million. The brochure also falsely identified several individuals as supposed directors or partners of the fund, including the son of a former U.S. cabinet secretary and certain supposed former high-ranking military officials. In fact, Hankins engaged in little, if any, substantial investment operations, and was not managing a multi-million dollar investment fund through any accounts at Goldman Sachs or any other firm. BTA and CFB were in fact companies that Hankins set up on paper during the course of this scheme. Hankins initiated this investment scheme while serving a sentence of imprisonment, in home confinement, for a previous federal securities fraud conviction. While Hankins made representations about his education and professional background, he failed to disclose to investors his criminal conviction or the fact that he was still serving his sentence while soliciting investment funds.

3. On June 13, 2011, Hankins pled guilty to three counts of wire fraud in violation of Title 18 United States Code, Sections 1343 and 2 before the United States District Court for the Northern District of Georgia, in United States v. Jon Edward Hankins, Crim. Indictment No. 1:10-CR-432.

4. The counts of the criminal information to which Hankins pled guilty alleged, inter alia, that Hankins, did knowingly and willfully devise and intend to devise and execute a scheme and artifice to defraud others, of money and property, by means of materially false and fraudulent pretenses, representations, and promises, and by the omission of material facts.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Hankins 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.

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

February 23, 2012

In the Matter of Jetronic Industries, Inc. (n/k/a New Bastion Development, Inc.), JMAR Technologies, Inc., Kolorfusion International, Inc. Legalopinion.com (n/k/a Drayton Richdale Corp.), Lifestream Technologies, Inc., Lions Petroleum, Inc., (n/k/a China Hongxing Agritech, Inc.), Luna Technologies International, Inc., Litewave Corp., MDI, Inc., and MobilePro Corp., File No. 500-1	ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Jetronic Industries, Inc. (n/k/a New Bastion Development, Inc.) because it has filed only two periodic reports since the period ended January 31, 2000.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of JMAR Technologies, Inc. because it has not filed any periodic reports since the period ended September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Kolorfusion International, Inc. because it has not filed any periodic reports since September 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Legalopinion.com (n/k/a Drayton Richdale Corp.) because it has not filed any periodic reports from the period ended December 31, 2000 through the period ended December 31, 2008, or from the period ended June 30, 2009 through the period ended September 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Lifestream Technologies, Inc. because it has not filed any periodic reports since the period ended March 31, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Lions Petroleum, Inc. (n/k/a China Hongxing Agritech, Inc.) because it has not filed any periodic reports since the period ended December 31, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Luna Technologies International, Inc. because it has not filed any periodic reports since the period ended September 30, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Litewave Corp. because it has not filed any periodic reports since the period ended September 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MDI, Inc. because it has not filed any periodic reports since the period ended September 30, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of MobilePro Corp. because it has not filed any periodic reports since the period ended March 31, 2009.

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

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 23, 2012, through 11:59 p.m. EST on March 7, 2012.

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. 66446 / February 23, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14767

In the Matter of **Jetronic Industries, Inc.** **(n/k/a New Bastion Development, Inc.),** **Lions Petroleum, Inc.** **(n/k/a China Hongxing Agritech, Inc.),** **MDI, Inc., and** **MobilePro Corp.,** **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 Jetronic Industries, Inc. (n/k/a New Bastion Development, Inc.), Lions Petroleum, Inc. (n/k/a China Hongxing Agritech, Inc.), MDI, Inc., and MobilePro Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Jetronic Industries, Inc. (n/k/a New Bastion Development, Inc.) (CIK No. 53500) is a Pennsylvania corporation located in Royal Palm Beach, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Jetronic is delinquent in its periodic filings with the Commission, having filed only two periodic reports since it filed a Form 10-K for the period ended January 31, 2000: Forms 10-K for the periods ended December 31, 2009 and December 31, 2010. The Form 10-K for the period ended December 31, 2010 reported a net loss of $592,993 for the prior

twelve months. As of February 14, 2012, the company's stock (symbol "NWBA") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Lions Petroleum, Inc. (n/k/a China Hongxing Agritech, Inc.) (CIK No. 1048407) is a void Delaware corporation located in Harbin, Heilongjiang Province, China with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lions Petroleum is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended December 31, 2007, which reported a net loss of $119,137 for the prior three months. As of February 14, 2012, the company's stock (symbol "LPET") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. MDI, Inc. (CIK No. 318259) is a void Delaware corporation located in San Antonio, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MDI 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, 2009. As of February 14, 2012, the company's stock (symbol "MDIZQ") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. MobilePro Corp. (CIK No. 769592) is a Delaware corporation located in Gaithersburg, Maryland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). MobilePro 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 March 31, 2009, which reported an operating loss of over $10.6 million for the prior twelve months. As of February 14, 2012, the company's stock (symbol "MOBL") was quoted on OTC Link, had ten market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. 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.

6. 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.

7. 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. 66447 / February 23, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14768

In the Matter of **JMAR Technologies, Inc.,** **Kolorfusion International, Inc.,** **Legalopinion.com** **(n/k/a Drayton Richdale Corp.),** **Lifestream Technologies, Inc.,** **Luna Technologies International, Inc., and** **Litewave Corp.,** **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 JMAR Technologies, Inc., Kolorfusion International, Inc., Legalopinion.com (n/k/a Drayton Richdale Corp.), Lifestream Technologies, Inc., Luna Technologies International, Inc., and Litewave Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. JMAR Technologies, Inc. (CIK No. 857953) is a void Delaware corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). JMAR is delinquent in its periodic filings with the Commission, having not filed any periodic reports since the period ended September 30, 2008, which reported a net loss of $736,897 for the prior nine months. As of February 14, 2012, the company's stock (symbol "JMAR") was quoted on OTC Link

(previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Kolorfusion International, Inc. (CIK No. 1059397) is a Colorado corporation located in Aurora, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Kolorfusion 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 September 30, 2008, which reported a net loss of $16,382 for the prior three months. As of February 14, 2012, the company's stock (symbol "KOLR") was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Legalopinion.com (n/k/a Drayton Richdale Corp.) (CIK No. 734089) is a Nevada corporation located in Las Vegas, Nevada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Legalopinion.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports from the period ended December 31, 2000 through the period ended December 31, 2008, or from the period ended June 30, 2009 through the period ended September 30, 2010. As of February 14, 2012, the company's stock (symbol "DRYN") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Lifestream Technologies, Inc. (CIK No. 1029738) is a revoked Nevada corporation located in Post Falls, Idaho with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lifestream 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 over $2.9 million for the prior nine months. As of February 14, 2012, the company's stock (symbol "LFTC") was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Luna Technologies International, Inc. (CIK No. 1085217) is a void Delaware corporation located in Coquitlam, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Luna Technologies is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2006, which reported a net loss of over $7.2 million for the prior nine months. As of February 14, 2012, the company's stock (symbol "LTII") was quoted on OTC Link, had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Litewave Corp. (CIK No. 1096264) is a revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Litewave 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, 2009, which reported a total loss of over $9.41 million since its June 30, 1989 inception through September 30, 2009. As of

February 14, 2012, 2011, the company's stock (symbol "LTWV") was quoted on OTC Link, had eleven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

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

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

III.

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

A. Whether the allegations contained in Section II 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. 66456 / February 24, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14770

In the Matter of **American United Gold Corporation,** **AMS Homecare Inc.,** **Aucxis Corp., and** **CYOP Systems 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 the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. American United Gold Corporation ("AMUG") [1] (CIK No. 1079222) is a revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AMUG is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2008, which reported a net loss of $36,872 for the prior nine months. As of February 17, 2012, the common stock of AMUG was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

[1]The short form of each issuer's name is also its stock symbol.

2. AMS Homecare Inc. ("AHCKF") (CIK No. 1201784) is a British Columbia corporation located in Delta, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AHCKF 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 February 28, 2007, which reported a net loss of $557,825 Canadian for the prior year. As of February 17, 2012, the common shares of AHCKF were quoted on OTC Link, had seven market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Aucxis Corp. ("AUCX") (CIK No. 1102233) is a revoked Nevada corporation located in Vancouver, British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AUCX is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2005. As of February 17, 2012, the common stock of AUCX was quoted on OTC Link, had five market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. CYOP Systems International Inc. ("CYOS") (CIK No. 1111698) is a revoked Nevada corporation located in London, England, United Kingdom with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CYOS is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB for the period ended December 31, 2006, which reported a net loss of $3,573,962 for the prior year. As of February 17, 2012, the common shares of CYOS were quoted on OTC Link, had eight market makers, and were eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

B. DELINQUENT PERIODIC FILINGS

5. 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.

6. 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.

7. 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

Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

February 24, 2012

In the Matter of

American United Gold Corporation,
AMS Homecare Inc.,
Aucxis Corp., and
CYOP Systems International Inc.,

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of American United Gold Corporation because it has not filed any periodic reports since the period ended June 30, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of AMS Homecare Inc. because it has not filed any periodic reports since the period ended February 28, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Aucxis Corp. because it has not filed any periodic reports since the period ended September 30, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of CYOP Systems International Inc. because it has not filed any periodic reports since the period ended December 31, 2006.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EST on February 24, 2012, through 11:59 p.m. EST on March 8, 2012.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66458; File No. 600-9)

February 24, 2012

Self-Regulatory Organizations; Midwest Clearing Corporation; Order Cancelling Clearing Agency Registration

I. Background

On December 1, 1975, pursuant to Sections 17A(b) and 19(a)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 17Ab2-1 thereunder,[2] the Securities and Exchange Commission ("Commission") approved on a temporary basis the application for registration as a clearing agency filed by the Midwest Clearing Corporation ("MCC").[3] By subsequent orders, the Commission extended MCC's temporary registration.[4] On September 23, 1983, pursuant to Section 17A and Rule 17Ab2-1 thereunder,[5] the Commission approved on a permanent basis MCC's registration as a clearing agency.[6]

MCC was a subsidiary of The Chicago Stock Exchange, Incorporated ("CHX")[7] and provided trade recording, comparison, clearance, and settlement services to its participants.[8]

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[1] 15 U.S.C. 78q-1(b) and 78s(a)(1).

[2] 17 CFR 240.17Ab2-1.

[3] Release No. 34-11875 (Nov. 26, 1975), 40 FR 55910 (Dec. 2, 1975).

[4] Release Nos. 34-1358 (June 1, 1977), 42 FR 30066 (Jun. 10, 1977); 34-13911 (Aug. 31, 1977), 1977 WL 190688; 34-14531, 43 FR 10288 (Mar. 10, 1978); and 34-18584 (March 22, 1982), 47 FR 13266 (Mar. 29, 1982).

[5] 15 U.S.C. 78q-1 and 17 CFR 240.17Ab2-1.

[6] Release No. 34-20221, 48 FR 45167 (Oct. 3, 1983).

[7] Letter from David C. Whitcomb Jr., General Counsel, Chicago Stock Exchange, to David Karasik, Division of Trading and Markets (Oct. 28, 2009) ("CHX 2009 Letter").

[8] Release No. 34-20221, supra note 6.

II. Cancellation of MCC's Registration as a Clearing Agency

In a letter dated October 28, 2009, CHX notified the Commission that MCC was no longer in operation and therefore had ceased to do business in the capacity specified in its application for registration.[9] CHX also indicated that, given the time elapsed since MCC ceased active operations, it did not anticipate any future claims against MCC or itself.[10]

CHX also stated that "most of the books and records relating to MCC are beyond the statutory retention period. Any books and records of duration less than the statutory requirement will be maintained in accordance with the CHX's standard document retention policies."[11]

Section 19(a)(3) of the Act provides that in the event any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, "the Commission, by order, shall cancel its registration."[12]

Based upon the representations and undertakings made by CHX to the Commission and

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[9] CHX 2009 Letter. MCC was incorporated in Delaware on September 21, 1973, and was dissolved on December 17, 2009. LexisNexis, Public Records, Corporate Filings search (http://www. lexis.com) and Secretary of State of the State of Delaware (http://corp.delaware.gov/ authver.shtml). CHX believes that MCC's clearing agency operations had ceased by late 1995. E-mail from James G. Ongeena, Vice President and Associate General Counsel, CSX, to David Karasik, Division of Trading and Markets, Commission (Aug. 18, 2011) (providing a copy of a Transfer Agreement dated as of November 14, 1995, by and among CSX, Midwest Securities Trust Company ("MSTC"), MCC, The Depository Trust Company("DTC"), and National Securities Clearing Corporation ("NSCC") wherein MCC and MSTC agreed to, among other things, transfer MCC and MSTC's clearing and depository services and related assets and obligations including participants' open positions to DTC and NSCC).

[10] CHX 2009 Letter. In addition, CHX represented to the Commission that as of August 16, 2011, CHX had not, to the best of its knowledge, received any claims against or document requests regarding MSTC within the last two years. E-mail from James G. Ongeena, Vice President and Associate General Counsel, Chicago Stock Exchange, to David Karasik, Division of Trading and Markets (Aug. 16, 2011).

[11] CHX 2009 Letter.

[12] 15 U.S.C. 78s(a)(3).

because MCC is no longer in existence and has ceased to do business in the capacity specified in its registration application, the Commission is canceling its registration effective February 24, 2012.

IT IS THEREFORE ORDERED that:

Effective February 24, 2012, based on the facts and representations noted above, MCC's registration as a clearing agency under Section 17A of the Exchange Act and Rule 17Ab2-1 thereunder is cancelled.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66459; File No. 600-11)

February 24, 2012

Self-Regulatory Organizations; Pacific Clearing Corporation; Order Cancelling Clearing Agency Registration

I. Background

On December 1, 1975, pursuant to Sections 17A(b) and 19(a)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 17Ab2-1 thereunder,[2] the Securities and Exchange Commission ("Commission") approved on a temporary basis the application for registration as a clearing agency filed by the Pacific Clearing Corporation ("PCC").[3] By subsequent orders, the Commission extended PCC's temporary registration.[4] On September 23, 1983, pursuant to Section 17A and Rule 17Ab2-1 thereunder,[5] the Commission approved on a permanent basis PCC's registration as a clearing agency.[6]

PCC was a subsidiary of PCX Equities, Inc. ("PCXE") (now NYSE Arca Equities, Inc.), which was a wholly owned subsidiary of the Pacific Exchange, Inc. ("PCX")[7] (now NYSE Arca,

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[1] 15 U.S.C. 78q-1(b) and 78s(a)(1).

[2] 17 CFR 240.17Ab2-1.

[3] Release No. 34-11875 (Nov. 26, 1975), 40 FR 55910 (Dec. 2, 1975).

[4] Release Nos. 34-13584 (June 1, 1977), 42 FR 30066 (Jun. 10, 1977); 34-13911 (Aug. 31, 1977), 1977 WL 190688; 34-14531, 43 FR 10288 (Mar. 10, 1978); and 34-18584 (Mar. 22, 1982), 47 FR 13266 (Mar. 29, 1982).

[5] 15 U.S.C. 78q-1 and 17 CFR 240.17Ab2-1.

[6] Release No. 34-20221 (Sept. 23, 1983), 48 FR 45167 (Oct. 3, 1983).

[7] Letter from Kathryn L. Beck, Senior Vice President, General Counsel and Corporate Secretary, Pacific Stock Exchange, to Jerry W. Carpenter, Assistant Director, Division of Market Regulation, Commission (April 11, 2005) ("April 2005 Letter").

Inc. ["NYSE Arca"]).[8] Prior to the transaction described below, PCC offered various clearance and settlement services, such as trade recording for PCX-listed and over-the-counter securities transactions, trade comparison, continuous net settlement, and book-entry depository services.[9]

II. Cancellation of PCC's Registration as a Clearing Agency

In an April 2005 Letter, PCX stated that on or about April 15, 1987, it had "transferred substantially all of its principal settlement and clearance activities to the National Security [sic] Clearing Corporation ("NSCC")."[10] PCX further stated that on September 13, 2003, the PCX Board of Governors and PCXE Board of Directors voted to take all necessary steps to dissolve PCC.[11] Finally, PCX represented, among other things, that pursuant to Rule 17a-1,[12] PCX would retain at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records of PCC in PCX's or PCXE's possession for at least 5 years from the date of dissolution of PCC.[13]

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[8] PCXE and PCC had previously been wholly owned subsidiaries of Archipelago Holdings, Inc. Following the merger on March 6, 2006, of New York Stock Exchange, Inc. with Archipelago Holdings, Inc., the PCX filed with the Securities and Exchange Commission a proposed rule change, which was effective upon filing, that amended its rules to reflect these name changes: from PCX to NYSE Arca; from PCX Equities, Inc. to NYSE Arca Equities, Inc.; from PCX Holdings, Inc., to NYSE Arca Holdings, Inc.; and from the Archipelago Exchange, L.L.C. to NYSE Arca, L.L.C. Release No. 34-53615, 71 FR 19226 (Apr. 13, 2006).

[9] Release No. 34-20221, supra note 6.

[10] Letter from Kathryn L. Beck, Senior Vice President, General Counsel and Corporate Secretary, Pacific Stock Exchange, to Jerry W. Carpenter, Assistant Director, Division of Market Regulation, Commission (April 11, 2005) ("April 2005 Letter").

[11] Id. PCC was incorporated in California on April 28, 1955, and was dissolved on August 7, 2007. LexisNexis, Public Records, Corporate Filings search, http://www.lexis.com.

[12] 17 CFR 240.17a-1.

[13] April 2005 Letter. In addition, NYSE Euronext represented to the Commission that as of August 26, 2011, it had not received any requests over the last two years for documents relating to PCC and that no claims relating to the operations of PCC had been made. E-mail from Janet

Section 19(a)(3) of the Act[14] provides that in the event any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, "the Commission, by order, shall cancel its registration."

Based upon the representations and undertakings made by PCX to the Commission and because PCC is no longer in existence and has ceased to do business in the capacity specified in its registration application, the Commission is canceling its registration effective February 24, 2012.

IT IS THEREFORE ORDERED that:

Effective February 24, 2012, based on the facts and representations noted above, PCC's registration as a clearing agency under Section 17A of the Exchange Act and Rule 17Ab2-1 thereunder is cancelled.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

McGinness, Senior Vice President, Legal and Corporate Secretary, NYSE Euronext, to David Karasik, Division of Trading and Markets, Commission (Aug. 26, 2011).

As a result of the business combination of NYSE Group, Inc. and Euronext N.V.,the businesses of NYSE Group, including that of the NYSE LLC and NYSE Arca, and Euronext are now held under a single, publicly traded holding company named NYSE Euronext. Release Nos. 34-55293 (Feb. 14, 2007), 72 FR 8033 (Feb. 22, 2007) and 34-55026 (Dec. 29, 2006), 72 FR 814 (Jan. 8, 2007).

[14] 15 U.S.C. 78s(a)(3).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66460; File No. 600-10)

February 24, 2012

Self-Regulatory Organizations; Pacific Securities Depository Trust Company; Order Cancelling Clearing Agency Registration

I. Background

On December 1, 1975, pursuant to Sections 17A(b) and 19(a)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 17Ab2-1 thereunder,[2] the Securities and Exchange Commission ("Commission") approved on a temporary basis the application for registration as a clearing agency filed by the Pacific Securities Depository Trust Company ("PSDTC").[3] By subsequent orders, the Commission extended PSDTC's temporary registration.[4] On September 23, 1983, pursuant to Section 17A and Rule 17Ab2-1 thereunder,[5] the Commission approved on a permanent basis PSDTC's registration as a clearing agency.[6]

PSDTC was a wholly owned subsidiary of the Pacific Exchange, Inc. ("PCX")[7] (now NYSE Arca, Inc. ["NYSE Arca"]).[8] Prior to the transaction described below, PSDTC offered

[1] 15 U.S.C. 78q-1(b) and 78s(a)(1).

[2] 17 CFR 240.17Ab2-1.

[3] Release No. 34-11875 (Nov. 26, 1975), 40 FR 55910 (Dec. 2, 1975).

[4] Release Nos. 34-13584 (June 1, 1977), 42 FR 30066 (Jun. 10, 1977); 34-13911 (Aug. 31, 1977), 1977 WL 190688; 34-14531, 43 FR 10288 (Mar. 10, 1978); and 34-18584 (Mar. 22, 1982), 47 FR 13266 (Mar. 29, 1982).

[5] 15 U.S.C. 78q-1 and 17 CFR 240.17Ab2-1.

[6] Release No. 34-20221, 48 FR 45167 (Oct. 3, 1983).

[7] Letter from Kathryn L. Beck, Senior Vice President, General Counsel and Corporate Secretary, Pacific Stock Exchange, to Jerry W. Carpenter, Assistant Director, Division of Market Regulation, Commission (April 11, 2005) ("April 2005 Letter").

various clearance and settlement services such as trade recording for Pacific Stock Exchange-listed and over-the-counter securities transactions, trade comparison, continuous net settlement, and book-entry depository services.[9]

II. Cancellation of PSDTC's Registration as a Clearing Agency

In the April 2005 Letter, PCX notified the Commission that PSDTC had been dissolved.[10] PCX represented PCX had diligently identified and paid all PSDTC claims and liabilities including completing the outstanding PSDTC transaction balances and making final monetary distributions to the proper parties or if the proper parties were not identified remitted to the State of California in accordance with state escheatment regulations.[11]

In connection with the dissolution of PSDTC, PCX represented that pursuant to Rule 17a-1[12] PCX would retain at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such PSDTC records in PCX's

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[8] PCXE and PCC had previously been wholly owned subsidiaries of Archipelago Holdings, Inc. Following the merger of New York Stock Exchange, Inc. with Archipelago Holdings, Inc., on March 6, 2006, the PCX filed a rule proposal with the Securities and Exchange Commission, which was effective upon filing, that amended its rules to reflect these name changes: from PCX to NYSE Arca; from PCX Equities, Inc. to NYSE Arca Equities, Inc.; from PCX Holdings, Inc., to NYSE Arca Holdings, Inc.; and from the Archipelago Exchange, L.L.C. to NYSE Arca, L.L.C. Release No. 34-53615, 71 FR 19226 (Apr. 13, 2006). For ease of reference NYSE Arca is generally referred to by its former name, PCX, in this order.

[9] Release No. 34-20221, supra note 6.

[10] April 2005 Letter. PSDTC was incorporated in California on September 5, 1974, and was dissolved on October 19, 1992. LexisNexis, Public Records, Corporate Filings search (http://www.lexis.com). PCX stated that PSDTC voluntarily surrendered its license with the California State Banking Department. April 2005 Letter.

[11] April 2005 Letter.

[12] 17 CFR 240.17a-1.

possession for at least 5 years from the date of termination of PSDTC's registration as a clearing agency.[13]

Section 19(a)(3) of the Act[14] provides that in the event any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, "the Commission, by order, shall cancel its registration."

Based upon the representations and undertakings made by PCX to the Commission and because PSDTC is no longer in existence and has ceased to do business in the capacity specified in its registration application, the Commission is canceling its registration effective February 24, 2012.

IT IS THEREFORE ORDERED that:

Effective February 24, 2012, based on the facts and representations noted above, PSDTC's registration as a clearing agency under Section 17A of the Exchange Act and Rule 17Ab2-1 thereunder is cancelled.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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[13] April 2005 Letter. In addition, NYSE Euronext represented to the Commission that as of August 26, 2011, it had not received any requests over the last two years for documents relating to PSDTC and that no claims relating to the operations of PSDTC had been made. E-mail from Janet McGinness, Senior Vice President, Legal and Corporate Secretary, NYSE Euronext, to David Karasik, Division of Trading and Markets, Commission (Aug. 26, 2011).

As a result of the business combination of NYSE Group, Inc. and Euronext N.V.,the businesses of NYSE Group, including that of the NYSE LLC and NYSE Arca, and Euronext are now held under a single, publicly traded holding company named NYSE Euronext. Release Nos. 34-55293 (Feb. 14, 2007), 72 FR 8033 (Feb. 22, 2007) and 34-55026 (Dec. 29, 2006), 72 FR 814 (Jan. 8, 2007).

[14] 15 U.S.C. 78s(a)(3).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66461; File No. 600-7)

February 24, 2012

Self-Regulatory Organizations; Midwest Securities Trust Company; Order Cancelling Clearing Agency Registration

I. Background

On December 1, 1975, pursuant to Sections 17A(b) and 19(a)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 17Ab2-1 thereunder,[2] the Securities and Exchange Commission ("Commission") approved on a temporary basis the application for registration as a clearing agency filed by the Midwest Securities Trust Company ("MSTC").[3] By subsequent orders, the Commission extended MSTC's temporary registration.[4] On September 23, 1983, pursuant to Section 17A and Rule 17Ab2-1 thereunder,[5] the Commission approved on a permanent basis MSTC's registration as a clearing agency.[6] MSTC was a subsidiary of The Chicago Stock Exchange, Incorporated ("CHX")[7] and operated as a securities depository and

[1] 15 U.S.C. 78q-1(b) and 78s(a)(1).

[2] 17 CFR 240.17Ab2-1.

[3] Release No. 34-11875 (Nov. 26, 1975), 40 FR 55910 (Dec. 2, 1975).

[4] Release Nos. 34-13584, 42 FR 30066 (Jun. 10, 1977); 34-13911 (Aug. 31, 1977), 1977 WL 190688; 34-14531, 43 FR 10288 (Mar. 10, 1978); and 34-18584 (March 22, 1982), 47 FR 13266 (Mar. 29, 1982).

[5] 15 U.S.C. 78q-1 and 17 CFR 240.17Ab2-1.

[6] Release No. 34-20221, 48 FR 45167 (Oct. 3, 1983).

[7] Letter from James A. Blanda, Senior Vice President & Treasurer, to Jerry Carpenter, Division of Market Regulation (now the Division of Trading and Markets), Commission (April 24, 2003) ("April 2003 Letter").

trust company providing trade recording, comparison, clearance, and settlement services.[8]

II. Cancellation of MSTC's Registration as a Clearing Agency

In a letter dated April 24, 2003, CHX stated that MSTC was no longer in operation and therefore had ceased to do business in the capacity specified in MSTC's application for registration.[9] Further, in a letter dated October 28, 2009, CHX indicated that MSTC had tendered its Certificate of Authority to the Illinois Office of Banks and Real Estate ("OBRE") and referenced an agreement between CHX and OBRE regarding the transfer of long-abandoned property from MSTC to OBRE.[10] As part of the subsequent wind down process, MSTC and CHX entered into an agreement with The Depository Trust Company ("DTC") under which DTC assumed all rights, title, and interest to the name Kray & Co., the nominee partnership for MSTC ("Kray").[11] CHX stated that, given the length of time that has elapsed since MSTC ceased active operations, CHX did not anticipate any future claims against MSTC, OBRE, Kray, or CHX.[12] CHX also stated that it would retain MSTC's records that were subject to Rule 17a-1

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[8] Release No. 34-20221, supra note 6. See also Letter from David C. Whitcomb Jr., General Counsel, Chicago Stock Exchange, to David Karasik, Division of Trading and Markets, Commission (Oct. 28, 2009) ("October 2009 Letter").

[9] April 2003 Letter. MSTC was incorporated in Illinois on April 19, 1973, and was dissolved on December 17, 2009. LexisNexis, Public Records, Corporate Filings search (http://www.lexis.com) and Illinois Office of the Secretary of State (http://www.ilsos.gov/corporatellc/).

[10] October 2009 Letter. See also April 2003 Letter.

[11] October 2009 Letter.

[12] Id. In addition, CHX represented that as of August 16, 2011, CHX has not, to the best of its knowledge, received any claims against, or document requests regarding, MSTC within the last two years. E-mail from James G. Ongeena, Vice President and Associate General Counsel, Chicago Stock Exchange, to David Karasik, Division of Trading and Markets, Commission (Aug. 16, 2011).

in accordance with CHX's document retention policies and that, as of October 28, 2009, most of the records required to be retained by Rule 17a-1 had exceeded the five year retention period required by Rule 17a-1(b).[13]

Section 19(a)(3) of the Act[14] provides that in the event any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, "the Commission, by order, shall cancel its registration."

Based upon the representations and undertakings made by CHX to the Commission with regard to MSTC's records and any potential future claims against MSTC and because MSTC is no longer in existence and has ceased to do business in the capacity specified in its registration application, the Commission is canceling MSTC's registration effective January XX, 2012.

IT IS THEREFORE ORDERED that:

Effective February 24, 2012, based on the facts and representations noted above, MSTC's registration as a clearing agency under Section 17A of the Act and Rule 17Ab2-1 thereunder is cancelled.

By the Commission.

Kevin M. O'Neill

Kevin M. O'Neill
Deputy Secretary

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[13] Id. As noted above, CHX represented in April 2003 that MSTC was no longer in operation and had ceased to do business in the capacity specified in MSTC's application for clearing agency registration. April 2003 Letter.

[14] 15 U.S.C. 78s(a)(3).

Chairman Schapiro not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66467 / February 24, 2012

Admin. Proc. File No. 3-14417

In the Matter of the Application of

HOWARD BRAFF
4 Mews Court
Holtsville, NY 11742

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority, Inc.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY PROCEEDINGS

Failure to Provide Written Notice to Member Firms and Brokerage Firms

Conduct Inconsistent with Just and Equitable Principles of Trade

General securities representative, general securities principal, and options principal of member firms of registered securities association failed to provide written notification to those member firms that he maintained trading accounts at other brokerage firms, and failed to provide written notification to the brokerage firms in which he maintained the outside accounts that he was associated with member firms. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

Howard Braff, *pro se*.

Marc Menchel, *Alan Lawhead*, and *Jante C. Turner*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: June 9, 2011
Last brief received: September 28, 2011

I.

Howard Braff, formerly registered as a general securities representative, general securities principal, and options principal with various Financial Industry Regulatory Authority, Inc. ("FINRA") member firms, seeks review of disciplinary action taken by FINRA.[1] FINRA found that Braff violated NASD Rule 3050(c) and NASD Rule 2110 because he failed to provide written notice of his outside brokerage accounts to three member firms with which he was associated.[2] FINRA also found a separate violation of Rule 3050(c) and Rule 2110 because Braff failed to provide written notice of his association with the member firms to the brokerage firms where he maintained the outside accounts. FINRA further found that Braff violated Rule 2110 because he falsely stated on certain employment documents that he had no outside brokerage accounts. FINRA fined Braff $25,000 and suspended him in all capacities for two years. We base our findings on an independent review of the record.

II.

A. Background

Braff entered the securities industry in July 1983 as a registered representative. From October 2005 through April 2007, the period at issue, Braff was registered with FINRA as a general securities representative, general securities principal, and options principal and was associated on various dates with three member firms: PGP Financial, Inc. ("PGP Financial"), PHD Capital, and Pointe Capital, Inc. ("Pointe Capital"). Braff has not been registered with a member firm since May 2011.

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[1] On July 26, 2007, the Commission approved a proposed rule change that NASD filed seeking to amend its Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc. ("FINRA"), in connection with the consolidation of its member firm regulatory functions with NYSE Regulation, Inc. *See* Securities Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522, 523. Following the consolidation, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See* Exchange Act Rel. No. 58643 (Sept. 25, 2008), 73 Fed. Reg. 57,174 (Oct. 1, 2008). FINRA's disciplinary action was instituted after the consolidation of NASD and NYSE, but the conduct at issue took place before the consolidated rules took effect. Accordingly, NASD conduct rules apply and references to FINRA herein include references to NASD.

[2] NASD Rule 3050(c) provides that an associated person shall provide written notification to his member firm about any accounts he maintains at a brokerage firm and provide written notification to the brokerage firm about his association with the employer firm. http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3728. NASD Rule 2110 requires members to observe "high standards of commercial honor and just and equitable principles of trade." http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504.

1. Braff's Outside Brokerage Accounts

From September 1993 through June 12, 2000, Braff was associated with Scottrade, Inc. ("Scottrade"). On June 15, 2000, after leaving Scottrade, Braff opened a brokerage account with that firm in which he established an individual retirement account to roll over his 401(k). On January 28, 2004, while he was associated with another FINRA member firm, Milestone Group Management LLC ("Milestone"), Braff completed an account application with TD Waterhouse Investor Services, Inc. ("TD Waterhouse").[3] Under the section titled "Occupation," Braff stated that he was a "solar energy engineer" and marked "No" in the box asking whether he was employed by a broker-dealer.

2. PGP Financial

On October 25, 2005, as part of his application to associate with PGP Financial, Braff completed two documents in which he stated that he had no outside brokerage accounts. One document was a questionnaire that contained PGP Financial's policy regarding the maintenance of an outside brokerage account:

> Employees of the Firm are required to disclose any outside brokerage account established by either themselves or their immediate family members prior to their employment with the firm.
>
> In addition, no employee may have the authority to effect transactions in a securities or commodities account in an outside brokerage account for any one without first obtaining the *prior written* consent of the Compliance Department.

The next page of the questionnaire required Braff to either state that he did not maintain an outside brokerage account or provide detailed information about any outside brokerage account that he owned. Braff drew a line through the questionnaire and wrote "none," on the page. The second document, titled "Brokerage Account Disclosure Form," also required Braff to provide details about any outside brokerage accounts. Braff wrote his initials in a box that stated "none" and left the remainder of the form blank. Braff registered with PGP Financial on November 7, 2005.

In January 2006, Braff executed a purchase agreement with PGP Financial's owners. The agreement provided that Braff would purchase twenty percent of the firm's stock immediately and serve as the branch manager and sole on-site principal and supervisor for a branch office of

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[3] It appears that Braff opened the TD Waterhouse account at an earlier, unspecified date. The record contains a letter dated July 18, 2003 in which Braff notified TD Waterhouse about his employment with Milestone. The letter refers to the same account number that is on the January 2004 account application. Braff testified that he had to complete the January 2004 account application because "there were like three or four mergers that Waterhouse went through" that necessitated new paperwork.

PGP Financial.[4] A section of the firm's 2006 written supervisory procedures stated that Braff, in connection with his new responsibilities, was to oversee each annual compliance meeting. These meetings would address, among other things, requirements related to outside brokerage accounts. Another section of those supervisory procedures addressed the requirements associated with having an outside brokerage account, and designated Braff as the individual responsible for reviewing all "confirms and statements received from the firms at which employees maintain securities accounts."

While Braff was associated with PGP Financial, he placed numerous trades in his brokerage accounts at Scottrade and TD Waterhouse. Braff admits that many of those trades involved Document Security Systems, a security that PGP Financial salespersons (including some supervised by Braff) contemporaneously recommended to customers. Braff left PGP Financial on October 5, 2006.

3. PHD Capital

On October 10, 2006, Braff became associated with PHD Capital and served as a compliance manager for a branch office. On October 5, 2006, Braff completed a document titled, "Transaction for or by Associated Person - Conduct Rules (NASD)," which required PHD Capital employees to disclose in writing any brokerage account. The document stated that the compliance department would approve or reject the account and, for approved accounts, required that duplicate statements and confirmations be sent to the firm's compliance officer for review. In the section of the document that sought detailed information about any accounts Braff might have, Braff wrote "None." At the bottom of the page, Braff signed his name below text that stated that he read the information regarding his obligations in accordance with the firm's and NASD's Conduct Rules, that he did not have any account to disclose at the time, and he understood that, should his situation change, he would comply with "the Rule, or be subject to disciplinary action."

While associated with PHD Capital, Braff actively traded in his Scottrade and TD Waterhouse accounts. For example, on October 6, 2006, one day after completing the document described above, Braff effected several trades in his TD Waterhouse account. Two of those October 6 trades involved the purchase of 2,000 shares of Document Security Systems, which PHD Capital salespersons also were recommending to their customers. Braff left PHD Capital on January 17, 2007.

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[4] The agreement also provided that Braff would purchase the remaining eighty percent of the firm at a later date, but that purchase never occurred.

4. Pointe Capital

From March 21, 2007 through April 2, 2007, Braff was associated with Pointe Capital. He received a copy of, among other things, the firm's written supervisory procedures that included a policy regarding outside brokerage accounts:

> *Securities Accounts*. All personnel must advise Pointe Capital, Inc. of all accounts at "notice-registered broker/dealers" . . . maintained in their name . . . . Pointe Capital, Inc. does not as a matter of policy permit any Registered Representative or employee to maintain a securities account with another broker-dealer without express prior written permission of the designated Principal.
>
> *Duplicate Confirmations*. Duplicate confirmations, statements and/or other information related to all non-Pointe Capital, Inc. account transactions must be sent contemporaneously to the designated Principal.

Braff signed the policy, acknowledging that he had "read and understood, and accept[ed] and agree[d] to abide by, the above policy."

In March 2007, FINRA learned that a Pointe Capital salesperson that Braff supervised was permitted to resign from the firm after he had failed to follow the firm's electronic communication procedures while posting messages about Document Security Systems. During the course of the investigation, FINRA discovered that Braff actively traded in his outside brokerage accounts while associated with PGP Financial, PHD Capital, and Pointe Capital, and that his employer firms were not aware of such trading.

5. FINRA Initiates a Disciplinary Proceeding

FINRA instituted this proceeding on July 27, 2009 and held a hearing on March 16, 2010. Braff stipulated that he failed to notify Scottrade or TD Waterhouse that he was associated with PGP Financial or PHD Capital, but he did not stipulate as to Pointe Capital. On that point, he testified that he considered it to be standard industry practice for an associated person to assume that an employer would notify an outside brokerage firm of the employee's firm association. On the other hand, he admitted that he, not his employer, had provided written notification to Scottrade and TD Waterhouse on one occasion in July 2003 about his pending association with Milestone.[5]

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[5] *See supra* note 3.

Braff stipulated that he failed to notify PHD Capital that he had accounts with Scottrade and TD Waterhouse. With respect to PGP Financial, Braff stated that Ellen Lozinski, PGP Financial's former president and chief compliance officer,[6] told him that he "should write none on the [disclosure] form in terms of having duplicate statements sent from the two [brokerage] firms," given that he was going to be the branch office's compliance officer. However, Lozinski testified that she did not speak with Braff about his outside brokerage accounts, and that, if she had, she would have told Braff to arrange for duplicate confirmations and statements to be sent directly to the firm to be reviewed by someone other than Braff.

Braff testified that he notified Pointe Capital orally and in writing about his outside brokerage accounts. Paul Chuzi, Pointe Capital's former director of compliance, testified that Braff never sought written permission to maintain outside brokerage accounts, that he recalled no conversations with Braff concerning his outside brokerage accounts, and that, if Braff had disclosed the brokerage accounts to him, he would have required Braff to do so in writing.

Braff further testified that it was more important to him to be able to have an outside brokerage account than to have a job with a member firm. For example, Braff testified that "if I cannot get a brokerage firm to allow me to have outside accounts, I will not work there." He reasoned that "you have to go to a discount broker . . . because I would have gone broke doing my hobby, trading actively, at $20 a ticket charge" if he traded where he worked. Braff also testified it is "just a bad idea to have an account at the same firm you worked for" because "if there is a problem at the clearing company or that firm, they freeze your accounts." Braff acknowledged at the hearing that he had placed hundreds of trades totaling $3,744,406 in his Scottrade and TD Waterhouse accounts while working at PGP Financial, PHD Capital, and Pointe Capital. He also admitted that he traded Document Security Systems stock during his association with PGP Financial and PHD Capital.

FINRA's Hearing Panel found that Braff violated Rule 3050(c) and Rule 2110 by failing to disclose his outside brokerage accounts to PGP Financial, PHD Capital, and Pointe Capital and failing to disclose his associated person status to Scottrade and TD Waterhouse, and that he also violated Rule 2110 by making false statements on the PGP Financial and PHD Capital disclosure documents. The Hearing Panel fined Braff $15,000 and suspended him from associating with a member firm in all capacities for one year. Braff appealed the Hearing Panel's decision to FINRA's National Adjudicatory Council ("NAC"). At the oral argument before the NAC, Braff stated that "[t]his is absolutely a situation where a mountain, indeed, Mount Everest, has been made out of a molehill," and characterized his conduct as "an insignificant infraction . . . ." Although Braff acknowledged that he traded in Document Security Systems while it was being recommended to PGP Financial and PHD Capital customers, he stated, "[t]o that I say a big, so what?"

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[6] In its opinion, the National Adjudicatory Council stated that Lozinski was not the firm's compliance officer. However, Lozinski testified that she was the firm's president and chief compliance officer. A PGP Financial board resolution regarding the purchase agreement, dated January 19, 2006, is consistent with Lozinski's testimony.

The NAC affirmed the findings of violation but increased the sanctions to a two-year suspension and $25,000 fine. The NAC concluded that "the Hearing Panel's sanctions [we]re inadequate to remedy Braff's misconduct and insufficient to deter Braff from engaging, again, in the type of misconduct presented here." For purposes of assessing the sanctions, the NAC aggregated the two counts of the complaint, reasoning that Braff's misconduct stemmed from "a single systemic problem or cause," *i.e.*, his failure to disclose the existence of his outside brokerage accounts.[7] This appeal followed.

III.

NASD Rule 3050(c) provides that an associated person shall notify his member firm in writing about any accounts he maintains at a brokerage firm and notify the brokerage firm in writing about his association with the employer firm.[8] On appeal, Braff does not challenge FINRA's findings of violation, but only the sanctions imposed.

The record establishes that Braff did not make the required disclosures to any of his three employers. Braff stipulated that he failed to notify PHD Capital in writing about his outside brokerage accounts with Scottrade and TD Waterhouse. The record contains no evidence that Braff notified PGP Financial in writing, and his false statements on the firm's questionnaire regarding outside brokerage accounts are consistent with a finding that he failed to properly notify the firm. Although Braff testified that he provided written notice to Pointe Capital, he provided no documentary evidence in support. Moreover, Paul Chuzi, Pointe Capital's former director of compliance, testified that Braff never sought written permission to maintain outside brokerage accounts.

The record also establishes that Braff failed to provide written notification to Scottrade and TD Waterhouse about his status as an associated person. Braff admitted his failures to notify these firms about his association with PGP Financial and PHD Capital. The record contains no evidence that he notified Scottrade or TD Waterhouse about his association with Pointe Capital and supports a finding that he failed to do so. Accordingly, we find by a preponderance of the evidence that Braff violated NASD Rule 3050(c) and Rule 2110.[9]

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[7] The FINRA Sanction Guidelines authorize the aggregation of "similar types" of violations, particularly if, among other things, "the violations resulted from a single systemic problem or cause." FINRA Sanction Guidelines at 4 (General Principles Applicable To All Sanction Determinations, No. 4) (2011).

[8] NASD Conduct Rule 3050(c), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3728.

[9] *John M. Crute*, 53 S.E.C. 870, 880 (1998) (finding that applicant violated former Article III, Sections 1 and 28(c), which were recodified as NASD Rule 3050, by failing to notify his broker-dealer employer in writing of his personal securities account at a firm, and to notify

(continued...)

Braff does not dispute that he falsely represented that he had no outside brokerage accounts on the PGP Financial and PHD Capital disclosure documents. His Scottrade and TD Waterhouse accounts were open when he made these representations, and he actively traded in those accounts during his association with the two firms. Braff's false statements on these disclosure documents are inconsistent with just and equitable principles of trade.[10] We therefore find by a preponderance of the evidence that Braff also violated NASD Rule 2110 by engaging in this misconduct.

IV.

Pursuant to Exchange Act Section 19(e)(2), we will sustain FINRA's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.[11] FINRA suspended Braff from associating with any FINRA member firm in all capacities for two years and imposed on him a $25,000 fine.

A. The sanctions imposed by FINRA are consistent with FINRA's Sanction Guidelines. Although the Commission is not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).[12] The Sanction Guidelines

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[9] (...continued)
such firm in writing of his broker-dealer employment); *see also Guang Lu*, 58 S.E.C. 43, 52 & n.17 (2005) (finding that applicant violated NASD Rule 3050(c) and Rule 2110 by failing to notify both employer firm and brokerage firm, in writing, that he was exercising discretionary authority over a brokerage account while he was associated with employer); *Brian Prendergast*, 55 S.E.C. 289, 309-10 (2001) (finding that applicant opened an account at member firm without giving prior written notice to employer firm).

[10] *See John M.E. Saad*, Exchange Act Rel. No. 62178 (May 26, 2010), 98 SEC Docket 28591, 28597 (finding that applicant's entry of false information in firm records violated NASD Rule 2110 and noting that entry of accurate information in firm records is foundation of FINRA's regulatory oversight of its members), *appeal filed*, No. 10-1195 (D.C. Cir. July 23, 2010); *Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8986 (stating that "conduct that reflects negatively on an applicant's ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade" and finding that applicant's submission of false information to his member firm violated NASD Rule 2110).

[11] 15 U.S.C. § 78s(e)(2). Braff does not claim, and the record does not show, that FINRA's action imposes an unnecessary or inappropriate burden on competition.

[12] *E.g., Mission Sec. Corp.*, Exchange Act Rel. No. 63453 (Dec. 7, 2010), 99 SEC Docket 35510 A1, 35510 A21 n.44.

recommend a fine of $1,000 to $25,000 for violations of NASD Rule 3050(c).[13] In egregious cases, the Guidelines suggest a suspension of up to two years, or a bar.[14] As to Braff's misrepresentations on the PGP Financial and PHD Capital account disclosure documents, for which there is no specific Guideline, FINRA concluded that the Guidelines regarding Forgery and/or Falsification of Records under NASD Rule 2110 were the most analogous. For such a violation, the Guidelines recommend a fine between $5,000 and $100,000 and a suspension in any and all capacities for up to two years, if mitigation exists.[15] In egregious cases, the Guidelines suggest a bar.[16]

Rule 3050(c) is intended to prevent associated persons from engaging in improper trading "by providing the employer member with more complete knowledge of its associated persons' trading activities."[17] The written notification requirement allows member firms to create and enforce internal compliance procedures and "facilitate more direct and early detection of the existence of potential rule violations," such as conflicts of interest with the firm or its customers.[18] A firm's ability to effectively monitor and address trading activity that may result in violative conduct is therefore highly dependent on the receipt of accurate and comprehensive information about an associated person's brokerage accounts.

We agree with FINRA that Braff's misconduct was egregious. Braff failed to disclose his outside brokerage accounts and firm associations over the course of eighteen months.[19] During this time, Braff made intentional efforts to conceal his outside brokerage accounts and personal trading activities from his employers.[20] The documents that Braff completed when he joined PGP Financial and PHD Capital contained unambiguous language requiring the disclosure of outside brokerage accounts. Yet, Braff falsely stated on the documents that he had no such brokerage accounts. While associated with Pointe Capital, Braff signed a document stating that

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13 *See* Sanction Guidelines at 16.

14 *Id.*

15 *Id.* at 37.

16 *Id.*

17 NASD Notice to Members 91-27, http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=1200.

18 *Id.*

19 *See* Sanction Guidelines at 6 (Principal Consideration 9) (considering whether the misconduct occurred over an extended period of time).

20 *Id.* at 7 (Principal Consideration 13) (considering whether the respondent's misconduct was the result of an intentional act, recklessness or negligence); *id.* at 6 (Principal Consideration 10) (considering whether the respondent attempted to conceal his misconduct).

he had read, understood, and would comply with the firm's written supervisory procedures, which included explicit language regarding outside brokerage accounts. He nonetheless failed to comply with those procedures.[21]

Braff's extensive experience, including having been in the securities industry for twenty-two years, is further evidence that he intended to conceal his outside brokerage accounts in violation of Rule 3050(c). Moreover, while at PGP Financial, Braff assumed supervisory and compliance responsibilities that included reviewing all confirmations and statements regarding employees' personal brokerage accounts. He also oversaw annual compliance meetings addressing, among other things, requirements related to outside brokerage accounts. Yet, despite his supervisory responsibilities in these areas, he repeatedly failed to disclose his outside brokerage accounts.

Braff admitted that he had previously complied with Rule 3050(c) when he notified Scottrade and TD Waterhouse in July 2003 about his pending association with Milestone. He then failed to report his continued association with Milestone on the January 2004 TD Waterhouse account application. Although the false information on the account application does not serve as a basis for a finding of violation, we consider it for purposes of assessing sanctions.[22] Braff testified that he knew that having an outside brokerage account was a more economical approach to facilitating his active trading hobby, and that such an account would be less susceptible to being frozen for various reasons. Indeed, Braff testified that having outside brokerage accounts was more important than having a job with a member firm. In this context, we agree with FINRA that Braff's misconduct "was not a matter of mere administrative oversight."

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21 The Sanction Guidelines suggest that adjudicators consider whether the respondent provided verbal notice of the violative conduct to the employer member and/or brokerage firm and whether the employer member verbally acquiesced. *See* Sanction Guidelines at 16 (Principal Consideration 3 regarding a violation of Rule 3050). Braff testified that he orally notified PGP Financial and Pointe Capital about his brokerage accounts. Witnesses from PGP Financial and Pointe Capital testified that Braff did not mention his brokerage accounts, and if he had, they would have required Braff to disclose the existence of the accounts in writing and provide documentation that would allow the firms to monitor those accounts. The Hearing Panel did not make a credibility finding, and neither party urges us to consider as dispositive whether, if Braff provided verbal notice, PGP Financial or Pointe Capital verbally acquiesced. Based on the lack of information in the record, we have not considered this element of the Sanction Guidelines in our analysis.

22 *See, e.g.*, *Edgar B. Alacan*, 57 S.E.C. 715, 742 n.70 (2004) (considering evidence regarding respondent's actions after the ending date specified in the order instituting proceedings, not as a basis for findings of violation, but in assessing the public interest for purposes of determining appropriate sanction); *Joseph J. Barbato*, 53 S.E.C. 1259, 1282 (1999) (considering in setting sanctions respondent's efforts to influence customer witnesses' testimony).

Braff's trading in his personal accounts created, at a minimum, the potential for conflicts of interest with the firms with which he was an associated person and their customers, and is precisely the kind of activity that the Rule 3050(c) was meant to address. Braff actively traded in his outside brokerage accounts while associated with PGP Financial, PHD Capital, and Pointe Capital and acknowledged that he placed hundreds of trades valued at $3,744,406. Moreover, Braff admitted that many of those trades involved Document Security Systems, a security that was recommended to customers of PGP Financial by its salespersons, including those whom Braff supervised. Braff continued to trade in Document Security Systems while working at PHD Capital, where salespersons also were recommending that security to customers. In fact, on October 6, 2006, one day after stating in a PHD Capital disclosure document that he had no personal brokerage accounts, Braff bought 2,000 shares of Document Security Systems through his TD Waterhouse account. This pattern of trading raised at least the potential for conflict between Braff's financial interests and his duties to his firms and their customers. Given these facts, we agree with FINRA that "Braff purposely thwarted safeguards intended to protect the integrity and transparency of the securities industry, and in so doing, created an environment ripe for customer abuse."

B. Braff claims that the sanctions imposed by FINRA are "overly severe" and "excessively harsh" in light of what he asserts are mitigating factors. Braff points to his "lack of any previous violations, and generally outstanding disciplinary background." However, "we have repeatedly stated that a 'lack of disciplinary history is not a mitigating factor for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.'"[23] Braff asserts that he cooperated with FINRA and that he did not "conceal any wrongdoing during any investigations." When Braff registered with FINRA, "he agreed to abide by its rules, and compliance with his obligation to cooperate with an investigation is not a mitigating factor."[24]

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[23] *Dennis S. Kaminiski*, Exchange Act Rel. No. 65347 (Sept. 16, 2011), 101 SEC Docket 45925, 45941 & n.35 (citing *Scott Epstein*, Exchange Act Rel. No. 59329 (Jan. 30, 2009), 95 SEC Docket 1833, 13865 (quoting *Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 n.20)); *see also Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (holding that lack of disciplinary history is not a mitigating factor); *Robert J. Prager*, 58 S.E.C. 634, 666-67 (2005) (finding no mitigation in respondent's "otherwise 'pristine' disciplinary record"); *Ernest A. Cipriani*, 51 S.E.C. 1004, 1007 & n.15 (1995) (rejecting respondent's "otherwise spotless" disciplinary record as a mitigating factor for purposes of sanctions).

[24] *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22038 & n.25 (citing *Keyes*, 89 SEC Docket at 801 & nn.20 & 22 (finding cooperation during NASD investigation and a lack of disciplinary history not mitigating) (citing cases), *aff'd*, 416 F. App'x 95 (2d Cir. 2011); *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (3d Cir. 1994)).

Braff argues that his "violation was never done for any reasons in an attempt to monetarily gain even one cent at the expense of any clients, firms, or anyone. And, in fact, it was never found that I had gained anything monetarily." The absence of monetary gain or customer harm is not mitigating, "as our public interest analysis 'focus[es] . . . on the welfare of investors generally.'"[25] Braff's failure to disclose his brokerage accounts and trading activity undermined his employers' ability to detect actual or potential conflicts of interest, or other violative conduct.[26] Thus, even if a failure to disclose an outside brokerage account or firm association does not result in an applicant's monetary gain or harm to investors, it is serious because it impedes detection of other potentially violative conduct.[27]

Braff claims that he "self-corrected" his disclosure failures before the investigation began.[28] It appears that Braff is referring to the fact that he disclosed his brokerage accounts to PHD Capital when he joined the firm for a second time in June 2007, after the events at issue. There is no evidence, however, that Braff *ever* corrected any of the information in the PGP Financial and PHD Capital disclosure documents or provided the required written notification to the brokerage firms or to his three employers regarding his status from October 2005 through April 2007, the period at issue. Braff's claimed compliance therefore is irrelevant. In any event, FINRA initiated the investigation that led to the discovery of Braff's violations four months before he made his disclosures to PHD Capital in June 2007. As we have stated, FINRA should not have to bring disciplinary proceedings in order to obtain compliance with its rules.[29]

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25 *See vFinance Inv., Inc.*, Exchange Act Rel. No. 62448 (Jul. 2, 2010), 98 SEC Docket 29918, 29944 & n.56 (quoting *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14259).

26 *See* Sanction Guidelines at 16, 6 (Principal Considerations 1 and 11) (considering whether the violation presented real or perceived conflicts of interest for the employer firm and/or customers and whether the respondent's misconduct resulted directly or indirectly in injury to investing public, employer firm, and/or other market participants).

27 *Cf. PAZ Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5129 ("[F]ailing to respond [to requests for information] undermines NASD's ability to detect misconduct that may have occurred and that may have resulted in harm to investors or financial gain to respondents. Thus, even if the failure to respond does not result in direct improper financial benefit to respondents or harm to investors, it is serious because it impedes detection of such violative conduct.").

28 *See* Sanction Guidelines at 6 (Principal Consideration 3) (considering whether respondent employed subsequent corrective measures prior to detection).

29 *Cf. Kent M. Houston*, Exchange Act Rel. No. 66014 (Dec. 20, 2011), __ SEC Docket __, __ & n.23 (stating that NASD should not have to bring disciplinary proceedings in order to obtain compliance with its rules governing its investigations).

Braff states that he is remorseful. At the same time, Braff has attempted to minimize the severity of his actions by characterizing these proceedings as a mountain made out of a "molehill," his violations as an "insignificant infraction," and his trading in Document Security Systems as a "big so what?" He also blamed Ellen Lozinski for the manner in which he completed the PGP Financial disclosure document and insisted that his employer firms should have notified the brokerage firms about his associations. Braff's attempt to shift blame for his violations to others and his failure to appreciate the fundamental duty to provide the notification required by Rule 3050(c) justifies the imposition of a serious sanction, particularly given his twenty-two years in the securities industry.[30]

Braff claims that FINRA's counsel incorrectly told the Hearing Panel that "'the guidelines can only be used to make sanctions HARSHER but can not be used to make sanctions lower.'" Braff is incorrect. At the oral argument before the NAC, FINRA's counsel stated that "the supposed guidelines that Mr. Braff mentioned are guidelines for the reduction of sanctions are actually what should be considered to be aggravating factors, not mitigating factors. The absence of an aggravating factor does not warrant a reduction in a fine or suspension." Counsel's statement is consistent with our view that the absence of an aggravating factor under the Sanction Guidelines is not necessarily mitigating, and we have addressed Braff's claims of mitigation.[31]

Braff challenges FINRA's application of the Sanction Guideline governing Forgery and/or Falsification of Records to his false statements on the PGP Financial and PHD Capital disclosure documents. He asserts that the Guideline, "which deals with sanctions for FORGERY, is totally inappropriate" because he did not forge any document. But the Sanction Guidelines encourage adjudicators to look at analogous guidelines to determine sanctions for violations that are not addressed specifically.[32] The NAC explained in its decision that the Guideline for Forgery and/or Falsification of Records was helpful and the most analogous under the facts presented because Braff's "false statements about the existence of the Scottrade and TD Waterhouse accounts on PGP Financial's and PHD Capital's disclosures caused the firms' records to contain false information concerning those accounts." We find that FINRA reasonably determined that the

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30 *See Philippe N. Keyes*, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800, 802 (rejecting claim of remorse given attempts to shift blame to others and failure to appreciate the fundamental duties of a securities professional, and finding claimed ignorance of obligations aggravated in light of fifteen years of securities industry experience).

31 *Michael Frederick Siegel*, Exchange Act Rel. No. 58737 (Oct. 6, 2008), 94 SEC Docket 10501, 10519 (finding that, while the presence of certain factors could constitute aggravating circumstances justifying an increase in sanctions under the Guidelines, their absence is not mitigating), *vacated and remanded in part on other grounds*, 592 F.3d 147, 157 (D.C. Cir. 2010).

32 *See* Sanction Guidelines at 1 (Overview) (encouraging adjudicators to look at analogous guidelines to determine sanctions for violations that guidelines do not address specifically).

falsification of records was the most analogous guideline and that its application to Braff's violation was appropriate.[33]

Accordingly, we find that the $25,000 fine and two-year suspension are remedial because they will deter Braff and others from failing to disclose information about outside brokerage accounts and firm associations thereby protecting the investing public by facilitating more direct and early detection of potential rule violations, such as a conflict of interest with a firm or its customers. We conclude that the sanctions are neither excessive nor oppressive.

An appropriate order will issue.[34]

By the Commission (Commissioners WALTER, AGUILAR, PAREDES, and GALLAGHER); Chairman SCHAPIRO not participating

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

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33 *See Saad*, 98 SEC Docket at 28602 (finding that FINRA reasonably determined and properly applied the most analogous guideline based on the facts).

34 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66467 / February 24, 2012

Admin. Proc. File No. 3-14417

In the Matter of the Application of

HOWARD BRAFF
4 Mews Court
Holtsville, NY 11742

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority, Inc.

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by the Financial Industry Regulatory Authority, Inc. against Howard Braff, and its imposition of costs, be, and they hereby are, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66470 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14771

In the Matter of JC Acquisition Corp., L.B. Nelson Corp., Lakeside Mortgage Fund LLC, and National Community Builders, 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 JC Acquisition Corp., L.B. Nelson Corp., Lakeside Mortgage Fund LLC, and National Community Builders, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. JC Acquisition Corp. (CIK No. 1390031) is a void Delaware corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). JC Acquisition 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, 2007, which reported a net loss of $28,995 from its January 17, 2007 inception to March 31, 2007.

2. L.B. Nelson Corp. (CIK No. 70998) is a suspended California corporation located in Redwood City, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). L.B. Nelson 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, 1992, which reported a net loss of $738,000 for the prior nine months.

3. Lakeside Mortgage Fund LLC (CIK No. 1299919) is a California corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lakeside 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, 2008, which reported a net loss of over $1.3 million for the prior nine months.

4. National Community Builders, Inc. (CIK No. 69992) is a suspended California corporation located in San Diego, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). National Community Builders 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, 1973.

B. DELINQUENT PERIODIC FILINGS

5. 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.

6. 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.

7. 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

Chairman Schapiro
Commissioner Walter
not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3377 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14772

In the Matter of **SHAWN R. MERRIMAN,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 and III.4 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From about 1994 through 2009, Respondent, through his wholly-owned entity, Market Street Advisors, and several other entities under his control, acted as an investment adviser, soliciting funds from investors purportedly to manage the funds to make a profit for investors. Respondent entered into operating agreements with investors wherein he agreed to manage investor money to invest in securities, including options, exercising complete control over the securities trading on behalf of the investors in exchange for fee-based compensation. During the period at issue, Merriman resided in Denver, Colorado.

2. On December 23, 2011, a final judgment was entered by consent against Merriman, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 206 of the Advisers Act and Rule 206(4)-8 thereunder, in the civil action entitled Securities and Exchange Commission v. Merriman, Civil Action Number 1:09-cv-00786-PAB, in the United States District Court for the District of Colorado.

3. The Commission's complaint alleged that from about 1994 through 2009, when soliciting funds from investors, Merriman made materially false and misleading statements to them regarding, among other things, the purported uses of investor funds and the expected rates of return. The Complaint further alleged that Merriman misappropriated and misused investor proceeds, failed to trade in securities as represented to investors, and otherwise engaged in a variety of conduct which operated as a fraud or deceit on investors. The Complaint further alleged that Merriman sent false account statements to investors through the United States mail system in order to conceal the scheme.

4. On December 2, 2009, Merriman entered a plea of guilty to one count 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. Merriman, Case No. 09-cr-00369-MSK-01. On September 14, 2010, a judgment in the criminal case was entered against Merriman. He was sentenced to a prison term of 151 months followed by three years of supervised release and ordered to make restitution in the amount of $20,124,183.13.

5. The counts of the criminal information to which Merriman pled guilty alleged, inter alia, that Merriman defrauded investors and obtained money and property by means of materially false and fraudulent pretenses, representations, and promises, and that he used the United States mails to send false account statements.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 203(f) of the Advisers Act, that Respondent Merriman be, and hereby is:

> barred from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent.

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

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

Commissioner Walter not participating

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3378 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14773

In the Matter of **DAMIAN OMAR VALDEZ,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

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

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Valdez, age 43, of New York, New York, was the managing member and 100% owner of Evolution Capital Advisors, LLC ("Evolution Capital"). Valdez also controlled Evolution Investment Group I ("EIGI"). Evolution Capital was an investment adviser registered with the Commission until June 2010. Evolution Capital, EIGI, and Valdez raised at least $10 million from more than 80 investors through two note offerings which the Commission alleged were fraudulent.

2. On December 22, 2011, following a contested evidentiary hearing, a permanent injunction was entered against Valdez, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Evolution Capital Advisors, et al., Civil Action Number 4:11-CV-02945, in the United States District Court for the Southern District of Texas.

3. The Commission's complaint alleged that, in the note offerings, Valdez, Evolution Capital, and EIGI falsely promised that the notes were safe and secured by assets guaranteed by the United States government. It further alleged that the defendants also falsely promised that they would use leverage to purchase the assets securing the notes. In fact, according to the Commission's complaint, the assets securing the notes were subject to significant, undisclosed default and prepayment risk. Moreover, the Commission alleged that the defendants did not obtain sufficient leverage to purchase the assets. The Commission further alleged that the defendants paid themselves more than $2.4 million in fees and expenses and used approximately $2.7 million from the second note offering to make Ponzi-like payments to investors in the first note offering. As a result of defaults and prepayments on the underlying assets, the alleged failure to obtain sufficient leverage and excessive Ponzi-like payments and fees, the Commission alleged that the defendants did not have sufficient assets to repay investors in accordance with the notes.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Valdez 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;

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. 66473 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14774

In the Matter of MICHAEL W. AVERETT, 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 Michael W. Averett ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From January 2007 through July 2008 Averett was engaged in the business of effecting transactions in securities for the accounts of others by offering and selling promissory notes to investors. During that time, Averett was neither registered as a broker-dealer nor associated with a registered broker dealer.

2. On December 15, 2011, a judgment was entered by consent against Averett, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Mowen*, Case No. 2:09-cv-00786-DB in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that, from at least January 2007 through July 2008, Averett offered and sold purported high-yield promissory notes to investors that he claimed would pay 2% to 3% interest monthly. The funds raised by Averett were given to Thomas R. Fry who funneled those funds into a Ponzi scheme run by Jeffrey L. Mowen, a convicted felon and securities law recidivist. The Commission alleged that Averett distributed private placement memoranda to investors that falsely stated that all the investors' funds were being used to make collateralized domestic real estate loans and domestic small business loans and that misrepresented the level of his due diligence as to the investment scheme. The Commission alleged that Averett conducted virtually no due diligence in connection with the purported investment opportunities and transferred investor money without any documentation or limitation on the use of the funds.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Averett 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;

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; and

That Respondent Averett be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy
Secretary

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. 66475 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14776

In the Matter of **MICHAEL G. BUTCHER,** **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 Michael G. Butcher ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From January 2007 through September 2007 Respondent was engaged in the business of effecting transactions in securities for the accounts of others by offering and selling promissory notes to investors. During that time, Respondent was neither registered as a broker-dealer nor associated with a registered broker dealer.

2. On December 19, 2011, a judgment was entered by consent against Respondent, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Mowen*, Case No. 2:09-cv-00786-DB in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that, from at least January 2007 through July 2008, Respondent offered and sold purported high-yield promissory notes to investors that he claimed would pay 2% to 3% interest monthly. The funds raised by Respondent were given to Thomas R. Fry who funneled those funds into a Ponzi scheme run by Jeffrey L. Mowen, a convicted felon and securities law recidivist. The Commission alleged that Respondent distributed private placement memoranda to investors that falsely stated that all the investors' funds were being used to make collateralized domestic real estate loans and domestic small business loans and that misrepresented the level of his due diligence as to the investment scheme. The Commission alleged that Respondent conducted virtually no due diligence in connection with the purported investment opportunities and transferred investor money without any documentation or limitation on the use of the funds.

IV.

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

Accordingly, it is hereby ORDERED:

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

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; and

That Respondent be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy
Secretary

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. 66474 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14775

In the Matter of **JAMES B. MOORING,** **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 James B. Mooring ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From January 2007 through July 2008 Mooring was engaged in the business of effecting transactions in securities for the accounts of others by offering and selling promissory notes to investors. During that time, Mooring was neither registered as a broker-dealer nor associated with a registered broker dealer.

2. On December 15, 2011, a judgment was entered by consent against Mooring, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Mowen*, Case No. 2:09-cv-00786-DB in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that, from at least January 2007 through May 2008, Mooring offered and sold purported high-yield promissory notes to investors that he claimed would pay 2% to 3% interest monthly. The funds raised by Mooring were given to Thomas R. Fry who funneled those funds into a Ponzi scheme run by Jeffrey L. Mowen, a convicted felon and securities law recidivist. The Commission alleged that Mooring distributed private placement memoranda to investors that falsely stated that all the investors' funds were being used to make collateralized domestic real estate loans and domestic small business loans and that misrepresented the level of his due diligence as to the investment scheme. The Commission alleged that Mooring conducted virtually no due diligence in connection with the purported investment opportunities and transferred investor money without any documentation or limitation on the use of the funds.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Mooring 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;

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; and

That Respondent Mooring be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy
Secretary

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. 66476 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14777

In the Matter of GARY W. HANSEN, 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 Gary W. Hansen ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From January 2007 through September 2007 Respondent was engaged in the business of effecting transactions in securities for the accounts of others by offering and selling promissory notes to investors. During that time, Respondent was neither registered as a broker-dealer nor associated with a registered broker dealer.

2. On September 21, 2011, a judgment was entered by consent against Respondent, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Mowen*, Case No. 2:09-cv-00786-DB in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that, from at least January 2007 through July 2008, Respondent offered and sold purported high-yield promissory notes to investors that he claimed would pay 2% to 3% interest monthly. The funds raised by Respondent were given to Thomas R. Fry who funneled those funds into a Ponzi scheme run by Jeffrey L. Mowen, a convicted felon and securities law recidivist. The Commission alleged that Respondent distributed private placement memoranda to investors that falsely stated that all the investors' funds were being used to make collateralized domestic real estate loans and domestic small business loans and that misrepresented the level of his due diligence as to the investment scheme. The Commission alleged that Respondent conducted virtually no due diligence in connection with the purported investment opportunities and transferred investor money without any documentation or limitation on the use of the funds.

IV.

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

Accordingly, it is hereby ORDERED:

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

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; and

That Respondent be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy
Secretary

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. 66478 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14779

In the Matter of THOMAS R. FRY, 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 Thomas R. Fry ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From January 2007 through July 2008 Fry was engaged in the business of effecting transactions in securities for the accounts of others by offering and selling promissory notes to investors. During that time, Fry was neither registered as a broker-dealer nor associated with a registered broker dealer.

2. On December 7, 2011, a judgment was entered by consent against Fry, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Mowen*, Case No. 2:09-cv-00786-DB in the United States District Court for the District of Utah.

3. The Commission alleged that, from at least January 2007 through July 2008, Fry offered and sold purported high-yield promissory notes to investors that he claimed would pay 2% to 3% interest monthly. In addition, Fry solicited funds from other promoters to purportedly be used as "virtual earnest money" to lock up parcels of real estate while developers negotiated the purchase transaction and obtained permanent financing. The funds raised by Fry and the other promoters were given to Jeffrey L. Mowen, a convicted felon and securities law recidivist who was operating a Ponzi scheme. The Commission alleged that Fry distributed private placement memoranda to investors that falsely stated that all the investors' funds were being used to make collateralized domestic real estate loans and domestic small business loans and that misrepresented the level of his due diligence as to the investment scheme. The Commission alleged that Fry conducted virtually no due diligence in connection with the purported investment opportunities and transferred investor money to Mowen without any documentation or limitation on the use of the funds.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Fry 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;

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; and

That Respondent Fry be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy
Secretary

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. 66477 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14778

In the Matter of **BEVAN J. WILDE,** **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 Bevan J. Wilde ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From January 2007 through July 2008 Wilde was engaged in the business of effecting transactions in securities for the accounts of others by offering and selling promissory notes to investors. During that time, Wilde was neither registered as a broker-dealer nor associated with a registered broker dealer.

2. On July 22, 2011, a judgment was entered by consent against Wilde, permanently enjoining him from future violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled *Securities and Exchange Commission v. Mowen*, Case No. 2:09-cv-00786-DB in the United States District Court for the District of Utah.

3. The Commission's complaint alleged that, from at least January 2007 through July 2008, Wilde offered and sold purported high-yield promissory notes to investors that he claimed would pay 2% to 3% interest monthly. The funds raised by Wilde were given to Thomas R. Fry who funneled those funds into a Ponzi scheme run by Jeffrey L. Mowen, a convicted felon and securities law recidivist. The Commission alleged that Wilde distributed private placement memoranda to investors that falsely stated that all the investors' funds were being used to make collateralized domestic real estate loans and domestic small business loans and that misrepresented the level of his due diligence as to the investment scheme. The Commission alleged that Wilde conducted virtually no due diligence in connection with the purported investment opportunities and transferred investor money without any documentation or limitation on the use of the funds.

IV.

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

Accordingly, it is hereby ORDERED:

Pursuant to Section 15(b)(6) of the Exchange Act, that Respondent Wilde 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;

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; and

That Respondent Wilde be, and hereby is barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary

Commissioner Aguilar Disapproved

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66479 / February 27, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3367 / February 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14780

In the Matter of ROBERT CHIU, (A/K/A Chi Hung Chiu) 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 Robert Chiu ("Chiu" or "Respondent") 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, Paragraph 3 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. Chiu, 51, was an audit partner at a major public accounting firm (the "Firm") and served as its Relationship Partner for the Syntax-Brillian Corporation ("Syntax") engagement for the fiscal year ended June 30, 2006, and the fiscal quarter ended September 30, 2006. Chiu also played a similar role in the Firm's audit of South China House of Technology Consultants Co. Ltd. ("SCHOT") in 2007. Chiu has never been licensed as a Certified Public Accountant. He is a United States citizen living in Valley Village, California.

2. Syntax was a Delaware corporation headquartered in Tempe, Arizona. Syntax developed and marketed, among other things, high-definition LCD televisions primarily in the United States and purportedly in China. At all relevant times, the Company's common stock was registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act"). Prior to its suspension on July 22, 2008, the Company's common stock was listed for trading on the Nasdaq under the stock symbol "BRLC." The Company's fiscal year ends on June 30.

3. On January 30, 2012, the Commission filed a Complaint against Chiu in the United States District Court for the District of Arizona. On February 20, 2012, the Court entered an order permanently enjoining Chiu, by consent, from aiding and abetting violations of Sections 10(b), 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act, and Exchange Act Rules 10b-5, 13b2-1, and 13b2-2.

4. The Complaint alleges that Chiu aided and abetted a fraudulent revenue recognition scheme. From at least June 2006 through April 2008, Syntax's senior management and members of its Board of Directors engaged in a complex scheme to overstate Syntax's revenues and earnings and artificially inflate its stock price. This resulted in Syntax's reported financial statements being materially false and misleading from the fiscal year ended June 30, 2006, through the fiscal first quarter ended September 30, 2007. The scheme was concealed with forged sales and shipping documents, as well as through the circular transfer of cash among and between Syntax, its primary manufacturer in Taiwan, Taiwan Kolin Co., Ltd., and its purported

distributor in Hong Kong, SCHOT, that altogether created a façade of substantial revenues and cash flows.

5. According to the Complaint, as part of the fraudulent scheme, Syntax executives sought to recognize revenue on what were actually fictitious fiscal 2006 year-end sales between Syntax and SCHOT. Based on the facts presented to Chiu, he knew it was improper for the Company to recognize revenue on these sales. Specifically, Chiu knew that the sales failed to meet requirements under GAAP (Generally Accepted Accounting Principles) due in part to the lack of a valid sales distribution agreement between Syntax and SCHOT at the time of the purported sales.

6. The Complaint also alleges that, during the period between August and September of 2007, based on audit procedures the Firm performed in the audits of SCHOT's financial statements for the period ended in March 2007, Chiu also failed to object to the Firm's issuance of multiple consents to the reissuance of its audit opinion to Syntax's Form 10-K for fiscal year 2007.

7. By the conduct described herein, Chiu aided and abetted the antifraud, recordkeeping, internal control, and communication with auditors provisions of the federal securities laws.

IV.

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

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

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

B. After 5 years from the date of this order, Chiu 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 an accountant.

By the Commission.

Elizabeth M. Murphy

Elizabeth M. Murphy
Secretary

Commissioner Walter
not participating

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 9299 / February 27, 2012

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66469 / February 27, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3376 / February 27, 2012

Admin. Proc. File No. 3-13532

In the Matter of the Application of

ERIC J. BROWN, MATTHEW J. COLLINS, KEVIN J. WALSH, AND MARK W. WELLS

c/o Robert G. Heim, Esq.
Meyers & Heim LLP
444 Madison Ave., 30th Floor
New York, NY 10022

and

Jane Degenhardt Bruno, Esq.
Bruno & Degenhardt
10615 Judicial Drive, Suite 703
Fairfax, VA 22030

and

Kevin J. Walsh
160 Deland Ave.
Indialantic, FL 32903

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Fraud in the Offer and Sale of Securities

Failure to Supervise

Aiding and Abetting and Causing Recordkeeping Violations

Salespersons associated with, and formerly associated with, registered broker-dealer willfully violated or were a cause of violations of 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 in connection with the sale of variable annuities; salesperson failed to reasonably supervise within the meaning of Exchange Act Sections 15(b)(4)(E) and 15(b)(6); and salespersons aided and abetted and caused broker-dealer's failure to keep accurate books and records in violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. *Held*, for three salespersons, it is in the public interest to bar them from associating with any broker, dealer, or investment adviser (except with respect to one of the three salespersons, who should have a right to reapply in a non-supervisory capacity after two years); to impose cease-and-desist orders; to order disgorgement of illegal profits; and to assess second-tier civil penalties, and to dismiss the proceedings as to one salesperson.

APPEARANCES:

Robert G. Heim, of Meyers & Heim, LLP, for Matthew J. Collins and Mark W. Wells.

Jane Degenhardt Bruno and *Christopher M. Bruno*, of Bruno & Degenhardt, for Eric J. Brown.

Kevin J. Walsh, *pro se*.

Martin F. Healey and *Alix Biel* for the Division of Enforcement.

Appeal filed: September 15, 2010
Oral Argument: August 24, 2011
Last brief received: October 7, 2011

I.

Eric J. Brown and Kevin J. Walsh, formerly associated with registered broker-dealer Prime Capital Services, Inc. ("Prime Capital" or the "Firm"), and Matthew J. Collins and Mark W. Wells, currently associated with Prime Capital (collectively, "Respondents"), appeal from the decision of an administrative law judge.[1] The law judge found that, in sales of variable annuities to elderly customers, Respondents violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 (collectively, the "antifraud provisions"),[2] and Exchange Act Section 17(a) and Exchange Act Rule 17a-3 (collectively, the "books and records provisions").[3] The law judge also found that Collins failed to reasonably supervise Brown within the meaning of Exchange Act Sections 15(b)(4)(E) and 15(b)(6).[4]

For these violations, the law judge issued cease-and-desist orders against Respondents; ordered Respondents to disgorge commissions earned from selling certain variable annuities; barred Respondents from associating with a broker, dealer, or investment adviser; and imposed a third-tier civil monetary penalty of $130,000 against each Respondent. The Division of Enforcement (the "Division") cross-appeals, contending that the law judge's imposition of civil monetary penalties "should have been significantly greater" for all four Respondents. We base

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1 *Prime Capital Servs., Inc.*, Initial Decision Rel. No. 398 (June 28, 2010). In the proceedings below, Prime Capital and five individuals were alleged, among other things, to have failed to supervise the Respondents. These additional parties either settled or did not appeal the law judge's decision: Prime Capital and its parent company, Gilman Ciocia, Inc., agreed to a cease-and-desist order and to pay disgorgement and prejudgment interest, and a Prime Capital compliance officer, Christie A. Andersen, agreed to a suspension from association with any broker-dealer or investment adviser in a supervisory capacity for twelve months and to pay a $10,000 civil monetary penalty. *Prime Capital Servs., Inc.*, Securities Exchange Act Rel. No. 61719 (Mar. 16, 2010) (order regarding Prime Capital and Gilman Ciocia); *Prime Capital Servs., Inc.*, Exchange Act Rel. No. 61079 (Nov. 30, 2009) (order regarding Christie Andersen). The law judge barred Prime Capital's president, Michael P. Ryan, and its chief compliance officer, Rose M. Rudden, from association with a broker-dealer or investment adviser with a right to reapply after one year and assessed each a second-tier monetary penalty of $65,000. *Prime Capital Servs., Inc.*, Initial Decision Rel. No. 398 (June 28, 2010). Rudden and Ryan did not appeal their sanctions, and the decision of the law judge was declared final as to them. *Prime Capital Servs., Inc.*, Exchange Act Rel. No. 62600 (Aug. 5, 2010).

2 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

3 15 U.S.C. § 78q(a); 17 C.F.R. § 240.17a-3.

4 15 U.S.C. § 78*o*(b)(4)(E), (b)(6).

our findings on an independent review of the record, except for findings that the parties do not challenge on appeal.[5]

II.

The facts and legal issues on appeal are largely distinct for each Respondent, although overlap exists between Brown and Collins, who worked in the same office and are alleged to have conspired to defraud customers. Therefore, after providing a brief overview of variable annuities, we discuss the following findings in Sections IV through VI below:

Brown Findings:

- Brown violated the antifraud provisions by selling variable annuities to elderly customers while failing to disclose material information, including a prohibition on his insurance license against making such sales, and by effecting unauthorized transactions in customer accounts.

- Brown aided and abetted and was a cause of Prime Capital's books and records violations by falsifying customer account forms.

- It is in the public interest to bar Brown from associating with any broker, dealer, or investment adviser; to impose a cease-and-desist order; to order disgorgement; and to impose a civil penalty of $560,000.

Collins Findings:

- The record does not support a finding that Collins was a primary violator of the antifraud provisions, but does support a finding that Collins was a cause of Brown's antifraud violations for purposes of imposing a cease-and-desist order and disgorgement against Collins.

- Collins failed to adequately supervise Brown by, among other things, allowing Brown to continue selling variable annuities despite a suspended license.

- Collins aided and abetted and was a cause of Prime Capital's books and records violations by falsifying customer account forms.

- It is in the public interest to bar Collins from associating with any broker, dealer, or investment adviser; provided, however, that he may apply to become so

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[5] Rule of Practice 451(d), 17 C.F.R. §201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral argument transcript prior to such participation. Commissioner Gallagher has reviewed the transcript of the oral argument.

associated in a non-supervisory capacity after two years; to impose a cease-and-desist order; to order disgorgement; and to impose a civil penalty of $310,000.

Walsh Findings:

- Walsh violated the antifraud provisions by failing to disclose material information to his elderly customers when selling variable annuities – including concealing the very type of investment he was selling.

- The record does not establish that Walsh aided and abetted or was a cause of Prime Capital's books and records violations.

- It is in the public interest to bar Walsh from associating with any broker, dealer, or investment adviser; to impose a cease-and-desist order; to order disgorgement; and to impose a civil penalty of $255,000.

Wells Findings:

- The record does not establish that Wells violated the antifraud provisions.

- The record does not establish that Wells aided and abetted or was a cause of Prime Capital's books and records violations.

III.

The securities at issue in this matter were all variable annuities. A variable annuity is a hybrid security and life insurance product. It is a contract between an investor and an insurance company in which the investor agrees to make a lump-sum payment or a series of payments in exchange for a regular stream of payments or a lump-sum payment in the future. Variable annuities generally offer investors a range of investment options (typically mutual funds that invest in stocks, bonds, and money market instruments), and the value of variable annuities depends on the performance of the underlying investments. Income and investment gains from variable annuities are generally tax-deferred and, when withdrawn, are taxed at ordinary income tax rates.

Variable annuities generally offer a "death benefit," which provides that, if the investor dies before receiving payments from the insurance company, the investor's stated beneficiaries are guaranteed to receive a specified amount (typically at least the amount of the investor's payments to the insurance company less accumulated withdrawals). Variable annuities also generally assess surrender charges if the investor withdraws money during the early years of the investment, although contracts will often allow an investor to withdraw a certain amount of his or her account without paying a surrender charge. Variable annuities also generally contain a "free-look" period of ten or more days after the initial investment, during which investors can terminate the contract without incurring a surrender charge.

Variable annuities generally contain a "mortality and expense risk" charge to compensate the insurance company for the insurance risk that the company assumes under the annuity contract. In addition, investors in variable annuities can often obtain certain optional features (such as a stepped-up death benefit, guaranteed minimum income benefit, long-term care insurance, and up-front bonus credits) at specified charges.

Insurance companies pay broker-dealers a commission for selling variable annuities. The amount of the commission depends on the insurance company, the relationship between the broker-dealer and the insurance company, the type of annuity sold, and how much money the customer invested. Commissions can be paid in full at the time of sale, over the life of the contract, or for another defined period.

IV.

A. Eric Brown's and Matthew Collins's Alleged Violations

1. Background

Eric Brown was associated with Prime Capital from 1998 until March 2006, first working in the Firm's Delray Beach, Florida office. Matthew Collins became associated with Prime Capital in 2001. Collins also worked in the Firm's Delray Beach office, where he and Brown were the only two registered representatives during much of the relevant period. In December 2004, Prime Capital moved the Delray office to Boynton Beach, Florida.[6]

Because Collins had not sold variable annuities before coming to Prime Capital, Brown (who was one of the Firm's top producers) taught Collins about variable annuities and how to sell them. In December 2002, Prime Capital assigned Collins to be Brown's supervisor, which required Collins to review and approve all of Brown's transactions and to complete a monthly report stating client names, phone numbers, net worth, reasons for trades, and suitability issues. Prime Capital did not begin training Collins to be a supervisor, however, until several months after he began supervising Brown and, even then, Collins acknowledged that the training was "lacking."

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[6] Brown resigned from Prime Capital on March 13, 2006, while he was being investigated by Prime Capital for selling away – an allegation not at issue in this appeal. FINRA barred Brown on October 5, 2007 from association with any FINRA member in any capacity for failure to provide information to FINRA upon request. At the time of hearing, Collins was still associated with Prime Capital in the Firm's Boynton Beach office.

a. Florida Revokes Brown's Insurance License

In August 2003, the Florida Department of Financial Services (the "State") filed an administrative complaint against Brown, alleging that Brown knowingly made false or fraudulent statements in connection with the sale of variable annuities to certain elderly customers. The complaint alleged that Brown (1) guaranteed to customers Ilse Reiss and Maynard Schlager a six to eight percent return on variable annuity investments; (2) invested customer Reiss's money into a variable annuity without her approval; (3) failed to provide customers Reiss, Schlager, or Claire Elkin with a prospectus in connection with the sale of variable annuities; and (4) failed to disclose to customer Schlager the fees (including surrender fees) associated with a variable annuity Brown sold to him. Another customer, Sylvia Kirshner, filed a complaint with the State in September 2003 alleging that Brown had mishandled the sale and repurchase of certain variable annuities in her account.

The State revoked Brown's insurance license in December 2003 because Brown failed to respond to the complaint. Collins testified that, at the time, Brown told him that he had some "mishap with the state of Massachusetts" regarding his insurance licence. Because Brown assured him the issue "was no big deal," however, Collins did nothing to find out more about the issue and allowed Brown to continue discussing variable annuities at public seminars and selling them to customers. Moreover, shortly before Brown told Collins about the supposed licensing "mishap," Prime Capital's compliance department had alerted Collins that he should review a $2 million sale of variable annuities that Brown had made to a single customer. Collins, however, never investigated whether Brown's licensing "mishap" might affect this sale.

Collins learned in February 2004 that Florida had revoked Brown's license. Collins nevertheless continued to allow Brown to discuss variable annuities at public seminars and to sell them to customers. Brown appealed the license revocation, and the State reinstated his license in April 2004 pending that appeal, but did so on the condition that Brown "not market annuities to individuals over the age of 65 years, who are not currently his clients."

b. Brown Continues to Sell Variable Annuities

Brown admitted at the hearing that he continued to sell variable annuities to new, elderly customers despite Florida's prohibition against doing so. Brown explained that he and Collins concealed Brown's unlicensed sales by listing Collins as the financial representative on new customers' account forms. Brown could not recall who came up with this idea, but he testified that they agreed that Collins would get credit for these sales and that they would share the commissions.

In contrast, Collins testified that the customers were his clients, that he recommended they purchase variable annuities, that he provided prospectuses to them, and that he explained to them the costs associated with the annuities. Collins rationalized the difference between his testimony and Brown's by claiming that Brown was upset with, among other things, Collins's refusal to testify on Brown's behalf at the State administrative proceedings. Collins nevertheless acknowledged that Brown's handwriting was on the customers' account documentation and that he had crossed out Brown's name as the customers' registered representative and put his own name instead. The law judge expressly rejected Collins's testimony, finding Collins's claims that he was the clients' representative to be "inherently incredible."

Customer testimony corroborated Brown's version of events. Lenore and Morton Jaye, Ria Skiena, Edward Bogan, and Bernice Rosenberg (all new customers in their 70s or older and described in more detail below) testified at the hearing that Brown sold them variable annuities and that they never met Collins or, if they did, it was only briefly. Moreover, Collins acknowledged that, as Brown's supervisor, he did nothing to ensure that Brown complied with the State's limitations on his license.

Additionally, branch reviews of the Delray Beach office from 2003 and 2004 found "no evidence" of supervisory review by Collins and repeatedly found that customer documents – and occasionally entire files – were missing. Collins acknowledged during the hearing that the missing documentation made any suitability assessment of Brown's customer accounts impossible. Although a subsequent review by Prime Capital of the Delray Beach office found "a marked improvement in the completeness of paperwork," the Firm nevertheless concluded that "there was [a] complete lack of supervision and evidence of OSJ [Office of Supervisory Jurisdiction] review by Matt Collins" over Brown – a conclusion Collins agreed with during the hearing.

In February 2005, the Firm put Brown on heightened supervision and, in March 2005, relieved Collins of his supervisory duties. In January 2006, Brown settled Florida's complaint against him by agreeing to a consent order, pursuant to which the State permanently revoked Brown's license to sell insurance and Brown agreed to pay restitution to the complaining customers in amounts ranging from approximately $14,000 to $84,000.

c. Brown Fails to Disclose Material Information

In addition to the allegations that Brown and Collins concealed the limitations on Brown's license, customer witnesses, all of whom first met Brown at free lunch seminars, testified that Brown failed to provide disclosure documents (such as prospectuses), that he executed transactions without their approval, and that, in some cases, he lied about the very type of investment into which he was investing their money. We summarize the customers' testimony below.

i. Claire Elkin

Claire Elkin, a retired secretary in her late 70s, first met Brown in early 2000. At Brown's recommendation, Elkin liquidated a certificate of deposit she owned in an individual retirement account ("IRA") to purchase a General Electric variable annuity in February 2000. Elkin had not been familiar with variable annuities before making this investment and relied on Brown to give her information. While recommending the variable annuity, Brown did not tell Elkin that the investment could lose money. Elkin was aware that variable annuities "fluctuated with the market," but she "was under the impression we were getting dividends and the dividends would make up for fluctuations." As Elkin explained, "[t]he way [Brown] spoke, you just didn't lose."

Elkin also testified that, while she was generally aware that she would incur a surrender charge "[i]f I would withdraw the whole [investment]," Brown never told her that mandatory withdrawals from her IRA could also trigger surrender fees. She testified that someone also forged her signature on a document (which purported to indicate her understanding of the minimum IRA distribution requirements), noting that the forged signature misspelled her first name as "Clare" instead of "Claire." Prime Capital became aware of this forgery allegation sometime in 2004 and ordered a handwriting analysis, which concluded that it was "[h]ighly probable that [Elkin's] signature was not genuine," although added that "[n]o identification can be made as to who wrote the questionable signature." Brown received $3,506 in commissions from selling Elkin the variable annuity.

In May 2006, Elkin filed a complaint with the NASD against Prime Capital, alleging that Brown mishandled her assets by, among other things, "[f]ailing to disclose market and liquidity risks associated with variable annuities" and by "[r]ecommending that [she] purchase variable annuities within her IRA." Prime Capital settled the complaint in October 2006 by agreeing to pay Elkin $24,000.

ii. Maynard Schlager

Maynard Schlager, a retired psychologist in his early 80s, and his wife Natalie, who was in her late 70s, also met Brown sometime in 2000. During their meeting, Brown recommended that the Schlagers transfer their entire portfolio of stocks, mutual funds, and fixed-rate annuities into variable annuities. Mr. Schlager was not familiar with variable annuities, but Brown "guarantee[d] that I would not lose any principal and I would get a guarantee on the income percentage." In making his recommendations, Brown did not disclose any of the fees associated with variable annuities, telling Schlager only that the insurance companies would pay any fees.

The Schlagers purchased six variable annuities from Brown in August 2000, signing blank applications without receiving a prospectus. After later noticing a substantial decline in the value of his variable annuities, Mr. Schlager confronted Brown, who advised Schlager to invest in five additional variable annuities. The Schlagers followed Brown's advice and, in October 2001 and April 2002, withdrew part of their original variable annuity investment (incurring surrender charges when they did so) to purchase five additional variable annuities. The Schlagers again signed blank applications and did not receive a prospectus in connection with their investments. Brown received $21,639 in commissions from selling variable annuities to the Schlagers.

In December 2004, the Schlagers filed a complaint against Prime Capital with the NASD alleging that Brown had defrauded him and his wife by, among other things, promising "no loss of principal and guaranteed gains on all annuities" and failing "to provide full disclosure and representations." The Schlagers eventually received approximately $40,000 as a result of their complaint, although the record contains few details about the settlement.

iii. Lenore and Morton Jaye

Lenore Jaye, a retired customer service representative in her early 70s, and Morton Jaye, a retired electrician in his mid-70s, met Brown in early 2004. After meeting with Brown at his office, the Jayes each agreed to purchase a Jackson National variable annuity at Brown's recommendation. Although Brown did not provide them with prospectuses when they filled out their investment documentation, Lenore Jaye admitted that she understood that variable annuities had surrender periods and Morton Jaye admitted that he understood that the value of variable annuities could fluctuate. Mr. Jaye finalized the purchase of the variable annuity, but Mrs. Jaye cancelled her investment several days after signing the paperwork, explaining that "I had changed my mind."

Although Collins had become associated with Prime Capital by this time, the Jayes testified that they had very limited interactions with him. Mrs. Jaye testified that she remembered meeting Collins only once, when he "stopped in" during their meeting with Brown and "may have mentioned what his title was," but the meeting "was very brief." Mr. Jaye similarly recalled Collins introducing himself, but testified that Collins never discussed variable annuities with him. Collins earned a $1,605 commission from Brown's variable annuity sale to Mr. Jaye.

iv. Ria Skiena

Ria Skiena, a retired assistant administrator in her early 70s, also met Brown in early 2004. Skiena and her husband subsequently met with Brown to discuss transferring funds from a variable annuity in her municipal retirement account into "something that I could track daily through the newspaper, something that was self-directed." She told Brown that she "didn't want to be in an annuity type of investment. I wanted to be in a regular stock fund that was traded openly and I could track through a newspaper. I suggested [a] Wellington fund . . . ." Brown agreed with her suggestion, telling her "that he could certainly do what I had wanted and that he would . . . put [the monies] into [a] Wellington [fund]."

To complete the transaction, Skiena hurriedly signed blank forms without reading them because she was pressed for time. Brown never gave her a prospectus, and she left the meeting thinking that she had just invested in the Wellington stock fund. Skiena testified that Collins was not at this meeting and, in fact, did not recall ever meeting him. She explained that, at most, Collins may have been at the initial lunch seminar and that, during her subsequent meeting with Brown at his office, someone phoned Brown, but she never spoke with the person who called and, as far as she knew, "[i]t might have been a personal call."

Brown later sent Skiena a letter "telling [me] I was in the Wellington growth and capital appreciation." When Skiena could not find these funds listed in the paper, she spoke to Brown, who told Skiena that her investment "was like Wellington only it was their own [Gilman Ciocca] fund." In fact, Brown had invested her money in an American International Group variable annuity. Collins received a $1,310 sales commission from the sale.

v. Edward Bogan and Bernice Rosenberg

Edward Bogan, who was approximately eighty years old and retired from the printing business, first met Brown sometime in late 2004. He and his significant other, Bernice Rosenberg, an 80-year-old retired headhunter, subsequently met with Brown at his office to discuss certain Allianz annuities they held. Brown, however, instead focused their attention on the financial troubles of another variable annuity Bogan and Rosenberg held that was issued by Scudder (also known as Allmerica). They subsequently signed blank pieces of paper, which Brown told them would "make the changes [to their Allianz annuities] that we wanted." Brown refused to provide them copies of the documents, however, telling them that "by law [the paperwork] has to go directly to the home office." Unbeknown to Bogan or Rosenberg, Brown used the documents to, among other things, transfer funds from their Scudder variable annuity into a Jackson National variable annuity. Neither Bogan nor Rosenberg authorized these transactions, and, because of these unauthorized transfers, Bogan and Rosenberg incurred surrender fees of $18,443 and $45,000, respectively. The record also contains written notes – signed by Rosenberg and Bogan but otherwise filled out in Brown's handwriting – that requested their financial representative be changed from Brown to Collins.

During one of their meetings, Brown also recommended that Bogan exchange one of his son's variable annuities for a different annuity. Bogan's son was forty-five years old at the time and disabled. Bogan told Brown that he did not have authority to handle his son's assets. Brown responded, "That's ok. I'll take care of it." Bogan signed his son's name to the necessary paperwork, but Brown never obtained authorization from Bogan's son to execute the transaction. Collins allowed the transaction to go through by guaranteeing the signature on the documents based solely on Brown's word to Collins that Bogan's son had signed the document. Bogan's son incurred a $5,000 surrender fee because of the transaction.

In April 2005, Bogan wrote to Prime Capital that he had became suspicious about Brown's and Collins's dealings in his account when he saw Collins name appear on an account statement, "because I never knew a Matt Collins." Rosenberg similarly testified that she "didn't even know [Collins] existed." Bogan and Rosenberg filed a formal complaint with the NASD on December 28, 2005, claiming that, "as a result of Mr. Brown's conduct," they had "incurred penalties totaling $59,114.60, and given up growth of at least $459,000.00." Prime Capital settled the matter on September 20, 2006 for $125,000. Collins received a $2,126 sales commission from Brown's sales to Bogan and Rosenberg, but these commissions were reversed when the investments were cancelled.

2. Antifraud Violations

Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, "prohibit the employing of fraudulent schemes or the making of material misrepresentations and omissions in offers, purchases, or sales of securities."[7] To establish liability under these provisions, the Division must show by a preponderance of the evidence that Respondents engaged in fraudulent conduct, that such conduct was in connection with the offer, sale, or purchase of securities, and that they acted with scienter.[8] Fraudulent conduct includes, among other things, (1) making an untrue statement of material fact; (2) omitting a fact that made a prior statement misleading; or (3) committing a deceptive or manipulative act as part of a scheme to defraud or employing any act, practice, or course of business which operates as a fraud or deceit.[9] A fact is material if there is a substantial likelihood that a reasonable investor would have considered the misstated or omitted fact important in making an investment decision, and if disclosure of the misstated or omitted fact would have significantly altered the total mix of information available to the investor.[10]

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[7] *SEC v. Brooks*, No. Civ. A. 3:99-CV-1326-D, 1999 WL 493052, at *2 (N.D. Tex. July 2, 1999); *see also SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855-56 (9th Cir. 2001) (noting that the antifraud provisions "prohibit fraudulent conduct or practices" and "forbid making a material misstatement or omission" in connection with the offer or sale of securities).

[8] *Gregory O. Trautman*, Exchange Act Rel. No. 61167 (Dec. 15, 2009), 98 SEC Docket 26534, 26558 (describing requirements for liability under antifraud provisions). Scienter includes recklessness, defined as conduct that is "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it." *Id.* at 26563 (quotations omitted). The Division may demonstrate scienter by circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *Valicenti Advisory Servs., Inc. v. SEC*, 198 F.3d 62, 65 (2d Cir. 1999). We need not find, however, that an actor acted with manipulative intent in order to conclude that the respondent violated Exchange Act Section 10(b). "It is sufficient if [respondent] engaged in a course of conduct that operated as a fraud or deceit as to the nature of the market . . . ." *Richard D. Chema*, 53 S.E.C. 1049, 1054 (1998). No scienter requirement exists for violations of Securities Act Section 17(a)(2) or (3). Negligence is instead sufficient. *Aaron v. SEC*, 446 U.S. 680, 685, 701-02 (1980).

[9] *See* 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5; *Trautman*, 98 SEC Docket at 26558-59.

[10] *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

a. Brown's Materially Misleading Omissions

We find that Brown willfully violated the antifraud provisions through material omissions in dealing with his customers.[11] Brown testified that he knowingly sold variable annuities to new customers who were sixty-five years old or older, in direct violation of Florida's prohibition against his doing so. Brown did not disclose this prohibition to these new, elderly customers, and his failure to do so was a misleading omission of information that a reasonable investor would have considered important.[12]

Moreover, Skiena, Bogan, and Rosenberg consistently testified that Brown failed to disclose material terms about their investments by rushing through the paperwork process and failing to give them prospectuses concerning their investments. Schlager testified that Brown never told him about the surrender fees associated with the six variable annuities he purchased from Brown, and Elkin testified that, although Brown explained surrender fees to her generally, he did not explain to her that the mandatory withdrawals from her IRA could trigger those fees. Surrender charges are a defining feature of variable annuities, as they limit an investor's ability to access their investment. A reasonable investor would want to know this information.[13]

We do not, however, find sufficient evidence to conclude that Brown violated the antifraud provisions in connection with his sales to Reiss and Kirshner. Although Brown's settlement with the Florida Department of Financial Services suggests that Brown's sales may have been improper, Brown did not admit liability in his settlement, and the record contains few details about the circumstances surrounding Kirshner's or Reiss's allegations, as neither customer testified at the hearing.

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[11] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (stating that "willfully" under the federal securities laws means that the respondent "intentionally committ[ed] the act which constitutes the violation" (citation omitted)).

[12] *See Shores v. M.E. Ratliff Inv. Co.*, No. CA 77-G-0604-S, 1982 WL 1559, at *5 (N.D. Ala. Jan. 18, 1982) (holding that underwriter's failure to disclose lack of a securities license was a material omission in violation of Rule 10b-5).

[13] *See Basic*, 485 U.S. at 240 ("[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information."); *Edgar B. Alacan*, 57 S.E.C. 715, 727 (2004) ("The deceptive conduct element is met when the broker omits 'to inform the customer of the materially significant fact of the trade before it is made.'" (quoting *Sandra K. Simpson*, 55 S.E.C. 766, 791 (2002)).

b. Brown's Unauthorized Trades

Brown also willfully violated the antifraud provisions by executing unauthorized trades in his customers' accounts. Unauthorized trading violates the antifraud provisions when accompanied by deceptive conduct.[14] "The deceptive conduct element is met when the broker omits 'to inform the customer of the materially significant fact of the trade before it is made.'"[15] Here, Brown (1) invested Skiena's money into an American International Group variable annuity instead of the Wellington fund she requested; (2) switched Bogan and Rosenberg out of their Scudder variable annuities without their consent or knowledge; and (3) switched Bogan's son out of a variable annuity without the son's consent or knowledge. The customers' testimony indicates that Brown was aware that he lacked authorization to effect the transactions or, at a minimum, was recklessly indifferent to whether his customers had authorized the transactions, and we can find no evidence to the contrary.

c. Collins was a Cause of Brown's Antifraud Violations

The record does not contain sufficient evidence to find that Collins was a primary violator of the antifraud provisions, but the evidence establishes that Collins was "a cause of" Brown's antifraud violations related to the limitations on his insurance license. Collins allowed Brown to conceal (and, in fact, to circumvent) Florida's licencing restrictions by falsifying customer account forms to indicate that he, not Brown, was the customers' account representative.[16]

We also find insufficient evidence to conclude that Collins was a primary violator regarding the unauthorized transactions in client accounts. Brown, not Collins, executed the unauthorized transactions in Skiena's, Bogan's, Rosenberg's, and Bogan's son's accounts. There is also insufficient evidence to conclude that Collins was a cause of such violations. Although Brown could not have made some of those transfers without Collins's approval – nor would

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[14] *See, e.g., Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678 (11th Cir. 1988) (holding that salesperson's unauthorized trading violates Rule 10b-5 when "it is accompanied by an intent to defraud or a willful and reckless disregard of the client's best interests" (citing *Brophy v. Redivo*, 725 F.2d 1218, 1220-21 (9th Cir. 1984))); *Steven E. Muth*, 58 S.E.C. 770, 792 (2005) (holding that salesperson's unauthorized trading in customer accounts violated the antifraud provisions (citing *Alacan*, 57 S.E.C. at 727)).

[15] *Alacan*, 57 S.E.C. at 727 (quoting *Simpson*, 55 S.E.C. at 791).

[16] See *Robert M. Fuller*, 56 S.E.C. 976, 984 (2003) (finding corporate officer to be "a cause of" a company's antifraud violations where "(1) a primary violation occurred, (2) there was an act or omission by the respondent that was a cause of the violation, and (3) the respondent knew, or should have known, that his conduct would contribute to the violation"), *petition for review denied*, No. 03-1334 (D.C. Cir. Apr. 23, 2004); *Erik W. Chan*, 55 S.E.C. 715, 724-25 (2002) (same). The Order Instituting Proceedings (the "OIP") did not allege that Collins aided and abetted Brown's violations.

Brown have even been their representative without Collins's involvement in concealing Brown's role in those sales – the record contains insufficient evidence to conclude that Collins knew or should have known that his conduct would have led to unauthorized transfers.[17]

3. Books and Records Violations

The books and records provisions "require that broker-dealers registered with the Commission make and keep current, for prescribed periods, certain books and records."[18] That requirement includes the requirement that the records be accurate,[19] which applies "regardless of whether the information itself is mandated."[20] An individual can be a cause of a broker-dealer's violations of the books and records provisions "if he was responsible for an act or omission that he knew or should have known would contribute to the violation."[21]

To establish that a respondent aided and abetted a books and records violation, we must find that (1) a violation of the books and records provisions occurred; (2) the respondent substantially assisted the violation; and (3) the respondent provided that assistance with the

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17 The Division also alleged that all four Respondents made recommendations to purchase variable annuities that were fraudulently unsuitable. To succeed on such a claim, the Division must establish that (1) the securities each Respondent recommended were unsuited to his customer's needs; (2) the Respondent knew that his recommendation was unsuitable or acted with recklessness regarding suitability in making his recommendation; and (3) the Respondent made material misrepresentations or failed to disclose material information relating to the suitability of the securities, including the associated risks. *See Muth*, 58 S.E.C. at 795-96 (citing *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1031 (2d Cir. 1993)). The record here does not establish that Respondents knew (or were reckless in not knowing) that their recommendations were unsuitable.

18 *Joseph John VanCook*, Exchange Act Rel. No. 61039 (Nov. 20, 2009), 97 SEC Docket 22664, 22722, *petition denied*, 653 F.3d 130 (2d Cir. 2011).

19 *See Anthony A. Adonnino*, 56 S.E.C. 1273, 1288 (2003) (finding that "instances of inaccuracy and falsity . . . caused violations of . . . Exchange Act Rule[] 17a-3"), *aff'd*, 111 Fed. Appx. 46 (2d Cir. 2004).

20 *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 S.E.C. 892, 901 (1993) (citing *Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) ("Although the Commission's rules did not specifically require that the executing brokers' names be put on the order tickets, that information was obviously material and important, and, even assuming no legal obligation to furnish the names, there was an obligation, upon voluntarily supplying that information, to be truthful.")).

21 *Stephen J. Horning*, Exchange Act Rel. No. 56886 (Dec. 3, 2007), 92 SEC Docket 207, 224, *aff'd*, 570 F.3d 337 (D.C. Cir. 2009).

requisite scienter.[22] The scienter requirement for aiding-and-abetting liability in administrative proceedings may be satisfied by evidence that the respondent knew of, or recklessly disregarded, the wrongdoing and his or her role in furthering it.[23] We have also held that one who aids and abets a primary violation is necessarily "a cause of" that violation.[24]

Here, Prime Capital committed a primary violation of the books and records provisions by maintaining new account forms that falsely indicated that Collins – and not Brown – was the associated person responsible for the Jayes', Skiena's, Bogan's, and Rosenberg's accounts. Brown and Collins substantially and knowingly assisted those violations by having Collins sign the customers' new account forms to conceal that Brown was prohibited from selling variable annuities to new, elderly customers. We consequently find that Brown and Collins willfully aided and abetted Prime Capital's violations of the books and records provisions and, as a result, were also a cause of Prime Capital's books and records violations.

4. Collins's Failure to Supervise Brown

Section 15(b)(4)(E) of the Exchange Act authorizes us to impose sanctions upon a registered representative who "has failed reasonably to supervise, with a view to preventing violations of [the federal securities laws] . . . another person who commits such a violation, if such other person is subject to his supervision." In assessing a respondent's actions, we consider whether the respondent exercised "reasonable [supervision] under the attendant circumstances."[25] As we have explained, where a supervisor, such as Collins, knows of an employee's past disciplinary history, the supervisor must ensure that rules and procedures are in place to

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[22] *See vFinance Invs., Inc.*, Exchange Act Rel. No. 62448 (July 2, 2010), 98 SEC Docket 29918, 29935 (finding that officer of a broker-dealer willfully aided and abetted broker-dealer's books and records violations); *Robert J. Prager*, 58 S.E.C. 634, 646 & n.17 (2005) (setting forth elements necessary for aiding and abetting liability and citing D.C. Circuit cases).

[23] *Compare Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004) (stating that a finding that one "generally was aware or knew that his or her actions were part of an overall course of conduct that was improper or illegal" may support aiding and abetting) *with Howard v. SEC*, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004) (holding that "extreme recklessness" may support aiding and abetting).

[24] *See Sharon M. Graham*, 53 S.E.C. 1072, 1085 n.35 (1998) (finding that respondent's willful aiding and abetting violation "necessarily makes her a 'cause' of those violations"), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

[25] *Clarence Z. Wurts*, 54 S.E.C. 1121, 1130 (2001) (quoting *Arthur James Huff*, 50 S.E.C. 524, 528-29 (1991)).

supervise the employee properly, and that those rules and procedures are enforced.[26] Collins did none of this.

Collins was responsible for supervising only one person: Brown. In fact, Collins and Brown were, for a time, the only two employees in the Delray office. Yet, as Prime Capital's own review of Collins accurately concluded, "there was [a] complete lack of supervision . . . by Matt Collins" over Brown. The Firm's records, for example, showed that customer documents, and in some cases entire files, were missing (which Collins acknowledged made an adequate review of Brown's sales impossible), and the Firm's branch reviews found "no evidence" of any supervisory review over certain of Brown's transactions.

Even more egregiously, when Brown told Collins of a "mishap" with his Massachusetts insurance license, Collins did nothing, accepting Brown's claim that it "was no big deal." When Collins later learned that, in fact, Florida had suspended Brown's license for making material misstatements and executing an unauthorized transaction, Collins still did nothing. And when Collins learned that Florida reinstated Brown's license with restrictions, he again did nothing. Collins not only allowed Brown to continue selling variable annuities to new customers in violation of Florida's prohibition, he also actively facilitated Brown's continued sales by falsely stating on customer account forms that he, and not Brown, was the customers' registered representative. Collins also continued to defer to Brown, relying entirely on Brown's word, for instance, that Bogan's son had signed a document authorizing a transfer in Bogan's son's account.[27]

As a result, Collins's supervision of Brown was not just inadequate, but entirely absent. Collins himself admitted that his supervision of Brown was deficient and that he lacked the training and documents to review Brown adequately. We thus find that Collins failed to exercise reasonable supervision with a view to preventing Brown's antifraud violations.

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26 *Wurts*, 54 S.E.C. at 1130; *see also Albert Vincent O'Neal*, 51 S.E.C. 1128, 1135 (1994) ("[T]he test is whether [the] supervision was reasonably designed to prevent the violations at issue.").

27 *Horning*, 92 SEC Docket at 219 (noting that the Commission has "'repeatedly stressed that supervisors cannot rely on the unverified representations of their subordinates'" and that "this is especially true where the subordinates have committed misconduct in the past" (quoting *Quest Capital Strategies*, 55 S.E.C. 362, 372 (2001))).

5. Sanctions

a. Bars

Exchange Act Sections 15(b)(4)(e) and (b)(6) and Advisers Act Section 203(f) authorize us to censure, place limitations on, suspend, or bar a person associated with a broker, dealer, or investment adviser if we determine that the person has, among other things, willfully violated the federal securities laws or reasonably failed to supervise and it is in the public interest to do so.[28] In determining what sanction is in the public interest, we consider, among other things, (1) the egregiousness of the respondent's actions; (2) the degree of scienter involved; (3) the isolated or recurrent nature of the infraction; (4) the respondent's recognition of the wrongful nature of his or her conduct; (5) the sincerity of any assurances against future violations; and (6) the likelihood that the respondent's occupation will present opportunities for future violations.[29] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[30]

Here, we find it appropriate to impose a bar against Brown and Collins from association with a broker, dealer, or investment adviser in any capacity (but allowing Collins the right to reapply in a non-supervisory capacity in two years). Brown and Collins engaged in highly troubling conduct that raises serious doubts about their fitness to work in the securities industry – "a business that is rife with opportunities for abuse."[31] Brown concealed from his customers and his employer that he was continuing to sell variable annuities to new, elderly customers despite

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[28] 15 U.S.C. §§ 78*o* (b)(4)(e), 78*o*(b)(6), 80b-3(f).

[29] *See, e.g.*, *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[30] *David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875, *petition denied*, 33 F. App'x 334 (D.C. Cir. 2008) (per curiam).

[31] *Mayer A. Amsel*, 52 S.E.C. 761, 768 (1996) (affirming NASD's imposition of a bar despite the fact that "no customer suffered as a result of any of his actions," but where applicant "exhibited a disturbing disregard for the standards that govern the securities industry").

limitations by the Florida Department of Financial Services against doing so.[32] His behavior showed not only that he was willing to commit fraud, but also that lesser sanctions by Florida did not affect his willingness to do so. In addition to concealing the limitations on his insurance license, Brown took further advantage of his customers' trust by failing to disclose material terms or to deliver prospectuses to Bogan, the Jayes, Rosenberg, and Skiena and by effecting unauthorized transactions in accounts owned by Skiena, Bogan, Rosenberg, and Bogan's son.[33]

Collins, meanwhile, was in a position to stop Brown's misconduct, but his complete failure to supervise Brown, including falsifying documents that misled his employer and the issuing insurance companies about what Brown was doing, created an environment where Brown could defraud his clients with impunity. Given these egregious supervisory violations, we impose a bar against Collins in all capacities, with a right to reapply in a non-supervisory capacity after two years. We believe the severity of the penalty is warranted in the public interest to address the severity of Collins's failure to supervise.[34]

These bars address the risk of allowing Brown and Collins to remain in the securities industry. Although Collins asserts that Prime Capital has "significantly upgraded its compliance and supervisory systems," he "cannot shift the blame for his violations to his firm."[35] The securities industry "presents continual opportunities for dishonesty and abuse, and depends

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32 *Cf., e.g., Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8989-90 (affirming bar where representative attempted to conceal misconduct by supplying false information during an investigation); *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19053 (affirming imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct); *Fox & Co. Invs.*, 58 S.E.C. 873, 896 (2005) (finding imposition of a bar to be neither excessive nor oppressive where applicants, among other things, concealed their conduct); *Robin Bruce McNabb*, 54 S.E.C. 917, 928-29 (2000) (sustaining bar where applicant attempted to conceal his misconduct), *aff'd*, 298 F.3d 1126 (9th Cir. 2002).

33 *See, e.g., Daniel D. Manoff*, 55 S.E.C. 1155, 1165-66 (2002) (affirming bar for effecting unauthorized transactions).

34 *See, e.g., Wurts*, 56 S.E.C. at 441 (noting "the seriousness with which we view failures to supervise" and that the Commission "had suspended supervisors who failed to supervise reasonably from association with a registered entity in all capacities and imposed supervisory and proprietary bars on such persons"); *Consol. Inv. Servs., Inc.*, 52 S.E.C. 582, 591 (1996) (barring firm officers from association with a right to reapply in one year); *O'Neal*, 51 S.E.C. at 1136 (barring branch manager in all capacities, with a right to reapply in a non-proprietary, non-supervisory capacity).

35 *John D. Audifferen*, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8141.

heavily on the integrity of its participants and on investors' confidence."[36] A bar will prevent Brown and Collins from putting the investing public at risk and will serve as a deterrent to others in the securities industry who might engage in similar misconduct.[37]

Collins argues that barring him from associating with an investment adviser amounts to an impermissible collateral bar. This is not correct. The Division expressly sought sanctions in the OIP under Section 203(f) of the Advisers Act, which authorizes the Commission to bar from association with an investment adviser "any person . . . at the time of the alleged misconduct, associated . . . with an investment adviser" who has "willfully violated any provision of the Securities Act of 1933 [or] the Securities Exchange Act of 1934."[38] A person "associated with an investment adviser" includes "any employee" of an investment adviser, and Respondents were all employees of Gilman Ciocia, a registered investment adviser, at the time of their misconduct.[39]

We further note that we issued the OIP against Respondents on June 30, 2009. Therefore, the five-year statute of limitations in 28 U.S.C. § 2462 would typically start on June 30, 2004 for purposes of imposing a bar or civil penalties.[40] Respondents, however, all entered into tolling agreements, with Collins, Walsh, and Wells entering into a tolling agreement that extended their limitations period to June 30, 2003, and Brown entering into tolling agreement that extended his limitations period to December 30, 2003. We accordingly do not consider conduct that occurred before those respective dates as violative conduct forming the basis for imposing a bar or civil penalties. We may, however, consider conduct that occurred outside the statute of limitations to establish Respondents' motive, intent, or knowledge in committing violations that occurred within the statute of limitations.[41] We can also consider conduct that occurred outside the

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36 *Conrad P. Seghers*, Investors Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2304, *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

37 *See, e.g.*, *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (noting that deterrent value is a relevant factor in deciding sanctions).

38 15 U.S.C. § 80b-3(f) (referencing offenses enumerated in 15 U.S.C. § 80b-3(e)).

39 15 U.S.C. § 80b-2(a)(17).

40 Section 2462 provides that "any proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," must be commenced "within five years from the date when the claim first accrued." *See Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996) (holding that Section 2462's five-year limitations period applied to certain Commission administrative proceedings).

41 *Graham*, 53 S.E.C. at 1089 n.47 (concluding that the Commission could consider time-barred conduct "as evidence of motive, intent, or knowledge"); *Terry T. Steen*, 53 S.E.C. 618, 624 (1998) (same).

limitations period when deciding whether to impose disgorgement or cease-and-desist orders (sanctions that we discuss below).[42]

Collins seeks to shorten the applicable limitations period by arguing that the law judge "presumably rejected" the tolling agreements when her initial decision failed to mention the agreements' existence when calculating the limitations period. Because the law judge's decision contains only a cursory discussion of the statute of limitations, however, her decision provides no indication about why she failed to mention the tolling agreements. Moreover, we review the record *de novo* and see no reason – nor does Collins provide any – for not considering the tolling agreements to be valid.[43] We therefore include the tolling agreements when calculating the applicable limitations period.

b. Cease-and-Desist Orders

Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" these Acts or the rules promulgated thereunder.[44] In determining whether a cease-and-desist order is appropriate, the Commission considers whether a reasonable likelihood of violations in the future exists, the seriousness of the violations, the isolated or recurrent nature of the violations, the respondent's state of mind in committing the violations, the respondent's recognition of the wrongful nature of his or her conduct, and the recency of violations.[45]

As described above, Brown's and Collins's violations were egregious. Brown repeatedly took advantage of older customers, many of whom had limited resources, and he continued to commit violations after having been sanctioned by the Florida Department of Financial Services. Collins, meanwhile, purposefully concealed Brown's misleading omission of the Florida sanction – and was thus "a cause of" Brown's antifraud violations – by inserting his name as account representative on account forms. We therefore find it appropriate to order Brown and Collins to

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[42] *Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010) (holding that the five-year statute of limitations in Section 2462 does not apply to disgorgement and cease-and-desist orders); *Zacharias v. SEC*, 569 F.3d 458, 471-73 (D.C. Cir. 2009) (same); *Steen*, 53 S.E.C. at 624 (noting that Section 2462 does not apply when considering restitution or disgorgement).

[43] Our *de novo* review cures any errors the law judge may have made when imposing sanctions. *See, e.g.*, *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14260 n.44 (finding that Commission's *de novo* review cured law judge's failure to consider lesser sanctions), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[44] 15 U.S.C. §§ 77h-1, 78u-3, 80b-3(k).

[45] *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1185, 1192 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

cease and desist from committing or causing any violations or future violations of the antifraud provisions.

We also find it appropriate to impose a cease-and-desist order against Brown and Collins from committing or causing any violations or future violations of the books and records provisions.[46] Their roles in Prime Capital's primary violations were significant, as the violations allowed Brown and Collins to repeatedly conceal material information from customers, their employer, and the issuing insurance companies.

c. Disgorgement

Securities Act Section 8A(e), Exchange Act Section 21C(e), and Advisers Act Section 203(j) authorize the Commission to require the disgorgement of ill-gotten gains in cease-and-desist proceedings.[47] An order for disgorgement "is not a punitive measure; it is intended primarily to prevent unjust enrichment."[48] Accordingly, "the amount of disgorgement should include all gains flowing from the illegal activities," but calculating the amount of disgorgement "requires only a reasonable approximation of profits causally connected to the violation."[49] Once the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation.[50] Here, the Division requests that we order Brown and Collins to disgorge the $41,992 and $2,915, respectively (plus prejudgement interest), in

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[46] *See, e.g.*, *vFinance*, 98 SEC Docket at 29944-45 (ordering respondents to cease and desist from committing or causing any violations or future violations of the books and records provisions); *VanCook*, 97 SEC Docket at 22690-91 (same).

[47] 15 U.S.C. §§ 77h-1(e), 78u-3(e), 80b-3(j).

[48] *See Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)).

[49] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006) (quotation omitted); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (noting that, when calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task").

[50] *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006); *see also, e.g.*, *Zacharias*, 569 F.3d at 473 (noting that, where disgorgement cannot be exact, the "well-established principle" is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoer whose illegal conduct created that uncertainty); *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) ("Exactitude is not a requirement; '[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" (quoting *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998))).

commissions that they earned from the variable annuity sales at issue. We agree with the disgorgement amount for Collins, but not for Brown.

For Collins, the Division's request of $2,915 in disgorgement is equal to the commissions he earned from variable annuity sales to customers Morton Jaye and Skiena – sales that Brown actually made, but that Collins failed to adequately supervise. (The Division's calculation does not include $2,126 in commissions that Collins received from Bogan and Rosenberg, as those commissions were offset by the $25,000 Collins paid toward settling their complaint against Prime Capital). We believe that the Division's requested amount accurately reflects Collins's ill-gotten gains, and note that Collins does not contest the use of these commissions as a measure of disgorgement – he instead disputes the underlying findings of violations.

For Brown, the Division's request of $41,992 in disgorgement is equal to the commissions that Brown received from his sales to Elkin, Kirshner, Reiss, and Schlager. As we explained above, however, the record does not support a finding that Brown violated the antifraud provisions when selling variable annuities to Kirshner or Reiss. We also believe that any disgorgement should be offset by $13,998 in restitution that Brown paid to Schlager to settle the Florida complaint. We accordingly calculate Brown's ill-gotten gains to be $11,147.

We thus find it appropriate to order Brown to disgorge $11,147, plus prejudgement interest, and for Collins to disgorge $2,915, plus prejudgment interest.[51] We believe these amounts will deprive Brown and Collins of their unjust enrichment and deter others from similar misconduct by making illegal conduct unprofitable.[52]

d. Civil Monetary Penalties

Exchange Act Section 21B and Advisers Act Section 203(i) authorize the Commission to impose civil monetary penalties for willful violations of these Acts and the Securities Act or for

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[51] *Terence Michael Coxon*, 56 S.E.C. 934, 971 (2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005); Rule of Practice 600(b), 17 C.F.R. § 201.600(b) (stating that "[i]nterest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly").

[52] *See Guy P. Riordan*, Exchange Act Rel. No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23482 (finding that ordering respondent to disgorge commissions "will prevent him from reaping substantial financial gain from his violations and deter others from violating the federal securities laws by making illegal conduct unprofitable"), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010).

failure to supervise any person who commits such a violation.[53] In considering whether a civil penalty is in the public interest, the Commission may consider (1) whether the act or omission involved fraud; (2) whether the act or omission resulted in harm to others; (3) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; (4) whether the individual has committed previous violations; (5) the need to deter such person and others from committing violations; and (6) such other matters as justice may require.[54]

Exchange Act Section 21B(b) and Advisers Act Section 203(i)(2) specify that civil monetary penalties can be issued by the Commission "for each act or omission" in violation of the federal securities laws. For each such "act or omission," the Commission may impose one of three tiers of penalties, depending on the nature of the violation: first-tier penalties of up to $6,500 for violations of the securities laws; second-tier penalties of up to $65,000 for violations of the securities laws that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;" or third-tier penalties of up to $130,000 for violations that satisfy the requirement for a second-tier penalty and "resulted in substantial losses or created significant risk of substantial losses to other persons or resulted in substantial pecuniary gain."[55]

The Division urges us to impose a maximum third-tier penalty for the violations affecting each of Respondents' customers. The Division contends that, given "the harm visited upon individual investor[s]," the Commission should impose a penalty that reflects that Respondents' misdeeds "were separate illegal acts, not merely a single course of action." In doing so, however, the Division states that it does not believe "the appropriate exercise of discretion in this instance" is to increase the number of violations even more by treating each misstatement as a separate act. The Division also contends that our calculation should include customers who purchased variable annuities from Respondents outside the statute of limitations because these were all part of the same "continuing course of conduct."[56]

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[53] 15 U.S.C. §§ 78u-2, 80b-3(i).

[54] 15 U.S.C. § 78u-2(c).

[55] The maximum second- and third-tier penalties depend, in part, on the date of the underlying violation. For conduct that occurred before February 3, 2001, the maximum second-tier penalty is $55,000 and the maximum third-tier penalty is $110,000. For conduct that occurred from February 3, 2001 through February 14, 2005, the maximum second-tier penalty is $60,000 and the maximum third-tier penalty is $120,000. For conduct that occurred after February 14, 2005, the maximum second-tier penalty is $65,000 and the maximum third-tier penalty is $130,000. *See* 17 C.F.R. §§ 201.1002, 201.1003.

[56] *Citing Laurie J. Canady*, 54 S.E.C. 65, 89 n.54 (1999) (stating, in *dicta*, that to consider all of respondent's fraudulent activity "both within and outside the limitations period" in assessing sanctions would be "in the public interest" because respondent's conduct "may be

(continued...)

The Division's calculation would impose a \$1,430,000 penalty against Brown (reflecting a maximum third-tier civil monetary penalty for twelve customers) and a \$620,000 penalty against Collins (reflecting a maximum third-tier civil monetary penalty for five customers). We agree with the Division that the penalties should be applied per customer, but we find that a second-tier (not third-tier) penalty is appropriate and that our calculation should not include sales to customers outside the applicable limitations period.[57]

Regarding the appropriate tier, both Brown's and Collins's violations support at least a second-tier penalty. Brown's violations involved fraud and a deliberate disregard of the regulatory requirements, and Collins knowingly allowed Brown to defraud customers through Collins's failure to supervise.[58] The Division and the law judge also both observed that the amount of customer losses was meaningful to those customers. At the same time, however, the Division and law judge also acknowledged that the nominal amount of customer losses was not large. Therefore, because Brown's and Collins's conduct did not expose customers to significant risk of substantial pecuniary loss or result in substantial gain, their misconduct does not support a higher, third-tier penalty.

While the nominal amount involved may not have been large, Brown's and Collins's misconduct was nevertheless egregious. Brown and Collins displayed a blatant failure to deal fairly with elderly, unsophisticated customers and exhibited a clear disregard for their customers' interests. Brown's and Collins's actions thus call for meaningful monetary penalties to encourage them and other industry participants to prioritize compliance with the securities laws in the future. We therefore find that a penalty at the maximum end of the second tier is appropriate.

Regarding the number of "acts or omissions" against which to apply the maximum second-tier penalty, we believe that imposing a penalty for each defrauded customer is appropriate. Although Brown's and Collins's misconduct followed a general pattern, their acts and omissions regarding each customer were nevertheless distinct and separate: this was not a single act that defrauded multiple customers, but rather separate interactions, where each

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56 (...continued)
viewed as part of a continuing, interconnected scheme to take advantage of her customers' lack of sophistication and trust"), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

57 *See supra* notes 40-43 and accompanying text.

58 *John A. Carley*, Exchange Act Rel. No. 888 (Jan. 31, 2008), 92 SEC Docket 1693, 1740 (stating that a supervisor's "failure to supervise involved a reckless disregard for his supervisory responsibilities in light of the numerous red flags suggesting that [subordinates] were violating the securities laws"), *rev'd in part on other grounds sub nom. Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009).

customer presented a unique opportunity to violate the securities laws.[59] This is true not only for Brown's antifraud violations, but also for Collins's failure to supervise. A failure to supervise is tied to the underlying securities law violations,[60] and Collins knowingly failed to supervise Brown's fraudulent conduct toward specific customers. We also impose additional penalties against Brown for his unauthorized transfers in Bogan's son's, Rosenberg's, and Skiena's accounts. These three unauthorized transfers were distinct from each other and unrelated to Brown's concealing the limitations on his license, thus constituting additional "acts or omissions."

We do not believe, however, that imposing civil penalties for customers to whom Brown sold variable annuities outside the statute of limitations period is appropriate. The Division argues that we should include such customers because they were part of Brown's continuing course of conduct.[61] This position contradicts the Division's earlier argument that we should view each customer separately for purposes of determining how many penalties to apply. We see no reason for taking such an inconsistent approach.

We therefore find that the following civil monetary penalties are appropriate:

- **Brown**: $560,000 (reflecting a maximum second-tier civil monetary penalty for each of the six customers that Brown defrauded within the limitations period, plus three additional second-tier penalties for the three unauthorized transfers).

- **Collins**: $310,000 (reflecting a maximum second-tier civil monetary penalty for each of the five customers that Brown defrauded because of Collins's failure to supervise).

In imposing these penalties, we note that Collins argued that the $620,000 penalty the Division sought would violate the Eighth Amendment, which prohibits, among other things, the

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59 *Cf. Muth*, 58 S.E.C. at 813 (concluding that separate third-tier penalties for each of seven customers was appropriate where respondent misrepresented and omitted material facts and engaged in unauthorized trading).

60 15 U.S.C. § 78*o*(b)(4)(E) (stating that the Commission may sanction an associated person for failing "reasonably to supervise, with a view to preventing violations of the federal securities laws and rules and regulations thereunder, another person who commits such violations if such person is subject to the individual's supervision").

61 *Citing Canady*, 54 S.E.C. at 89 n.54 (holding that respondent had waived statute of limitations argument, but noting that, even if limitations period applied, the Commission would still consider all of respondent's fraudulent activity in assessing sanctions because it would be in the public interest when imposing sanctions to consider all of respondent's misconduct – both within and outside the limitations period).

imposition of excessive fines.[62] To the extent Collins continues to advance this argument regarding the lower $310,000 penalty we now impose, we note that substantial deference is granted to the legislature when determining whether a fine is excessive under the Eighth Amendment.[63] The three-tier penalty structure was established by Congress, and the penalties we impose are well within the limits set forth in the statute and are consistent with the seriousness of Brown's and Collins's misconduct.

* * *

During oral argument before the Commission, Brown's counsel stated that Brown engaged in "a blatant scheme to defraud aimed at vulnerable victims," but argued that we should impose lower sanctions because he voluntarily cooperated with the Division's investigation in "good faith" reliance that the Division would credit his cooperation when seeking penalties against him. Brown contended that the Division, by seeking higher penalties, did not honor its agreement and asked that we credit his supposed cooperation by imposing only a single third-tier penalty of $130,000.

Brown's first mention of this purported cooperation arrangement with the Division was during oral argument. Brown had not raised this claim with the law judge or in his petition for review, and he never filed any briefs in support of his petition for review. Because Brown had not raised the issue previously, we ordered additional briefing in the interest of fairness, stating that "the parties shall be permitted to file additional briefs clarifying the extent of Brown's cooperation with the Division in this matter and how that cooperation, if any, should affect the imposition of sanctions."[64]

In his supplemental brief, Brown explained that he approached the Division approximately six months before his hearing testimony about a "desire[] to accept responsibility for his conduct and [to state] that he would voluntarily cooperate as a witness at the hearing against other culpable individuals." Brown claimed that he "offered to settle" under terms in which the Division would "utilize Brown's cooperation in the form of testimony in [its] direct case against other respondents" in exchange for Brown's consenting to a bar and paying both disgorgement and a civil penalty equal to that disgorgement. Brown asserted that he lived up to his end of the bargain by attending two "proffers" and a "prep session," during which he claimed

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62 U.S. Const. amend. VIII.

63 *See United States v. Bajakajian*, 524 U.S. 321, 336 (1998); *Rockies Fund, Inc.*, Exchange Act Rel. No. 54892 (Dec. 7, 2006), 89 SEC Docket 1517, 1529 n.44, *petition denied*, 298 F. App'x 4 (D.C. Cir. 2008).

64 *Eric J. Brown*, Exchange Act Rel. No. 65207 (Aug. 26, 2011) (the "August 26 Order").

to have "unequivocally detailed his role and that of others in the scheme [to defraud customers]," and then testifying truthfully at the hearing.[65]

In its cross-brief, the Division acknowledged that Brown "opened a dialogue" about resolving the matter without litigation six months before the hearing, but argued that no cooperation agreement ever existed, "either informal, implicit, in concept or in writing." The Division added, "Any suggestion to the contrary is wishful thinking at best, and a false representation at worst." We agree.

Although Brown offered the Division terms on which he was willing to settle (claiming an inability to pay higher penalties), the record contains no evidence that Brown ever submitted a written offer to settle, as required by our rules, or submitted the necessary financial information to support his claimed inability to pay.[66] The Division also made clear to Brown, in writing, that his proposed terms of settlement were "not binding on or admissible against the Commission in any judicial or administrative proceeding [and] any terms . . . must be approved by the Commission for any settlement to be effective." In fact, our rules are clear on this point: an offer to settle is binding only if formally submitted to, and approved by, the Commission – neither of which happened here.[67]

The same day the Division sent Brown the email emphasizing that Brown's offer to settle was not binding on the Commission, Brown's counsel – who has represented Brown in these proceedings since he first responded to the OIP – informed the law judge during a pre-hearing conference that the parties "have been having discussions [about settlement] . . . and anticipate filing a joint motion to stay proceedings." When asked, however, whether the settlement

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[65] On January 13, 2010, the Commission announced a series of measures to encourage greater cooperation from individuals and companies in the agency's investigations and enforcement actions. *See* 17 C.F.R. § 202.12 (setting forth Commission policy regarding cooperation by individuals during investigations and related enforcement actions). That initiative is not implicated here, as Brown's alleged cooperation occurred before the Commission announced the initiative. Even if that initiative were to apply, Brown does not present evidence of sufficient cooperation to warrant a reduced sanction.

[66] Rule of Practice 240(b), 17 C.F.R. §§ 201.240(b) ("An offer of settlement shall state that it is made pursuant to this rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(4) and (5) of this rule [relating to waiver]; shall be signed by the person making the offer, not by counsel; and shall be submitted to the interested division."); *see also* Rule of Practice 630(b), 17 C.F.R. § 201.630(b) (noting that "[a]ny respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement); 17 C.F.R. § 209.1 (Form D-A).

[67] Our Rule of Practice 240 specifies that "[f]inal acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Commission." 17 C.F.R. § 201.240.

discussions had "gotten to the point you could file a joint motion orally" to stay the proceedings, Brown's counsel's told the law judge only that she believed that a request for a stay was "imminent, within the next day to two days." Neither Brown nor the Division ever requested such a stay.

Once the hearing began, and after several of Brown's customers had already testified against him, Brown and his lawyer met with the Division, during which the Division evaluated Brown's proffered testimony. The Division then subpoenaed Brown to testify, but states that it "warned him and his counsel several times that it could make no promises about what credit, if any, Brown would receive for [his testimony] in any settlement the Commission might consider."[68] Brown's lawyers, in fact, admit as much, acknowledging in their supplemental brief that "[i]t is beyond dispute that . . . the nature and degree of any credit would be based upon the Division's discretion after the hearing." Brown even testified at the hearing that the Division had made no representations or promises to him and that he was appearing pursuant to a subpoena. These two concessions alone effectively undercut all of Brown's claims that he believed the Division had made any promises about crediting his testimony.

In fact, Brown learned quickly that the Division had no intention of crediting his testimony. After the hearing, the Division asked the law judge to impose essentially the maximum sanctions allowable against Brown, more than for any other Respondent. Brown and his lawyers could have objected at that point if they believed the Division's sanction request violated some type of agreement. Instead, Brown and his lawyers did nothing. Brown filed no post-hearing briefs with the law judge opposing the maximum penalties sought by the Division. Nor did Brown otherwise inform the law judge that he had been cooperating with the Division or that such a factor should be mitigating. Although Brown later filed a petition for review with the Commission, his filing did not mention any supposed cooperation and stated only vaguely that the law judge had erred by "fail[ing] to give individual consideration, including mitigating circumstances, relative to Respondent when imposing sanctions." Brown filed no briefs in support of this short, vaguely worded petition nor any briefs in response to the Division's petition in which it again sought nearly maximum sanctions against Brown. Brown instead waited until the last minute, at oral argument, to raise his cooperation claim.

In other words, Brown asks us to believe that the Division had promised to credit his testimony despite (1) no evidence that Brown ever submitted a formal offer to settle under Rule 240; (2) Brown's failure to request a stay of the proceedings to finalize such an agreement despite the law judge's express invitation to do so; (3) Brown's statement, under oath, that the Division had made no representations or promises to him in exchange for his testimony; (4) Brown's acknowledgment in his supplemental brief that "the nature and degree of any credit" for his testimony was within the Division's discretion; and (5) Brown's complete failure to mention

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[68] Six of the original respondents also listed Brown as a witness in pre-hearing filings.

any agreement or otherwise object to the Division's repeated and consistent attempts to seek maximum penalties against him until oral argument.

Nor has Brown demonstrated a level of cooperation that, even without a formal agreement or settlement, might warrant "lesser sanctions than [he] otherwise might have received based on pragmatic considerations such as avoidance of time-and-manpower-consuming adversary proceedings."[69] Instances warranting such lesser sanctions involve far different circumstances than present here. In *Leo Glassman*, for example, we reduced the suspension imposed by a law judge based on respondent's cooperation with the Division in reconstructing records he had destroyed and our rejection of the law judge's finding of fraud in the transactions at issue.[70] Similarly, in *Raymond L. Dirks*, we reduced the law judge's imposition of a suspension to a censure because of respondent's role "in bringing [a] massive [insider trading] fraud to light."[71]

Here, in contrast, Brown's supposed cooperation essentially consisted of only his testimony about defrauding elderly investors and his kickback arrangement with Collins – testimony that he gave pursuant to a subpoena, under penalty of perjury, and that, as the Division accurately describes, was "at best" only "marginally beneficial to the Division's case." Brown was unable to recall such basic details as who came up with the scheme of sharing commissions with Collins; how they came up with that scheme; or where they devised their plan. In a particularly curious exchange, the Division asked Brown whether his conversation with Collins was "in person or over the telephone," to which Brown responded: "In person. Excuse me, I don't remember." During cross-examination, Collins's attorney then highlighted the stark differences between Brown's investigative testimony (where he denied defrauding customers) and his hearing testimony (where he admitted his misconduct). The law judge also expressly discredited some of Brown's testimony, rejecting his statement that Prime Capital's president had known about Brown's scheme.

Brown claims his cooperation also included proffer sessions, but neither the record nor Brown's supplemental briefs in response to our August 26 Order contain any evidence that the proffer sessions yielded information beyond what Brown testified to at the hearing. At best, Brown claims only that, "during the course of the formal proffer, counsel and the Division discussed a strategy for anticipated cross-examination that could 'open the door' to additional incriminating evidence against certain respondents." Brown, however, does not explain what that additional incriminating evidence might have been, and statements allegedly made during

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69 *Stonegate Sec., Inc.*, 55 S.E.C. 346, 355 (2001) (internal quotation marks omitted) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973)).

70 46 S.E.C. 209, 211 (1975).

71 47 S.E.C. 434, 448 (1981), *aff'd*, 681 F.2d 824 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983).

negotiations are not part of the administrative record.[72] Instead, "[t]he penalties we impose are based on Respondents' conduct as established by the record."[73]

Brown does not make clear whether he still claims to be unable to pay, but to the extent he does, we note that an inability to pay is only one factor that informs our determination regarding penalties and is not dispositive.[74] Even when a respondent demonstrates an inability to pay – which Brown has never done – "we have discretion not to waive the penalty, . . . particularly when the misconduct is sufficiently egregious."[75] Here, for the reasons described earlier, Brown's misconduct was egregious and plainly warrants the sanctions that we have imposed against him.

Collins and Wells filed a Motion Requesting Additional Briefing and Oral Argument on September 29, 2011, citing Brown's unsubstantiated claims. In that motion, Collins and Wells allege that the Division failed to disclose Brown's supposed cooperation agreement and speculate that the Division may have "called other witnesses pursuant to undisclosed cooperation agreements." However, Collins and Wells cite no evidence to support their allegations, and the Division represents in its opposition to Collins and Wells' motion that "[t]he only cooperation agreement in this matter was an undertaking by Respondent Christie Andersen" – which was publically disclosed – and that "the Division had no undisclosed cooperation agreements with . . . any other witnesses."[76] We have repeatedly warned that respondents are "not 'entitled to conduct

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72 *Cf. Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1113 n.84 (citing Rule of Practice 240(6), 17 C.F.R. § 201.240(6)) (rejecting respondents' argument that the Commission should consider their offer to settle when imposing sanctions); Fed. R. Evid. 408 (stating that evidence of "conduct or statements made in compromise negotiations" is not admissible).

73 *Phlo Corp.*, 90 SEC Docket at 1113 n.84.

74 *See, e.g.*, *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008) (per curiam) (stating that "[a]t most" a defendant's ability to pay is one factor to be considered in imposing a civil money penalty or disgorgement for violations of the federal securities laws); *Robert L. Burns*, Advisers Act Rel. No. 3260 (Aug. 5, 2011), 101 SEC Docket 44807, 44825 & n.57 (noting that ability to pay a penalty is but one factor to consider in determining whether a penalty is in the public interest), *petition dismissed*, No. 11-2161 (1st Cir. Dec. 22, 2011) (per curiam); *Brian A. Schmidt*, 55 S.E.C. 576, 597-98 (2002) (same).

75 *Burns*, 101 SEC Docket at 44825 (quoting *Philip A. Lehman*, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 543).

76 *See Prime Capital Servs., Inc.*, Exchange Act Rel. No. 61079 (Nov. 30, 2009) (order imposing remedial sanctions as to Andersen); *cf.* Rule of Practice 153, 17 C.F.R. § 201.153 (stating that counsel's signature on a filing constitutes a certification that, "to the best

(continued...)

a fishing expedition . . . in an effort to discover something that might assist [them] in [their] defense' ... or 'in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory.'"[77] Having found no basis for Collins's and Wells's assertions, we deny the motion.

V.

A. Kevin Walsh's Alleged Violations

1. Background

Kevin Walsh was a registered representative associated with Prime Capital in the Firm's Melbourne, Florida, office from 1998 to 2007. A majority of Walsh's business involved selling variable annuities to retirees or soon-to-be retirees he met through free lunch seminars. At issue here are Walsh's sales to five customers. Because Walsh did not testify at the hearing, the evidence regarding what he did, or did not, tell his customers consists largely of their testimony, which we describe below.[78]

a. Harold and Barbara Koenig

Harold Koenig was a retired management consultant in his late 70s, and his wife, Barbara Koenig, was in her late 60s. Mrs. Koenig was unable to testify at the hearing, but Mr. Koenig testified that his wife had discussed all aspects of her investments with him and that he had been

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[76] (...continued)
of his or her knowledge, . . . the filing is well grounded in fact"). Respondents cite no evidence that contradicts the Division's representation.

[77] *Richard G. Cody*, Exchange Act Rel. No. 64565 (May 27, 2011), 101 SEC Docket 41887, 41912 n.61 (internal citations omitted) (quoting *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13860 n.54); *cf. Orlando Joseph Jett*, 52 S.E.C. 830, 830 (June 17, 1996) (order vacating order to produce memoranda for *in camera* review) ("[I]t is well established that the Supreme Court's *Brady* decision does not authorize respondents to engage in 'fishing expeditions' through confidential Government materials in hopes of discovering something helpful to their defense." (citation omitted)).

[78] Walsh did not testify at the hearing, he cross-examined only Denise Merrill, and he did not file a post-hearing brief. On appeal, Walsh filed only a petition for review, *pro se*, in which he listed thirty-one brief exceptions to the law judge's findings and conclusions. On September 16, 2010, two days after briefs were due, Walsh filed a "letter of explanation and apology" with the Commission in which he asked for "for leniency with my lack of timeliness" in filing his brief and promised "to work at providing a final document" by September 20, 2010. Walsh, however, never filed a brief in support of his petition nor did he appear at oral argument.

present for most of her discussions with Walsh. The Koenigs attended a free lunch seminar at which Walsh was speaking sometime in late 2004 or early 2005. They did so, Mr. Koenig explained, because they were looking for someone who could advise Mrs. Koenig in the event Mr. Koenig died before she did. Variable annuities were not a major topic of Walsh's lunch seminar. In later meetings at Walsh's office (meetings that Mr. Koenig attended), however, Walsh recommended variable annuities as a "good fit" for Mrs. Koenig.

At Walsh's recommendation, Mrs. Koenig purchased two AXA Equitable Accumulator variable annuities. When making his recommendation, Walsh did not discuss the fees associated with the annuities, nor did Walsh discuss the "free-look" period during which Mrs. Koenig could cancel the investment at no cost. Mr. Koenig was also "absolutely" certain that Walsh did not discuss the seven-year surrender periods contained in each annuity. Nor did Mr. Koenig recall Walsh ever explaining the guaranteed monthly income benefit rider that came with the annuities, for which Mrs. Koenig paid extra.

The process of purchasing the annuities was rushed. Mr. Koenig explained that they "were pressed to get out of there to . . . pick our kids up at school. So my wife was and myself, we were under a lot of pressure time-wise, we kept telling Carmen [Walsh's assistant] we got to get out of here, maybe we ought to come back. No, we can do it all now [responded Carmen]. So the papers came to my wife and she signed as fast as she could." When asked whether Walsh or his assistant explained the documents his wife was signing, Mr. Koenig responded, "Not really." Mr. Koenig also did not see Mrs. Koenig read any of the documents she was signing, and he testified that some forms his wife signed contained blanks that were not yet filled out. Mr. Koenig acknowledged, however, that he was out of the room for part of the time, "making telephone calls and going to the bathroom, but I saw most of the documents that my wife got involved with."

Mr. Koenig also testified that his wife's account forms were completed in a way that did not accurately reflect her investment goals. For example, Mrs. Koenig's new account form listed her overall investment objective as "Aggressive Growth" – which was the most aggressive option of four choices provided and which the account form described as "Maximum growth of assets with a tolerance for a correspondingly higher degree of volatility." Mr. Koenig testified that this choice "probably would have been mine but not hers" and that the account form "probably" should have been marked "Conservative Growth" – which the form described as "Moderate growth of assets and income with lower than average risk and fluctuation in value" and was the least aggressive option.

Similarly, the new account form listed Mrs. Koenig's risk tolerance as "Concerned" – which was the second least aggressive option and which the account form described as a customer who is "more interested in my total return over a three to five year period." When asked which risk tolerance choice was appropriate for his wife, Mr. Koenig responded that he thought his wife's tolerance was "Extremely Concerned" – which the account document described as a customer who "cannot accept even temporary loss of principal" and was again the least aggressive option. Mr. Koenig added that her tolerance was "[c]ertainly not what is checked" and that his wife had explained to Walsh that her investment goal "was to protect her principal and to have an opportunity at a reasonable safe return without much risk but always with hoping and counting other principal being protected."

Mrs. Koenig did not receive a prospectus until approximately five months after purchasing the variable annuities, and then only after Mr. Koenig "g[o]t on my hands and beg[ged]" the issuer to send one. Almost immediately after receiving the prospectuses, Mrs. Koenig wrote to the issuer, asking that AXA refund her investments because she was not satisfied with the products. AXA initially declined to return Mrs. Koenig's investment, claiming that the free-look period had expired, but AXA later unwound her investments at no cost to her. Walsh had received approximately $6,000 in sales commissions from his sales to Mrs. Koenig, but these commissions were reversed when AXA cancelled Mrs. Koenig's investment.

b. Stanley and Barbara Hannon

Stanley Hannon, a retired airline pilot and World War II veteran, first did business with Walsh sometime in the early 2000s, when he purchased about $25,000 worth of penny stocks from Walsh. In September 2004, Mr. Hannon began discussing another investment with Walsh. Mr. Hannon was in his early 80s at the time and was supporting himself and his wife, Barbara Hannon (since deceased), on an annual income of approximately $30,000. Walsh mentioned annuities to Mr. Hannon when discussing options for the new investment, but Mr. Hannon responded, "[D]efinitely no, I did not want an annuity because it ties up your money and at my age at that time I didn't feel like the money should be tied up since it was to be used for emergency funds."

On September 15, 2004, the Hannons met Walsh and Walsh's assistant, Carmen, to discuss the investment. Walsh told the Hannons that no rooms were available at Walsh's temporary office space, so they met in the parking area near Walsh's car. Walsh told Mr. Hannon that the proposed investment "would pay about 13 percent . . . and [Mr. Hannon] said that sounds good to me." Mrs. Hannon then wrote a check for $100,000, and the Hannons put the investment in Mrs. Hannon's name – at Walsh's recommendation – because she was the younger of the two.

In discussing the investment, Walsh never told Mr. Hannon about surrender fees or about any other fee or commission associated with the investment product the Hannons were purchasing from Walsh. Mr. Hannon also stated that "there was no mention of the fact [Walsh] was contemplating an annuity." Mr. Hannon instead "thought I was getting a mutual fund, which I had asked him to do." Mr. Hannon testified that he did not have sufficient opportunity to read or understand the purchase documents before signing them.

Mr. Hannon did not realize his wife had signed a contract for a variable annuity until he received a prospectus from the issuer a month after purchasing the annuity. Because he received the prospectus so late, Mr. Hannon feared that he was past the time his wife could cancel the contract without incurring a penalty. Mr. Hannon called Walsh repeatedly to discuss the investment, but it took several weeks for Mr. Hannon to arrange a meeting. At their eventual meeting, Mr. Hannon told Walsh "that I was not satisfied and I want my money back," but Walsh refused and, according to Mr. Hannon, "looked at me in complete disgust." Walsh allegedly told Mr. Hannon: "Are you kidding? If I gave you your money back, I would lose ten grand" (although the record indicates that Walsh received only a $2,520 commission for selling Mrs. Hannon the variable annuity). Unable to cancel the annuity contract through Walsh, Mr. Hannon contacted the issuer, General Electric, which also denied Mr. Hannon's request. Mrs. Hannon held her variable annuity until April 2007, when she finally liquidated it.

c. Allan Chambers

Allan Chambers was a seventy-seven-year-old retiree who had been managing his own investments when he met Walsh in 2004 at a free lunch seminar, where he hoped to get advice on increasing his investment income. Chambers had twenty-five years of investment experience with stock, bonds, and mutual funds at the time, but had no experience investing in variable annuities.

After the free seminar, Chambers met Walsh at his office, where Walsh recommended that Chambers invest in a variable annuity. Chambers subsequently purchased a Manulife variable annuity from Walsh on or about March 18, 2004. (Manulife later changed its name to John Hancock as the result of a merger.) According to Chambers, Walsh told him that the annuity had an annual administrative charge of $30 and a surrender penalty, but did not tell him about any other fees associated with the variable annuity, such as those related to mortality and expense risk or riders.

The annuity contract Chambers signed contained a representation that he received a copy of the most recent prospectus during Walsh's sales presentation, but Chambers testified that he did not receive a prospectus until approximately thirty days after purchasing the annuity. Documents in the record corroborate Chambers's testimony, as disclosure forms that explained some of the annuity's key terms and contained a representation that Chambers received a prospectus were not signed and dated until June 2005 – fifteen months after Chambers purchased the investment.

In June 2005, Chambers bought another variable annuity (issued by Genworth Life & Annuity Company) from Walsh. As with the first annuity, the record contains discrepancies about what disclosures Walsh provided to Chambers. In particular, the record contains two versions of a switch letter authorizing the transfer of some of Chambers's investments into the Genworth annuity. The two versions are identical except that one form adds a more expansive explanation for why Chambers was authorizing the switch, adding that Chambers understood that the annuity's benefits "require additional expenses," that Chambers "understood the use of annuitization," and that "penalties and liquidity were explained." Chambers, however, could not remember Walsh mentioning any fees related to the Genworth variable annuity other than a $30 administrative fee and testified that the additional language on the letter was not his handwriting (the handwriting does, in fact, look different from other handwriting on the forms).

Shortly after buying the second variable annuity, Chambers noticed that an annual service fee had been withdrawn from his account. Chambers called Walsh to complain, and "lo and behold for the first time ever in our conversation [I] find out that I was paying him a fee for his advice." Chambers decided that Walsh "was not being straight with me and I wanted to get out." Chambers complained to both John Hancock and Genworth that Walsh had deceived him and asked that the issuers waive their surrender fees. Neither did so. Chambers nevertheless liquidated his variable annuities, incurring approximately $12,000 in surrender charges. Walsh earned $7,712 in commissions from selling variable annuities to Chambers.

d. Denise Merrill

Denise Merrill and her husband, Rodney Merrill, met Walsh in 2006. Mr. Merrill , who was unable to testify, had recently inherited money, and Walsh was the first person they consulted about what to do with that money. The Merrills thought that Walsh seemed knowledgeable and personable and, after several meetings, jointly purchased three variable annuities from him.

During the purchasing process, Walsh never mentioned the term "variable annuity." Mr. Merrill "asked repeatedly" about fees before purchasing the annuities, but Walsh "would change the subject." Walsh rushed through the signature process, and Walsh's assistant told the Merrills that she would fill in certain blanks on the signature forms later. The Merrills asked Walsh to see the signature documents before their meeting with Walsh, but Walsh did not provide them. Instead, the Merrills got copies of the paperwork only after requesting them directly from Prime Capital's parent firm, Gilman Ciocia. Walsh earned $8,400 in commissions from selling the variable annuities to the Merrills.

A year after investing with Walsh, the Merrills withdrew some money to fund their daughter's wedding. They were surprised to learn that the withdrawals incurred penalties and taxes. Mr. Merrill tried to contact Walsh, but was told by his assistant that Walsh was "unavailable." The Merrills sent complaints to Walsh, Prime Capital' s compliance department, and the State of Florida. Prime Capital refused to reverse the Merrills' investments, contending that the Merrills had signed a disclosure form indicating that they understood their investments. Due to the high surrender penalties, the Merrills still held their variable annuity investments at the time of the hearing.

2. Antifraud Violations

We find that Walsh willfully violated the antifraud provisions through material misstatements and misleading omissions in communications to Chambers, the Hannons, the Koenigs, and the Merrills.[79] Walsh's customers consistently testified that he failed to inform them of key aspects of the investments he was recommending.[80] Mr. Koenig, for instance, testified that Walsh never told Mrs. Koenig about surrender periods and never gave her a prospectus. Chambers similarly testified that Walsh made "no mention of any cost" and that he did not learn about the various fees until they were withdrawn from his account. Mrs. Merrill testified that Walsh would not answer her husband's direct questions about the existence of fees and, in fact, never told her she was purchasing a variable annuity. The customers' testimony also shows that Walsh knew he was making investments contrary to his customers' directions, as Mr. Hannon testified that Walsh used Mrs. Hannon's money to purchase a variable annuity despite a direct instruction against doing so. Customers also testified that Walsh rushed them through the purchasing process (and in some cases did not give them prospectuses or other disclosure documents), further confirming that Walsh's conduct was intentional.

3. Books and Records Violations

We find that the record contains insufficient evidence to conclude that Walsh aided, abetted, or was a cause of Prime Capital's books and records violations. The primary evidence against Walsh is Mr. Koenig's testimony that his wife's new account forms did not accurately reflect her investing preferences. Mr. Koenig's testimony, however, was equivocal, and Mrs. Koenig did not testify. The evidence, therefore, is insufficient to conclude that Walsh purposefully – or even recklessly – misrepresented Mrs. Koenig's investment wishes on an account document. The only other evidence against Walsh was the alteration in Chambers's switch letter, but the record contains no evidence that Walsh was responsible for or even knew about the alteration.

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[79] The Division also alleged that Walsh violated the antifraud provisions in connection with another customer, Ralph Angelillo, claiming that Angelillo had not approved a transfer that Walsh effected in his account in 2001. Angelillo, however, did not testify, and the record contains too little evidence on which to base a finding that Walsh's sales to Angelillo violated the antifraud provisions.

[80] *Alacan*, 57 S.E.C. at 727 ("The deceptive conduct element is met when the broker omits 'to inform the customer of the materially significant fact of the trade before it is made.'" (quoting *Simpson*, 55 S.E.C. at 790-91)).

4. Sanctions

a. Bar

We find it to be in the public interest to impose a bar against Walsh from association with a broker, dealer, or investment adviser in any capacity. Walsh engaged in egregious conduct that raises serious doubts about his fitness to work in the securities industry. Walsh failed to disclose key terms of variable annuities he was recommending to his customers and, in some cases, lied to customers about the fact that they were purchasing a variable annuity. The record also shows that Walsh acted with scienter. A bar will address the risk of allowing Walsh to remain in the securities industry, prevent Walsh from putting the investing public at risk, and serve as a deterrent to others in the securities industry who might engage in similar misconduct.[81]

b. Cease-and-Desist Order

The record establishes that ordering Walsh to cease and desist from committing or causing any violations or future violations of the antifraud provisions is appropriate. As noted above, Walsh's violations were egregious. He repeatedly took advantage of and defrauded older customers, many of whom had limited resources. These repeated violations show a reasonable likelihood that Walsh will commit future violations.

c. Disgorgement

We find it appropriate to order Walsh to disgorge $18,632, plus prejudgment interest. This amount equals the commissions Walsh earned from his fraudulent variable annuity sales to Chambers, Mrs. Hannon, and Mrs. Merrill, and Walsh made no effort to show that this amount is not a reasonable approximation of his ill-gotten gains. Ordering this disgorgement will prevent Walsh from profiting from his violations and will deter others from violating the federal securities laws.

d. Civil Monetary Penalty

The Division urges the Commission to impose a $630,000 penalty against Walsh, which would represent a maximum third-tier penalty for each of Walsh's customers, including Angelillo.[82] As with Brown and Collins, however, we believe that a maximum second-tier (not third-tier) penalty is appropriate for Walsh and, although the penalty should be applied per

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[81] Because Walsh was an employee of Gilman Ciocia at the time of the misconduct, barring him from associating with an investment adviser does not raise a collateral bar issue. *See supra* notes 38-39 and accompanying text.

[82] *See supra* note 79 (discussing Angelillo).

customer, the calculation should not include customers who fall outside the applicable limitations period.

Walsh's egregious violations involved a failure to disclose material information to his customers and thus support a maximum second-tier penalty. Walsh's violations, however, did not expose his customers to significant risk of substantial loss or result in substantial pecuniary gain to Walsh, and therefore do not support a third-tier penalty. As for the number of "acts or omissions" against which to apply the maximum second-tier penalty, we believe that imposing a penalty for each defrauded customer is appropriate. Although Walsh's misconduct followed a general pattern, his acts and omissions toward each customer were nevertheless distinct. We therefore order Walsh to pay $255,000 in civil penalties, reflecting a maximum second-tier civil monetary penalty for each of the four customers (Chambers, Mrs. Hannon, Mrs. Koenig, and Merrill) that we find Walsh defrauded.

VI.

A. Mark Wells's Alleged Antifraud Violations

Mark Wells has been a registered representative associated with Prime Capital since May 2001. In 2002, Wells was the biggest producer in Prime Capital's Boca Raton, Florida, office, which had eighteen registered representatives. At issue here are Wells's sales of variable annuities to five elderly customers.[83]

The Division alleges that Wells violated the antifraud provisions by, among other things, material misstatements and misleading omissions in communications to customers regarding the potential returns of variable annuities or the ability to withdraw money from such annuities without penalty. Although the record raises questions about Wells's sales practices, we believe the record, taken as a whole, falls short of establishing that Wells violated the antifraud provisions. Wells's customers testified that they were often confused about, or even unaware of, certain aspects of the variable annuities they purchased from Wells. The customers' testimony, however, contains too many gaps and contradictions to be sure what occurred during Wells's sales presentations.[84]

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[83] Wells is still employed by Prime Capital, but Prime Capital and Gilman Ciocia agreed to prohibit Wells from selling variable annuities to anyone more than 59 ½ years old until an independent compliance consultant had completed its review and new policies and practices were put in place. *See Prime Capital Servs., Inc.*, Securities Act Rel. No. 9113 (Mar. 16, 2010).

[84] The law judge did not make specific credibility findings regarding Wells or his customers.

The record is unclear, for example, about whether Wells failed to disclose the fees and risks associated with variable annuities he recommended. One customer testified that Wells did not tell her about key terms of her investments, including the existence of surrender fees. The customer acknowledged, however, that Wells had "explained many things" to her, that she signed various documents that disclosed the annuities' material terms, and that she expressly chose not to read those materials. Furthermore, although the record contains evidence that one of the customer's account forms was altered after she signed it, the changes were not material and the record contains no evidence that Wells was responsible for those changes. Another customer testified that she understood – incorrectly – that her principal was "absolutely" safe, but she did not explain what Wells told her that made her believe this. This second customer also acknowledged signing documents that disclosed her annuities' terms and that she never felt rushed during the purchasing process.

The record is also unclear about whether Wells failed to disclose commissions he earned from selling variable annuities to his customers: one customer did not testify about whether Wells disclosed his commissions, and another customer stated that she "knew [Wells] was making a good commission on the things he was selling." Although the record contains an arbitration complaint against Prime Capital alleging that Wells failed to disclose his commissions, the customer who had made that complaint did not repeat this allegation in her testimony and instead testified only that, to the extent Wells was earning commissions, he was entitled to them. Evidence of settlements that Prime Capital and Wells reached with some customers over allegations of improper sales practices offer some support for finding that Wells's annuity sales were improper, but the record contains few details about the circumstances surrounding those settlements.

The admission by Nicole Loffredo (Wells's assistant) during the hearing that she signed customers' initials for customers during the sales process is troubling. However, the evidence does not establish that Wells knew about this practice given all the uncertainty about what occurred during the sales process. The evidence also fails to connect Wells's practice of listing variable annuities as liquid assets with a fraudulent intent. Wells readily acknowledged that he completed forms this way, but claimed that he had been trained to do so, and that he had not been told it was wrong until he testified before the Division. The law judge accepted Wells's testimony in this regard, finding that there was "no evidence in the record that [Wells] was aware that his role [in completing the account forms incorrectly] was part of an overall activity that was improper." We accordingly find that the record contains insufficient evidence to find that Wells violated the antifraud provisions.

B. Wells's Alleged Books and Records Violations

The Division also argues that Wells was a cause of Prime Capital's books and records violations because his customers' new account forms were "erroneous and created a distorted picture of customers' financial situations." We disagree. Although Wells does not dispute that he filled out his customers' new account forms incorrectly, the record does not establish that Wells knew or should have known that he was completing the forms incorrectly at the time.

Wells testified that he had been trained to complete the forms as he did, and he acknowledged that he had done so for a long time. We can find no evidence to contradict Wells's claim, and the law judge appears to credit Wells's testimony, noting that there was "no evidence in the record that [Wells] was aware that his [conduct] was part of an overall activity that was improper."

The Division also alleges that Wells added entries and information to customer forms without customer knowledge or consent. As noted in the antifraud discussion above, however, although one customer's account documents appear to have been altered after she signed them, the changes were minor, and we can find no evidence that Wells was responsible for those changes. Wells's assistant also admitted that she signed customers' initials on forms, but the evidence does not establish that Wells knew or should have known of this practice. We accordingly find that the record contains insufficient evidence to find that Wells was a cause of Prime Capital's books and records violations.

An appropriate order will issue.[85]

By the Commission (Chairman SCHAPIRO and Commissioners PAREDES, AGUILAR and GALLAGHER); Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

Lynn M. Powalski

By: Lynn M. Powalski
Deputy Secretary

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[85] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9299 / February 27, 2012

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66469 / February 27, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3376 / February 27, 2012

Admin. Proc. File No. 3-13532

In the Matter of the Application of
ERIC J. BROWN, MATTHEW J. COLLINS, KEVIN J. WALSH, AND MARK W. WELLS

c/o Robert G. Heim, Esq.
Meyers & Heim LLP
444 Madison Ave., 30th Floor
New York, NY 10022

and

Jane Degenhardt Bruno, Esq.
Bruno & Degenhardt
10615 Judicial Drive, Suite 703
Fairfax, VA 22030

and

Kevin J. Walsh
160 Deland Ave.
Indialantic, FL 32903

ORDER IMPOSING REMEDIAL SANCTIONS (CORRECTED)

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

ORDERED that Eric J. Brown, Matthew J. Collins, and Kevin J. Walsh be, and they hereby are, barred from association with any broker, dealer, or investment adviser; provided, however, that Collins may apply to become so associated in a non-supervisory capacity after two years; and it is further

ORDERED that Brown, Collins, and Walsh cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934; and Exchange Act Rule 10b-5; and it is further

ORDERED that Brown and Collins cease and desist from committing or causing any violations or future violations of Exchange Act Section 17(a) and Exchange Act Rule 17a-3; and it is further

ORDERED that Brown disgorge $11,147, plus prejudgment interest of $8,065.24, such prejudgment interested calculated beginning from November 1, 2001, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Collins disgorge $2,915, plus prejudgment interest of $1,324.74, such prejudgment interested calculated beginning from March 1, 2005, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Walsh disgorge $18,632, plus prejudgment interest of $6,775.08, such prejudgment interested calculated beginning from March 1, 2006, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Brown pay a civil money penalty of $560,000; and it is further

ORDERED that Collins pay a civil money penalty of $310,000; and it is further

ORDERED that Walsh pay a civil money penalty of $255,000; and it is further

ORDERED that the proceedings against Mark W. Wells be, and they hereby are, dismissed.

Payment of the amounts to be disgorged and the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, 100 F Street NE, Mail Stop 6042, Washington, DC 20549; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to Alix Biel, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, 4th Floor, New York, NY 10281-1022.

By the Commission.

Elizabeth M. Murphy
Secretary

By: Lynn M. Powalski
Deputy Secretary

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 162

RIN: 3038-AD14

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 248

[Release No. IC-29969; File No. S7-02-12]

RIN: 3235-AL26

Identity Theft Red Flags Rules

AGENCIES: Commodity Futures Trading Commission and Securities and Exchange Commission.

ACTIONS: Joint proposed rules and guidelines.

SUMMARY: The Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC," together with the CFTC, the "Commissions") are jointly issuing proposed rules and guidelines to implement new statutory provisions enacted by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These provisions amend section 615(e) of the Fair Credit Reporting Act and direct the Commissions to prescribe rules requiring entities that are subject to the Commissions' jurisdiction to address identity theft in two ways. First, the proposed rules and guidelines would require financial institutions and creditors to develop and implement a written identity theft prevention program that is designed to detect, prevent, and mitigate identity theft in connection with certain existing accounts or the opening of new accounts. The Commissions also are proposing guidelines to assist entities in the formulation and maintenance of a program that would satisfy the requirements of the proposed rules. Second, the proposed rules would establish special requirements for any credit and debit

card issuers that are subject to the Commissions' jurisdiction, to assess the validity of notifications of changes of address under certain circumstances.

DATES: Comments must be received on or before May 7, 2012.

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

CFTC:

- Agency web site, via its Comments Online Process: Comments may be submitted to http://comments.cftc.gov. Follow the instructions for submitting comments on the Internet web site.
- 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.

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 not have the obligation, to review, pre-screen, filter, redact, refuse, or remove any or all submissions from www.cftc.gov that it may deem to be inappropriate for publication, such as 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, 5 U.S.C. 551, et seq., and other applicable laws, and may be accessible under the Freedom of Information Act, 5 U.S.C. 552.

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 S7-02-12 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 S7-02-12.

. 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: Carl E. Kennedy, Counsel, at Commodity Futures Trading Commission, Office of the General Counsel, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581, telephone number (202) 418-6625, facsimile number (202) 418-5524, e-mail c_kennedy@cftc.gov; SEC: with regard to investment companies and investment advisers, contact Thoreau Bartmann, Senior Counsel, or Hunter Jones, Assistant Director, Office of Regulatory Policy, Division of Investment Management, (202) 551-6792, or with regard to brokers, dealers, or transfer agents, contact Brice Prince, Special Counsel, or Joseph Furey, Assistant Chief Counsel, Office of Chief Counsel, Division of Trading and Markets, (202) 551-5550, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION:

The Commissions are proposing new rules and guidelines on identity theft red flags for entities subject to their respective jurisdiction. The CFTC is proposing to add new subpart C ("Identity Theft Red Flags") to part 162 of the CFTC's regulations [17 CFR part 162] and the SEC is proposing to add new subpart C ("Regulation S-ID: Identity Theft Red Flags") to part 248 of the SEC's regulations [17 CFR part 248], under the Fair Credit Reporting Act of 1970 [15 U.S.C. 1681], the Commodity Exchange Act [7 U.S.C. 1], the Securities Exchange Act of 1934 [15 U.S.C. 78], the Investment Company Act of 1940 [15 U.S.C. 80a], and the Investment Advisers Act of 1940 [15 U.S.C. 80b].

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I. BACKGROUND

The growth and advancement of information technology and electronic communication have made it increasingly easy to collect, maintain and transfer personal information about individuals. Advancements in technology also have led to increasing threats to the integrity and privacy of personal information.[1] During recent decades, the federal government has taken steps to help protect individuals, and to help individuals protect themselves, from the risks of theft, loss, and abuse of their personal information.[2]

The Fair Credit Reporting Act of 1970[3] ("FCRA") sets standards for the collection, communication, and use of information about consumers by consumer reporting agencies.[4] Congress has amended the FCRA numerous times since 1970 to augment the protections the law provides. For example, the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act")[5]

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1 *See, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INFORMATION SECURITY: FEDERAL GUIDANCE NEEDED TO ADDRESS CONTROL ISSUES WITH IMPLEMENTING CLOUD COMPUTING (May 2010) (available at http://www.gao.gov/new.items/d10513.pdf) (discussing information security implications of cloud computing); DEPARTMENT OF COMMERCE, INTERNET POLICY TASK FORCE, COMMERCIAL DATA PRIVACY AND INNOVATION IN THE INTERNET ECONOMY: A DYNAMIC POLICY FRAMEWORK, at Section I (2010) (available at http://www.ntia.doc.gov/reports/2010/iptf_privacy_greenpaper_12162010.pdf) (reviewing recent technological changes that necessitate a new approach to commercial data protection). *See also* FRED H. CATE, PRIVACY IN THE INFORMATION AGE, at 13-16 (1997) (discussing the privacy and data security issues that arose during early increases in the use of digital data).

2 *See, e.g.*, Report of President's Identity Theft Task Force (Sept. 2008) (available at http://www.ftc.gov/os/2008/10/081021taskforcereport.pdf) (documenting governmental efforts to reduce identity theft); Testimony of Edith Ramirez, Commissioner of Federal Trade Commission, on Data Security, before House Subcommittee on Commerce, Manufacturing, and Trade, June 15, 2011 (available at http://www.ftc.gov/os/testimony/110615datasecurityhouse.pdf) (describing efforts of the Federal Trade Commission to promote data security).

3 Pub. L. 91-508, 84 Stat. 1114 (1970), *codified at* 15 U.S.C. § 1681 *et seq.*

4 The FCRA states that its purpose is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information ...." *Id.*

5 *See* Pub. L. 108-159, 117 Stat. 1952 (2003).

amended the FCRA to enhance the ability of consumers to combat identity theft.[6] The FACT Act also amended the FCRA to direct certain federal agencies to jointly issue rules and guidelines related to identity theft.[7]

Under the FACT Act's amendments to the FCRA, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Federal Trade Commission (the "FTC") (together, the "Agencies") were required to issue joint rules and guidelines regarding the detection, prevention, and mitigation of identity theft for entities that are subject to their respective enforcement authority (the "identity theft red flags rules and guidelines").[8] The Agencies also were required to prescribe joint rules applicable to issuers of credit and debit cards, to require that such issuers assess the validity of notifications of

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6 The Federal Trade Commission has defined "identity theft" as "a fraud committed or attempted using the identifying information of another person without authority." *See* 16 CFR 603.2(a).

7 Section 114 of the FACT Act.

8 *See* sections 615(e)(1)(A) – (B) of the FCRA, 15 U.S.C. 1681m(e)(1)(A) – (B). Section 615(e)(1)(A) of the FCRA provides that the Agencies shall jointly "establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary." Section 615(e)(1)(B) provides that the Agencies shall jointly "prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to [section 615(e)(1)(A)], to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers."

changes of address under certain circumstances (the "card issuer rules").[9] In 2007, the Agencies issued joint final identity theft rules and guidelines, and joint final card issuer rules.[10]

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[11] Title X of the Dodd-Frank Act, which is titled the Consumer Financial Protection Act of 2010 ("CFP Act"), established a Bureau of Consumer Financial Protection within the Federal Reserve System and gave this new agency certain rulemaking, enforcement, and supervisory powers over many consumer financial products and services, as well as the entities that sell them. In addition, Title X amended a number of other federal consumer protection laws enacted prior to the Dodd-Frank Act, including the FCRA.

Within Title X, section 1088(a)(8),(10) of the Dodd-Frank Act amended the FCRA by adding the Commissions (CFTC and SEC) to the list of federal agencies required to jointly

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9 Section 615(e)(1)(C) of the FCRA provides that the Agencies shall jointly "prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer" follows certain procedures (including notifying the cardholder at the former address) to assess the validity of the change of address. 15 U.S.C. 1681m(e)(1)(C).

10 *See* Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 FR 63718 (Nov. 9, 2007) ("2007 Adopting Release"). The Agencies' final rules also implemented section 315 of the FACT Act, which required the Agencies to adopt joint rules providing guidance regarding reasonable policies and procedures that a user of consumer reports must employ when a consumer reporting agency sends the user a notice of address discrepancy. *See* 15 U.S.C. 1681c(h). The Dodd-Frank Act does not authorize the Commissions to propose rules under section 315 of the FACT Act, and therefore entities under the authority of the Commissions, for purposes of the identity theft red flags rules and guidelines, will be subject to other agencies' rules on address discrepancies. *See, e.g.,* 16 CFR 641.1 (FTC).

11 Pub. L. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act is available at http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.

prescribe and enforce identity theft red flags rules and guidelines and card issuer rules.[12] Thus, the Dodd-Frank Act provides for the transfer of rulemaking responsibility and enforcement authority to the CFTC and SEC with respect to the entities under their respective jurisdiction. Accordingly, the Commissions are now jointly proposing for public notice and comment identity theft rules and guidelines and card issuer rules.[13] The proposed rules and guidelines[14] are substantially similar to those adopted by the Agencies in 2007.[15] As discussed further below, the Commissions recognize that most of the entities over which they have jurisdiction are likely to be already in compliance with the final rules and guidelines that the Agencies adopted in 2007, to the extent that these entities' activities fall within the scope of the Agencies' final rules and guidelines. The proposed rules and guidelines, if adopted, would not contain new requirements not already in the Agencies' final rules, nor would they expand the scope of those rules to

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12 *See* section 615(e)(1) of the FCRA, 15 U.S.C. 1681m(e)(1). In addition, section 1088(a)(10) of the Dodd-Frank Act added the Commissions to the list of federal administrative agencies responsible for enforcement of rules pursuant to section 621(b) of the FCRA. *See infra* note 19. Section 1100H of the Dodd-Frank Act provides that the Commissions' new enforcement authority (as well as other changes in various agencies' authority under other provisions) becomes effective as of the "designated transfer date" to be established by the Secretary of the Treasury, as described in section 1062 of that Act. On September 20, 2010, the Secretary of the Treasury designated July 21, 2011 as the transfer date. *See* Designated Transfer Date, 75 FR 57252 (Sept. 20, 2010).

13 The CFTC is proposing to add the proposed rules and guidelines in this release as a new subpart C to part 162 of the CFTC's regulations, 17 CFR 162. *See* Business Affiliate Marketing and Disposal of Consumer Information Rules, 76 FR 43879 (July 22, 2011). As a result, the purpose, scope, and definitions in part 162 would apply to the proposed identity theft red flags rules and guidelines, as well as to the proposed card issuer rules. The new subpart C would be titled "Identity Theft Red Flags." The SEC is proposing to add the proposed rules and guidelines in this release as a new subpart C to part 248 of the SEC's regulations. 17 CFR part 248. The new subpart C is titled "Regulation S-ID: Identity Theft Red Flags."

14 For ease of reference, unless the context indicates otherwise, our general use of the term "rules and guidelines" in this preamble will refer to both the identity theft red flags rules and guidelines and the card issuer rules.

15 *See* 15 U.S.C. 1681m(e)(1).

include new entities that were not already previously covered by the Agencies' rules.[16] The proposed rules and guidelines do contain examples and minor language changes designed to help guide entities under the Commissions' jurisdiction in complying with the rules. The Commissions anticipate that the proposed rules, if adopted, may help some entities discern whether and how the identity theft rules and guidelines apply to their circumstances.

II. EXPLANATION OF THE PROPOSED RULES AND GUIDELINES

A. Proposed Identity Theft Red Flags Rules

Sections 615(e)(1)(A) and (B) of the FCRA, as amended by the Dodd-Frank Act, require that the Commissions jointly establish and maintain guidelines for "financial institutions" and "creditors" regarding identity theft, and prescribe rules requiring such institutions and creditors to establish reasonable policies and procedures for the implementation of those guidelines.[17] The Commissions have sought to propose identity theft red flags rules and guidelines that are substantially similar to the Agencies' final identity theft red flags rules and guidelines, and that would provide flexibility and guidance to the entities subject to the Commissions' jurisdiction. To that end, the proposed rules discussed below would specify: (1) which financial institutions and creditors would be required to develop and implement a written identity theft prevention program ("Program"); (2) the objectives of the Program; (3) the elements that the Program would be required to contain; and (4) the steps financial institutions and creditors would need to take to administer the Program.

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16 The CFTC notes that the Dodd-Frank Act creates two new entities that must comply with these proposed rules and guidelines: swap dealers and major swap participants. The CFTC anticipates that to the extent that these new entities currently maintain or offer covered accounts (as discussed below), they also may be in compliance with the Agencies' final rules.

17 15 U.S.C. 1681m(e)(1)(A) and (B). Key terms such as financial institution and creditor are defined in the proposed rules and discussed later in this Section.

1. *Which Financial Institutions and Creditors Would Be Required to Have a Program*

The "scope" subsections of the proposed rules generally set forth the types of entities that would be subject to the Commissions' identity theft red flags rules and guidelines.[18] Under these proposed subsections, the rules would apply to entities over which the Commissions have recently been granted enforcement authority under the FCRA.[19] The Commissions' proposed scope provisions are similar to the scope provisions of the rules adopted by the Agencies.[20]

The CFTC has tailored its proposed "scope" subsection, as well as the definitions of "financial institution" and "creditor," to describe the entities to which its proposed identity theft red flags rules and guidelines would apply.[21] The CFTC's proposed rule states that it would apply to futures commission merchants ("FCMs"), retail foreign exchange dealers, commodity

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[18] Proposed § 162.30(a) (CFTC); § 248.201(a) (SEC).

[19] Section 1088(a)(10)(A) of the Dodd-Frank Act amended section 621(b) of the FCRA to add the Commissions to the list of federal agencies responsible for enforcement of the FCRA. As amended, section 621(b) of the FCRA specifically provides that enforcement of the requirements imposed under the FCRA "with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of [certain information] shall be enforced under ... the Commodity Exchange Act, with respect to a person subject to the jurisdiction of the [CFTC]; [and under] the Federal securities laws, and any other laws that are subject to the jurisdiction of the [SEC], with respect to a person that is subject to the jurisdiction of the [SEC] ...." 15 U.S.C. 1681s(b)(1)(F) – (G). *See also* 15 U.S.C. 1681a(f) (defining "consumer reporting agency").

[20] *See, e.g.,* 12 CFR 717.90 (stating that the National Credit Union Administration red flags rule "applies to a financial institution or creditor that is a federal credit union"). The Commissions do not have general regulatory jurisdiction over banks, savings and loan associations, or credit unions that hold a transaction account, although the Commissions may have supervisory authority over specific activities of those persons. For example, the CFTC may have jurisdiction over those persons to the extent that they engage in the trading of, or the provision of advice related to, futures or swaps. Similarly, the SEC may have jurisdiction over these persons to the extent that they engage in the trading of, or the provision of advice related to, securities or security-based swaps.

[21] Proposed § 162.30(a).

trading advisors ("CTAs"), commodity pool operators ("CPOs"), introducing brokers ("IBs"), swap dealers, and major swap participants.[22]

The SEC's proposed "scope" subsection provides that the proposed rules and guidelines would apply to a financial institution or creditor, as defined by the FCRA, that is:

- a broker, dealer or any other person that is registered or required to be registered under the Securities Exchange Act of 1934 ("Exchange Act");
- an investment company that is registered or required to be registered under the Investment Company Act of 1940, that has elected to be regulated as a business development company under that Act, or that operates as an employees' securities company under that Act; or
- an investment adviser that is registered or required to be registered under the Investment Advisers Act of 1940.[23]

The entities listed in the proposed scope section are the entities regulated by the SEC that are most likely to be "financial institutions" or "creditors," *i.e.*, registered brokers or dealers ("broker-dealers"), investment companies and investment advisers.[24] The proposed scope

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22 The CFTC has determined that the proposed identity theft red flags rules and guidelines would apply to these entities because of the increased likelihood that these entities open or maintain covered accounts, or pose a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft. This approach is consistent with the scope of part 162. *See* 76 FR at 43884.

23 Proposed § 248.201(a).

24 The SEC's proposed rules would define the scope of the proposed identity theft red flags rules and guidelines, proposed § 248.201(a), differently than Regulation S-AM, the affiliate marketing rule the SEC adopted under FCRA, defines its scope. *See* 17 CFR 248.101(b) (providing that Regulation S-AM applies to any brokers or dealers (other than notice-registered brokers or dealers), any investment companies, and any investment advisers or transfer agents registered with the Commission). Section 214(b) of the FACT Act, pursuant to which the SEC adopted Regulation S-AM, did not specify the types of entities that would be subject to the SEC's rules, and did not state that the affiliate marketing rules should apply to all persons over which the SEC has jurisdiction. By contrast, the Dodd-Frank Act specifies that the SEC's identity theft red flags

section also would include other entities that are registered or are required to register under the Exchange Act. The section would not specifically identify those entities, such as nationally recognized statistical ratings organizations, self-regulatory organizations, and municipal advisors and municipal securities dealers, because, as discussed below, they are unlikely to qualify as "financial institutions" or "creditors" under the FCRA.[25] The proposed scope section also would not include entities that are not themselves registered with the Commission,[26] even if they register securities under the Securities Act of 1933 or the Exchange Act, or report information under the Investment Advisers Act of 1940.[27]

- The Commissions solicit comment on the "scope" section of the proposed identity theft red flags rules.
- Should the SEC's proposed scope section specifically list all of the entities that would be covered by the rule if they were to qualify as financial institutions or

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rules and guidelines should apply to a "person that is subject to the jurisdiction" of the SEC. *See* Dodd-Frank Act section 1088(a)(8), (10).

The scope of the SEC's proposed rules also would differ from that of Regulation S-P, 17 CFR part 248, subpart A, the privacy rule the SEC adopted in 2000 pursuant to the Gramm-Leach-Bliley Act. Pub. L. 106-102 (1999). Regulation S-P was adopted under Title V of that Act, which, unlike the FCRA, limited the SEC's regulatory authority to (i) brokers and dealers, (ii) investment companies, and (iii) investment advisers registered under the Investment Advisers Act of 1940. *See* 15 U.S.C. 6805(a)(3)-(5).

25 Although the Commission preliminarily believes that municipal advisors and municipal securities dealers are unlikely to qualify as "financial institutions" because they are unlikely to maintain transaction accounts for consumers, we welcome comment on this point specifically, as well as on the general issue of whether the list of entities in the proposed scope section should include any other entities.

26 The Dodd-Frank Act defines a "person regulated by the [SEC]," for other purposes of that Act, as certain entities that are registered or required to be registered with the SEC, and certain employees, agents and contractors of those entities. *See* section 1002(21) of the Dodd-Frank Act.

27 *See* 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. 3222 (June 22, 2011) [76 FR 39646 (July 6, 2011)] (adopting rules related to investment advisers exempt from registration with the SEC, including "exempt reporting advisers").

creditors under the FCRA? Are the entities specifically listed in the proposed rule the registered entities that are most likely to be financial institutions or creditors under the FCRA? Should the SEC exclude any entities that are listed? Should it include any other entities that are not listed? Should the SEC include entities that register securities with the SEC or that report certain information to the SEC even if the entities themselves do not register with the SEC?

i. *Definition of Financial Institution*

As discussed above, the Commissions' proposed red flags rules and guidelines would apply to "financial institutions" and "creditors." The Commissions are proposing to define the term "financial institution" by reference to the definition of the term in section 603(t) of the FCRA.[28] That section defines a financial institution to include certain banks and credit unions, and "any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer."[29] Section 19(b) of the Federal Reserve Act defines a transaction account as "a deposit or account on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers, or other similar items for the purpose of making payments or transfers to third parties or others."[30]

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28 15 U.S.C. 1681a(t). *See* proposed § 162.30(b)(7) (CFTC); proposed § 248.201(b)(7) (SEC). The Agencies also defined "financial institution," in their identity theft red flags rules and guidelines, by reference to the FCRA. *See, e.g.,* 16 CFR 681.1(b)(7) (FTC) ("Financial institution has the same meaning as in 15 U.S.C. 1681a(t).").

29 15 U.S.C. 1681a(t).

30 12 U.S.C. 461(b)(1)(C). Section 19(b) further states that a transaction account "includes demand deposits, negotiable order of withdrawal accounts, savings deposits subject to automatic transfers, and share draft accounts."

Accordingly, the Commissions are proposing to define "financial institution" as having the same meaning as in the FCRA. The CFTC's proposed definition, however, also specifies that the term "includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that directly or indirectly holds a transaction account belonging to a customer."[31]

The SEC is not proposing to mention specific entities in its definition of "financial institution" because the SEC's proposed scope section lists specific entities subject to the SEC's rule.[32] The SEC notes that entities under its jurisdiction that may be financial institutions because they hold customers' transaction accounts would likely include broker-dealers that offer custodial accounts and investment companies that enable investors to make wire transfers to other parties or that offer check-writing privileges. The SEC recognizes that most registered investment advisers are unlikely to hold transaction accounts and thus would not qualify as financial institutions. The proposed definition nonetheless does not exclude investment advisers or any other entities regulated by the SEC because they may hold transaction accounts or otherwise meet the definition of "financial institution."

- The Commissions solicit comment on their proposed definitions of financial institution. Should the Commissions provide further guidance on the types of accounts that an entity might hold that would qualify the entity as a financial institution? Should the Commissions tailor the definition in any way to reflect the characteristics of the entities that would be subject to the rule? If so, how? Would

31 *See* proposed § 162.30(b)(7).

32 *See* proposed § 248.201(a).

defining "financial institution" instead in a way that differs from the Agencies' definition compromise the substantial similarity of the red flags rules?

- What type of entities regulated by the Commissions would most likely qualify as financial institutions under the proposed definition?
- Should the SEC's rule omit investment advisers or any other SEC-registered entity from the list of entities covered by the proposed rule?

ii. *Definition of Creditor*

The Commissions are proposing to define "creditor" to reflect a recent statutory definition of the term. In December 2010, President Obama signed into law the Red Flag Program Clarification Act of 2010 ("Clarification Act"), which amended the definition of "creditor" in the FCRA for purposes of identity theft red flag rules and guidelines.[33] The Commissions' proposed definition of "creditor" would refer to the definition in the FCRA as amended by the Clarification Act.[34]

The FCRA now defines a "creditor," for purposes of the red flags rules and guidelines, as a creditor as defined in the Equal Credit Opportunity Act[35] ("ECOA") (*i.e.*, a person that regularly extends, renews or continues credit,[36] or makes those arrangements) that "regularly and

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[33] Red Flag Program Clarification Act of 2010, Pub. L. 111-319 (2010) (inserting new section 4 at the end of section 615(e) of the FCRA), *codified at* 15 U.S.C. 1681m(e)(4).

[34] *See* proposed § 162.30(b)(5) (CFTC); proposed § 248.201(b)(5) (SEC). The Commissions understand that the Agencies are likely to amend their red flags rules and guidelines to reflect the new definition of "creditor" in the FCRA enacted by the Red Flag Program Clarification Act.

[35] Section 702(e) of the ECOA defines "creditor" to mean "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." 15 U.S.C. 1691a(e).

[36] The Commissions are proposing to define "credit" by reference to its definition in the FCRA. *See* proposed § 162.30(b)(4) (CFTC); proposed § 248.201(b)(4) (SEC). That definition refers to the definition of credit in the ECOA, which means "the right granted by a creditor to a debtor to defer

in the course of business … advances funds to or on behalf of a person, based on an obligation of the person to repay the funds or repayable from specific property pledged by or on behalf of the person."[37] The FCRA excludes from this definition a creditor that "advances funds on behalf of a person for expenses incidental to a service provided by the creditor to that person …."[38] The Clarification Act does not define the extent to which the advancement of funds for expenses would be considered "incidental" to services rendered by the creditor. The legislative history does indicate that the Clarification Act was intended to ensure that lawyers, doctors, and other small businesses that may advance funds to pay for services such as expert witnesses, or that may bill in arrears for services provided, should not be considered creditors under the red flags rules and guidelines.[39]

As discussed above, the Commissions propose to define "creditor" by reference to its definition in section 615(e)(4) of the FCRA as added by the Clarification Act.[40] The CFTC's proposed definition also would include certain entities (such as FCMs and CTAs) that regularly

payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." The Agencies defined "credit" in the same manner in their identity theft red flags rules. *See, e.g.*, 16 CFR 681.1(b)(4) (FTC) (defining "credit" as having the same meaning as in 15 U.S.C. 1681a(r)(5), which defines "credit" as having the same meaning as in section 702 of the ECOA).

37 15 U.S.C. 1681m(e)(4)(A)(iii). The FCRA defines a "creditor" also to include a creditor (as defined in the ECOA) that "regularly and in the ordinary course of business (i) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction; (ii) furnishes information to consumer reporting agencies … in connection with a credit transaction …." 15 U.S.C. 1681m(e)(4)(A)(i) - (ii).

38 Section 615(e)(4)(B) of the FCRA, 15 U.S.C. 1681m(e)(4)(B). The definition of "creditor" also authorizes the Agencies and the Commissions to include other entities in the definition of "creditor" if those entities are determined to offer or maintain accounts that are subject to a reasonably foreseeable risk of identity theft. 15 U.S.C. 1681m(e)(4)(C). The Commissions are not at this time proposing to include other types of entities in the definition of "creditor" that are not included in the statutory definition.

39 *See* 156 Cong. Rec. S8288-9 (daily ed. Nov. 30, 2010) (statements of Senators Thune and Dodd).

40 *See* proposed § 162.30(b)(5); proposed § 248.201(b)(5).

extend, renew or continue credit or make those credit arrangements.[41] The SEC's proposed definition also would include "lenders such as brokers or dealers offering margin accounts, securities lending services, and short selling services."[42] These entities are likely to qualify as "creditors" under the proposed definition because the funds that are advanced in these accounts do not appear to be for "expenses incidental to a service provided." The proposed definition of "creditor" would not include, however, CTAs or investment advisers because they bill in arrears, *i.e.,* on a deferred basis, if they do not "advance" funds to investors and clients.[43]

- The Commissions request comment on their proposed definitions of the terms credit and creditor. Should the proposed terms be tailored to take into account the particular characteristics of the entities regulated by the Commissions? If so, how? Should the Commissions provide further guidance, in the rule text or elsewhere, regarding the types of activities that might qualify an entity as a creditor? Should the Commissions provide guidance regarding the circumstances in which expenses, paid for by advanced funds, are "incidental" to services provided?
- Do commenters agree that broker-dealers that offer margin accounts, securities lending services, or short-selling services are likely to qualify as "creditors" under the proposed definition? Are there other activities that would likely cause SEC-registered entities to qualify as "creditors"?

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41 *See* proposed § 162.30(b)(5).

42 *See* proposed § 248.201(b)(5).

43 Investment advisers that bill for their services on a quarterly or other deferred basis might have qualified as "creditors" if the term were defined as under section 702 of the Equal Credit Opportunity Act, but they would not qualify as creditors under the definition the Commissions are proposing because they are not "advanc[ing] funds."

- Are there any other entities under the CFTC's or SEC's jurisdiction that maintain accounts that pose a reasonably foreseeable risk of identity theft and that the Commissions should include as "creditors" under the definition?[44]

iii. *Definition of Covered Account and Other Terms*

Under the proposed rules, entities that adopt red flags Programs would focus their attention on "covered accounts" for indicia of possible identity theft. The Commissions propose to define a "covered account" as: (i) an account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions; and (ii) any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers[45] or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.[46] The CFTC's proposed definition includes a margin account as an example of a covered account.[47] The SEC's proposed definition includes a brokerage account with a broker-dealer or an account maintained by a

44 *See* 15 U.S.C. 1681m(e)(4)(C).

45 Proposed § 162.30(b)(6) (CFTC) and proposed § 248.201(b)(6) (SEC) would define a "customer" to mean a person who has a covered account with a financial institution or creditor. The Commissions propose this definition for two reasons. First, this definition is the same as the definition of "customer" in the Agencies' final rules and guidelines. Second, because the definition uses the term "person," it would cover various types of business entities (*e.g.*, small businesses) that could be victims of identity theft. 15 U.S.C. 1681a(b). Although the definition of "customer" is broad, a financial institution or creditor would be required to determine which type of accounts its Program will cover, because the proposed identity theft red flags rules and guidelines are risk-based.

46 Proposed § 162.30(b)(3) (CFTC); proposed § 248.201(b)(3) (SEC).

47 *See* proposed § 162.30(b)(3)(i).

mutual fund (or its agent) that permits wire transfers or other payments to third parties as examples of such an account.[48]

The Commissions are proposing to define "account" as a "continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes."[49] The CFTC's proposed definition would specifically include an extension of credit, such as the purchase of property or services involving a deferred payment.[50] The SEC's proposed definition would specifically include "a brokerage account, a 'mutual fund' account (*i.e.*, an account with an open-end investment company, which may be maintained by a transfer agent or other service provider), and an investment advisory account."[51] Both the CFTC's and SEC's proposed definitions would differ from the definitions in the Agencies' final rules and guidelines by not including a "deposit account." Deposit accounts typically are offered by banks in connection with their banking activities, and not by the entities regulated by the Commissions.[52]

The proposed identity theft red flags rules and guidelines would define several other terms as the Agencies defined them in their final rules and guidelines, where appropriate, to

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48 *See* proposed § 248.201(b)(3)(i).

49 Proposed § 162.30(b)(1) (CFTC) and proposed § 248.201(b)(1) (SEC).

50 Proposed § 162.30(b)(1).

51 Proposed § 248.201(b)(1).

52 *See, e.g.,* Uniform Commercial Code § 9-102(a)(29) ("'Deposit account' means a demand, time, savings, passbook, or similar account maintained with a bank.").

avoid needless conflicts among regulations.[53] In addition, terms that are not defined in Regulation S-ID would have the same meaning as in the FCRA.[54]

- The Commissions request comment on the proposed definition of "covered account." Should the Commissions include the proposed examples of covered accounts? Should the definition include additional examples of accounts that may be covered accounts? If so, what other types of examples should be included?
- What other types of accounts that are offered or maintained by financial institutions or creditors subject to the Commissions' enforcement authority may pose a reasonably foreseeable risk of identity theft? Should the Commissions explicitly identify them and include them as examples in the proposed rule?
- Are deposit accounts offered by any of the entities regulated by the Commissions?
- The Commissions request comment on other terms defined in the proposed rules and guidelines.

iv. *Determination of Whether a Covered Account is Offered or Maintained*

Under the proposed rules, each financial institution or creditor would be required to periodically determine whether it offers or maintains covered accounts.[55] As a part of this

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53 *See, e.g.*, proposed § 162.30(b)(10) (CFTC); proposed § 248.201(b)(10) (SEC) (definition of "Red Flag").

54 *See* proposed § 248.201(b)(12)(vi) (SEC). The Agencies defined "identity theft" in their identity theft red flags rules and guidelines by referring to a definition previously adopted by the FTC. *See, e.g.*, 12 CFR 334.90(b)(8) (FDIC). The FTC defined "identity theft" as "a fraud committed or attempted using the identifying information of another person without authority." *See* 16 CFR 603.2(a) The FTC also has defined "identifying information," a term used in its definition of "identity theft." *See* 16 CFR 603.2(b). The Commissions are proposing to define the terms "identifying information" and "identity theft" by including the same definition of the terms as they appear in 16 CFR 603.2. *See* proposed § 162.30(b)(8) and (9) (CFTC); proposed § 248.201(b)(8) and (9) (SEC).

periodic determination, a financial institution or creditor would be required to conduct a risk assessment that takes into consideration: (1) the methods it provides to open its accounts; (2) the methods it provides to access its accounts; and (3) its previous experiences with identity theft.[56] Under the proposed rules, a financial institution or creditor should consider whether, for example, a reasonably foreseeable risk of identity theft may exist in connection with accounts it offers or maintains that may be opened or accessed remotely or through methods that do not require face-to-face contact, such as through the Internet or by telephone. In addition, if financial institutions or creditors offer or maintain accounts that have been the target of identity theft, they should factor those experiences into their determination. The Commissions anticipate that entities would maintain records concerning their periodic determinations.[57]

The Commissions acknowledge that some financial institutions or creditors regulated by the Commissions may engage only in transactions with businesses where the risk of identity theft is minimal. In these instances, the financial institution or creditor may determine after a preliminary risk assessment that it does not need to develop and implement a Program,[58] or that

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55 Proposed § 162.30(c) (CFTC) and proposed § 248.201(c) (SEC). As discussed above, the proposed rules would define a "covered account" as (i) an account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a brokerage account with a broker-dealer or an account maintained by a mutual fund (or its agent) that permits wire transfers or other payments to third parties; and (ii) any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks. Proposed § 162.30(b)(3) (CFTC); proposed § 248.201(b)(3) (SEC).

56 Proposed § 162.30(c) (CFTC) and proposed § 248.201(c) (SEC).

57 *See, e.g.*, FREQUENTLY ASKED QUESTIONS: IDENTITY THEFT RED FLAGS AND ADDRESS DISCREPANCIES at I.1, *available at* http://www.ftc.gov/os/2009/06/090611redflagsfaq.pdf.

58 For example, an FCM that would otherwise be subject to the proposed identity theft red flags rules and guidelines and that handles accounts only for large, institutional investors might make a risk-based determination that because it is subject to a low risk of identity theft, it does not need to develop and implement a Program. Similarly, a money market fund that would otherwise be

it may develop and implement a Program that applies only to a limited range of its activities, such as certain accounts or types of accounts.[59] Under the proposed rules, a financial institution or creditor that initially determines that it does not need to have a Program would be required to periodically reassess whether it must develop and implement a Program in light of changes in the accounts that it offers or maintains and the various other factors set forth in proposed § 162.30(c) (CFTC) and proposed § 248.201(c) (SEC).

- The Commissions request comment regarding the proposed requirement to periodically determine whether a financial institution or creditor offers or maintains covered accounts. Do the proposed rules provide adequate guidance for making the periodic determinations? Should the rules specifically require the documentation of such determinations?

2. *The Objectives of the Program*

The proposed rules would provide that each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Program designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.[60] These proposed provisions also would require that each Program be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities. Thus, the proposed rules are designed to be scalable, by permitting Programs that take into account the operations of smaller institutions.

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subject to the proposed red flags rules but that permits investments only by other institutions and separately verifies and authenticates transaction requests might make such a risk-based determination that it need not develop a Program.

59 Even a Program limited in scale, however, would need to comply with all of the provisions of the proposed rules and guidelines. *See, e.g.*, proposed § 162.30(d) – (f) (CFTC) and proposed § 248.201(d) – (f) (SEC) (Program requirements).

60 *See* proposed § 162.30(d)(1) (CFTC) and proposed § 248.201(d)(1) (SEC).

- The Commissions request comment on the proposed objectives of the Program.

3. *The Elements of the Program*

The proposed rules set out the four elements that financial institutions and creditors would be required to include in their Programs.[61] These elements are identical to the elements required under the Agencies' final identity theft red flag rules.[62]

First, the proposed rule would require financial institutions and creditors to develop Programs that include reasonable policies and procedures to identify relevant red flags[63] for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those red flags into its Program.[64] Rather than singling out specific red flags as mandatory or requiring specific policies and procedures to identify possible red flags, this first element would provide financial institutions and creditors with flexibility in determining which red flags are relevant to their businesses and the covered accounts they manage over time. The list of factors that a financial institution or creditor should consider (as well as examples) are included in section II of the proposed guidelines, which are appended to the proposed rules.[65] Given the changing nature of identity theft, the Commissions believe that this element would allow

61 *See* proposed § 162.30(d)(2) (CFTC) and proposed § 248.201(d)(2) (SEC).

62 *See* 2007 Adopting Release, *supra* note 10, at 63726-63730.

63 Proposed § 162.30(b)(10) (CFTC) and proposed § 248.201(b)(10) (SEC) define "red flags" to mean a pattern, practice, or specific activity that indicates the possible existence of identity theft.

64 *See* proposed § 162.30(d)(2)(i) (CFTC) and proposed § 248.201(d)(2)(i) (SEC). The board of directors, appropriate committee thereof, or designated employee may determine that a Program designed by a parent, subsidiary, or affiliated entity is also appropriate for use by the financial institution or creditor. However, the board (or designated employee) must conduct an independent review to ensure that the Program is suitable and complies with the requirements of the red flags rules and guidelines. *See* 2007 Adopting Release, *supra* note 10.

65 The factors and examples are discussed below in Section II.B.2.

financial institutions or creditors to respond and adapt to new forms of identity theft and the attendant risks as they arise.

Second, the proposed rule would require financial institutions and creditors to have reasonable policies and procedures to detect red flags that have been incorporated into the Program of the financial institution or creditor.[66] This element would not provide a specific method of detection. Instead, section III of the proposed guidelines provides examples of various means to detect red flags.[67]

Third, the proposed rule would require financial institutions and creditors to have reasonable policies and procedures to respond appropriately to any red flags that are detected.[68] This element would incorporate the requirement that a financial institution or creditor assess whether the red flags detected evidence a risk of identity theft and, if so, determine how to respond appropriately based on the degree of risk. Section IV of the proposed guidelines sets out a list of aggravating factors and examples that a financial institution or creditor should consider in determining the appropriate response.[69]

Finally, the proposed rule would require financial institutions and creditors to have reasonable policies and procedures to ensure that the Program (including the red flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.[70] As discussed above, financial institutions and creditors would be required to determine which red

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66 *See* proposed § 162.30(d)(2)(ii) (CFTC) and proposed § 248.201(d)(2)(ii) (SEC).

67 These examples are discussed below in Section II.B.3.

68 *See* proposed § 162.30(d)(2)(iii) (CFTC) and proposed § 248.201(d)(2)(iii) (SEC).

69 The aggravating factors and examples are discussed below in Section II.B.4.

70 *See* proposed § 162.30(d)(2)(iv) (CFTC) and proposed § 248.201(d)(2)(iv) (SEC).

flags are relevant to their businesses and the covered accounts they manage. The Commissions are proposing a periodic update, rather than immediate or continuous updates, to be parallel with the final identity theft red flags rules of the Agencies and to avoid unnecessary regulatory burdens. Section V of the proposed guidelines provides a set of factors that should cause a financial institution or creditor to update its Program.[71]

- The Commissions request comment on whether the proposed four elements of the Program would provide effective protection against identity theft and whether any additional elements should be included.
- The Commissions anticipate that a financial institution or creditor that adopts a Program could integrate the policies and procedures with other policies and procedures it has adopted pursuant to other legal requirements, such as compliance[72] and safeguards rules.[73] Should the Commissions provide guidance on how financial institutions or creditors could integrate identity theft policies and procedures with other policies and procedures?

4. *Administration of the Program*

The Commissions are proposing to provide direction to financial institutions and creditors regarding the administration of Programs to enhance the effectiveness of those Programs. Accordingly, the proposed rule would prescribe the steps that financial institutions and creditors would have to take to administer a Program.[74] These sections would provide that

71 These factors are discussed below in Section II.B.5.

72 *See* rule 38a-1 under the Investment Company Act, 17 CFR 270.38a-1; rule 206(4)-7 under the Investment Advisers Act, 17 CFR 275.206(4)-7.

73 Regulation S-P, 17 CFR 248.30 (applicable to broker-dealers, investment companies, and investment advisers).

74 *See* proposed § 162.30(e) (CFTC) and proposed § 248.201(e) (SEC).

each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and meet four additional requirements.

First, the proposed rules would require that a financial institution or creditor obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors.[75] This proposed requirement highlights the responsibility of the board of directors and senior management in approving a Program. This requirement would not mandate that a board be responsible for the day-to-day operations of the Program. The proposed rules provide that the board or appropriate committee must approve only the initial written Program. This provision is designed to enable a financial institution or creditor to update its Program in a timely manner. After the initial approval, at the discretion of the entity, the board, a committee, or senior management may update the Program.

Second, the proposed rules would provide that financial institutions and creditors must involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation, and administration of the Program.[76] The proposed rules would provide discretion to a financial institution or creditor to determine who would be responsible for the oversight, development, implementation, and administration of the Program in allowing the board of directors to delegate these functions. The Commissions appreciate that boards of directors have many responsibilities and that it

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75 *See* proposed § 162.30(e)(1) (CFTC) and proposed § 248.201(e)(1) (SEC). Proposed § 162.30(b)(2) (CFTC) and proposed § 248.201(b)(2) (SEC) define the term "board of directors" to include: (i) in the case of a branch or agency of a non-U.S-based financial institution or creditor, the managing official in charge of that branch or agency; and (ii) in the case of a financial institution or creditor that does not have a board of directors, a designated senior management employee.

76 *See* proposed § 162.30(e)(2) (CFTC) and proposed § 248.201(e)(2) (SEC). Section VI of the proposed guidelines elaborates on the proposed provision.

generally is not feasible for a board to involve itself in these functions on a daily basis. A designated management official who is responsible for the oversight of a broker-dealer's, investment company's or investment adviser's Program may also be the entity's chief compliance officer.[77]

Third, the proposed rules would provide that financial institutions and creditors must train staff, as necessary, to effectively implement their Programs.[78] The Commissions believe that proper training would enable relevant staff to address the risk of identity theft. For example, staff would be trained to detect red flags with regard to new and existing accounts, such as discrepancies in identification presented by a person opening an account. Staff also would need to be trained to mitigate identity theft, for example, by recognizing when an account should not be opened.

Finally, the proposed rules would provide that financial institutions and creditors must exercise appropriate and effective oversight of service provider arrangements.[79] The Commissions believe that it is important that the proposed rules address service provider arrangements so that financial institutions and creditors would remain legally responsible for compliance with the proposed rules, irrespective of whether such institutions and creditors outsource their identity theft red flags detection, prevention, and mitigation operations to a third-party service provider.[80] The proposed rules do not prescribe a specific manner in which

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77 *See, e.g.*, rule 38a-1(a)(4) under the Investment Company Act (description of chief compliance officer), 17 CFR 270.38a-1(a)(4); rule 206(4)-7(c) under the Investment Advisers Act, 17 CFR 275.206(4)-7 (same).

78 *See* proposed § 162.30(e)(3) (CFTC) and proposed § 248.201(e)(3) (SEC).

79 *See* proposed § 162.30(e)(4) (CFTC) and proposed § 248.201(e)(4) (SEC). Proposed § 162.30(b)(11) (CFTC) and proposed § 248.201(b)(11) (SEC) would define the term "service provider" to mean a person that provides a service directly to the financial institution or creditor.

80 For example, a financial institution or creditor that uses a service provider to open accounts on its

appropriate and effective oversight of service provider arrangements must occur. Instead, the proposed requirement would provide flexibility to financial institutions and creditors in maintaining their service provider arrangements, while making clear that such institutions and creditors would still be required to fulfill their legal compliance obligations.[81] Section VI(c) of the proposed guidelines specifies what a financial institution or creditor could do so that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft.[82]

- The Commissions solicit comment on whether the proposed four steps to administer the Program are appropriate and whether any additional or alternate steps should be included.

B. Proposed Guidelines

As amended by the Dodd-Frank Act, section 615(e)(1)(A) of the FCRA provides that the Commissions must jointly "establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary."[83] Accordingly, the Commissions are jointly proposing guidelines in an appendix to the proposed rules that are intended to assist financial institutions and creditors in the formulation and maintenance of a

behalf, could reserve for itself the responsibility to verify the identity of a person opening a new account, may direct the service provider to do so, or may use another service provider to verify identity. Ultimately, however, the financial institution or creditor would remain responsible for ensuring that the activity is being conducted in compliance with a Program that meets the requirements of the proposed identity theft red flags rules and guidelines.

81 These legal compliance obligations would include the maintenance of records in connection with any service provider arrangements.

82 Section VI(c) of the proposed guidelines is discussed below in Section II.B.6.

83 15 U.S.C. 1681m(e)(1)(A).

Program that would satisfy the requirements of those proposed rules. These guidelines are substantially similar to the guidelines adopted by the Agencies. The changes we are proposing to make to the Agencies' guidelines are designed to tailor the guidelines to the circumstances of the entities within the Commissions' regulatory jurisdiction, such as by modifying the examples provided by the guidelines. We believe this approach would meet the Commissions' obligation under section 615(e)(1)(A) of the FCRA to jointly establish and maintain guidelines for financial institutions and creditors.

The proposed rules would explain the relationship of the proposed rules to the proposed guidelines.[84] In particular, they would require each financial institution or creditor that is required to implement a Program to consider the guidelines. The proposed guidelines set forth policies and procedures that financial institutions and creditors would be required to consider and use, if appropriate. Although a financial institution or creditor could determine that a particular guideline is not appropriate for its circumstances, its Program would need to contain reasonable policies and procedures to fulfill the requirements of the proposed rules. As discussed above, the proposed guidelines are substantially similar to the final guidelines issued by the Agencies. In the Commissions' view, the proposed guidelines would provide financial institutions and creditors with flexibility to determine "how best to develop and implement the required policies and procedures."[85]

The proposed guidelines are organized into seven sections and a supplement. Each section in the proposed guidelines corresponds with the provisions in the proposed rules.

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84 *See* proposed § 162.30(f) (CFTC) and proposed § 248.201(f) (SEC).

85 *See* H.R. Rep. No. 108-263 at 43, Sept. 4, 2003 (accompanying H.R. 2622); S. Rep. No. 108-166 at 13, Oct. 17, 2003 (accompanying S. 1753).

- The Commissions request comment on all sections, including Supplement A, of the proposed guidelines described below.

1. *Section I of the Proposed Guidelines — Identity Theft Prevention Program*

As noted above, proposed § 162.30(d)(1) (CFTC) and proposed § 248.201(d)(1) (SEC) would require each financial institution or creditor that offers or maintains one or more covered accounts to develop and maintain a program that is designed to detect, prevent, and mitigate identity theft. Section I of the proposed guidelines corresponds with these provisions. Section I of the proposed guidelines makes clear that a covered entity may incorporate into its Program, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft. An example of such existing policies, procedures, and other arrangements may include other policies, procedures, and arrangements that the financial institution or creditor has developed to prevent fraud or otherwise ensure compliance with applicable laws and regulations. The Commissions believe that this section of the proposed guidelines would allow financial institutions and creditors to minimize cost and time burdens associated with the development and implementation of new policies, procedures, and arrangements by leveraging existing policies, procedures, and arrangements and avoiding unnecessary duplication.

- The Commissions request comment on this section of the proposed guidelines.

2. *Section II of the Proposed Guidelines — Identifying Relevant Red Flags*

As recently amended by the Dodd-Frank Act, section 615(e)(2)(A) of the FCRA provides that, in developing identity theft red flags guidelines as required by the FCRA, the Commissions must identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft. Section II of the proposed guidelines would identify those patterns, practices and forms of activity. Section II(a) of the proposed guidelines sets out several risk factors that a financial institution or creditor would be required to consider in identifying relevant red flags for covered accounts, as appropriate: (1) the types of covered accounts it offers or maintains; (2) the methods it provides to open its covered accounts; (3) the methods it provides to access its covered accounts; and (4) its previous experiences with identity theft. Thus, for example, red flags relevant to margin accounts may differ from those relevant to advisory accounts, and those applicable to consumer accounts may differ from those applicable to business accounts. Red flags relevant to accounts that may be opened or accessed remotely may differ from those relevant to accounts that require face-to-face contact. In addition, under the proposed guidelines, a financial institution or creditor should consider identifying as relevant those red flags that directly relate to its previous experiences with identity theft.

Section II(b) of the proposed guidelines sets out examples of sources from which financial institutions and creditors should derive relevant red flags. This proposed section provides that a financial institution or creditor should incorporate relevant red flags from such sources as: (1) incidents of identity theft that the financial institution or creditor has experienced; (2) methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and (3) applicable regulatory guidance (*i.e.,* guidance received from regulatory authorities). As discussed above in Section II.B, this proposed section would not require financial institutions and creditors to incorporate relevant red flags strictly from these three sources. Instead, the section would require that financial institutions and creditors consider them when developing a Program.

As noted above, the proposed rules would not identify specific red flags that financial institutions or creditors must include in their Programs.[86] Instead, under the proposed guidelines, a Program would be required to identify and incorporate relevant red flags that are appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities. Section II(c) of the proposed guidelines identifies five categories of red flags that financial institutions and creditors must consider including in their Programs:

- Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;
- Presentation of suspicious documents, such as documents that appear to have been altered or forged;
- Presentation of suspicious personal identifying information, such as a suspicious address change;
- Unusual use of, or other suspicious activity related to, a covered account; and
- Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

In Supplement A to the proposed guidelines, the Commissions include a non-comprehensive list of examples of red flags from each of these categories that a financial institution or creditor may experience.[87]

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[86] *See* proposed § 162.30(d) (CFTC) and § 248.201(d) (SEC).

[87] These examples are discussed below in Section II.B.8.

- The Commissions request comment on this section of the proposed guidelines. Are there specific, additional red flags associated with the types of institutions subject to the Commissions' jurisdiction that the Commissions should identify?
- Would the five categories of red flags discussed in the proposed guidelines provide flexible and adequate guidance for financial institutions and creditors that they can use to develop a Program?

3. *Section III of the Proposed Guidelines — Detecting Red Flags*

As noted above, the proposed rules would provide that a financial institution or creditor must have reasonable policies and procedures to detect red flags in its Program.[88] Section III of the proposed guidelines would provide examples of policies and procedures that a financial institution or creditor must consider including in its Program for the purpose of detecting red flags. These would include (1) in the case of the opening of a covered account, obtaining identifying information about, and verifying the identity of, the person opening the account, and (2) in the case of existing covered accounts, authenticating customer identities, monitoring transactions, and verifying the validity of change of address requests. Entities that are currently subject to the Agencies' final identity theft red flag rules and guidelines,[89] the federal customer identification program ("CIP") rules[90] or other Bank Secrecy Act rules,[91] the Federal Financial

88 *See* proposed § 162.30(d)(2)(ii) (CFTC) and proposed § 248.201(d)(2)(ii) (SEC).

89 *See* 2007 Adopting Release, *supra* note 10.

90 *See, e.g.*, 31 CFR 1023.220 (broker-dealers), 1024.220 (mutual funds), and 1026.220 (futures commission merchants and introducing brokers). The CIP regulations implement section 326 of the USA PATRIOT Act, codified at 31 U.S.C. 5318(l).

91 *See, e.g.*, 31 CFR 103.130 (anti-money laundering programs for mutual funds).

Institutions Examination Council's guidance on authentication,[92] or the Federal Information Processing Standards[93] may already be engaged in detecting red flags.

In developing the proposed rules and guidelines, the Commissions sought to minimize the burdens that would be imposed on entities that may be in compliance with existing similar laws. These entities may wish to integrate the policies and procedures already developed for purposes of complying with these rules and standards into their Programs. However, such policies and procedures may need to be supplemented. For example, the CIP rules were written to implement section 326[94] of the USA PATRIOT Act,[95] an Act directed towards facilitating the prevention, detection and prosecution of international money laundering and the financing of terrorism. Certain types of "accounts," "customers," and products are exempted or treated specially in the CIP rules because they pose a lower risk of money laundering or terrorist financing. Such special treatment may not be appropriate to accomplish the broader objective of detecting, preventing, and mitigating identity theft. Accordingly, the Commissions would expect that, if the proposed rules are adopted, all financial institutions and creditors would evaluate the adequacy of existing policies and procedures, and develop and implement risk-based policies and procedures that detect red flags in an effective and comprehensive manner.

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92 *See* "Authentication in an Internet Banking Environment," Oct. 12, 2005, available at: http://www.ffiec.gov/press/pr101205.htm.

93 The Federal Information Processing Standards are issued by the National Institute of Standards and Technology ("NIST") after approval by the Secretary of Commerce pursuant to section 5131 of the Information Technology Management Reform Act of 1996, Pub. L. 104-106, 110 Stat. 702, Feb. 10, 1996, and the Federal Information Security Management Act of 2002, 44 U.S.C. 3541, et seq. NIST manages and publishes the most current Federal Information Processing Standards at: http://csrc.nist.gov/publications/PubsFIPS.html.

94 31 U.S.C. 5318(*l*).

95 Pub. L. 107-56 (2001).

- The Commissions request comment on this section of the proposed guidelines. Should the Commission provide further guidance on the integration of or differentiation between identity theft red flags programs and other existing procedures?

4. *Section IV of the Proposed Guidelines — Preventing and Mitigating Identity Theft*

As noted above, the proposed rules would require that a Program include reasonable policies and procedures to respond appropriately to red flags that are detected.[96] Section IV of the proposed guidelines states that a Program's policies and procedures should include a list of appropriate responses to the red flags that a financial institution or creditor has detected, that are commensurate with the degree of risk posed by each red flag.[97] In determining an appropriate response, under the proposed guidelines, a financial institution or creditor would be required to consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor, or to a fraudulent Internet website.

Section IV of the proposed guidelines also provides several examples of appropriate responses, such as monitoring a covered account for evidence of identity theft, contacting the customer, and changing any passwords, security codes, or other security devices that permit

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96 *See* proposed § 162.30(d)(2)(iii) (CFTC) and proposed § 248.201(d)(2)(iii) (SEC).

97 A financial institution or creditor, in order to respond appropriately, would have to assess whether the red flags indicate risk of identity theft, and must have a reasonable basis for concluding that a red flag does not demonstrate a risk of identity theft.

access to a covered account.[98] The Commissions are proposing to include the same list of examples presented in the Agencies' final guidelines, because, upon review, the Commissions believe the list is comprehensive, relevant to entities regulated by the Commissions, and designed to enhance consistency of regulations and Programs.

- The Commissions seek comment on this section of the proposed guidelines. Should the Commission revise the guidelines to add, modify, or delete any examples?

5. *Section V of the Proposed Guidelines — Updating the Identity Theft Prevention Program*

As discussed above, the proposed rules would require each financial institution or creditor to periodically update its Program (including the relevant red flags) to reflect changes in risks to its customers or to the safety and soundness of the financial institution or creditor from identity theft.[99] Section V of the proposed guidelines would include a list of factors on which a financial institution or creditor could base the updates to its Program: (a) the experiences of the financial institution or creditor with identity theft; (b) changes in methods of identity theft; (c) changes in methods to detect, prevent, and mitigate identity theft; (d) changes in the types of accounts that the financial institution or creditor offers or maintains; and (e) changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

98 Other examples of appropriate responses provided in the proposed guidelines are: reopening a covered account with a new account number; not opening a new covered account; closing an existing covered account; not attempting to collect on a covered account or not selling a covered account to a debt collector; notifying law enforcement; and determining that no response is warranted under the particular circumstances. The final proposed example – no response – might be appropriate, for example, when a financial institution or creditor has a reasonable basis for concluding that the red flags do not evidence a risk of identity theft.

99 *See* proposed § 162.30(d)(2)(iv) (CFTC) and proposed § 248.201(d)(2)(iv) (SEC).

- The Commissions request comment on this section of the proposed guidelines. Should the Commissions provide any further guidance regarding the updating of Programs?

6. *Section VI of the Proposed Guidelines — Methods for Administering the Identity Theft Prevention Program*

Section VI of the proposed guidelines would provide additional guidance for financial institutions and creditors to consider in administering their identity theft Programs.[100] These proposed guideline provisions are identical to those prescribed by the Agencies in their final guidelines, which were modeled on sections of the Federal Information Processing Standards.[101]

i. *Oversight of Identity Theft Prevention Program*

Section VI(a) of the proposed guidelines would state that oversight by the board of directors, an appropriate committee of the board, or a designated senior management employee should include: (1) assigning specific responsibility for the Program's implementation; (2) reviewing reports prepared by staff regarding compliance by the financial institution or creditor with the proposed rules; and (3) approving material changes to the Program as necessary to address changing identity theft risks.

ii. *Reporting to the Board of Directors*

Section VI(b) of the proposed guidelines states that staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated senior management employee, at least annually, on compliance by the financial institution or creditor

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[100] *See* proposed § 162.30(e) (CFTC) and proposed § 248.201(e) (SEC) (administration of Programs).

[101] *See supra* note 93 (brief explanation of the Federal Information Processing Standards).

with the proposed rules. In addition, section VI(b) of the proposed guidelines provides that the report should address material matters related to the Program and evaluate several issues, such as: (i) the effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; (ii) service provider arrangements; (iii) significant incidents involving identity theft and management's response; and (iv) recommendations for material changes to the Program.

iii. *Oversight of Service Provider Arrangements*

Section VI(c) of the proposed guidelines would provide that whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts, the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. The Commissions believe that these guidelines would make clear that a service provider that provides services to multiple financial institutions and creditors may do so in accordance with its own program to prevent identity theft, as long as the service provider's program meets the requirements of the proposed identity theft red flags rules.

Section VI(c) of the proposed guidelines would also include, as an example of how a financial institution or creditor may comply with this provision, that a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant red flags that may arise in the performance of the service provider's activities, and either report the red flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft. In those circumstances, the Commissions would expect that the contractual arrangements would include the provision of sufficient documentation by the service provider to the financial institution or creditor to enable it to assess compliance with the identity theft red flags rules.

- The Commissions request comment on section VI of the proposed guidelines.
- The SEC anticipates that information about compliance with an entity's Program could be included in any periodic reports submitted by the entity's chief compliance officer to its board of directors. The SEC requests comment on whether such reports are an appropriate means for reporting information to the board about the entity's compliance with its identity theft Program.

7. *Section VII of the Proposed Guidelines — Other Applicable Legal Requirements*

Section VII of the proposed guidelines would identify other applicable legal requirements that financial institutions and creditors should keep in mind when developing, implementing, and administering their Programs. Specifically, section VII of the proposed guidelines identifies section 351 of the USA PATRIOT Act, which sets out the requirements for financial institutions that must file "Suspicious Activity Reports" in accordance with applicable law and regulation.[102] In addition, section VII of the proposed guidelines identifies the following three requirements under the FCRA, which a financial institution or creditor should keep in mind: (1) implementing any requirements under section 605A(h) of the FCRA, 15 U.S.C. 1681c-1(h), regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;[103] (2) implementing any requirements for furnishers of

[102] 31 U.S.C. 5318(g).

[103] Section 603(q)(2) of the FCRA defines the terms "fraud alert" and "active duty alert" as "a statement in the file of a consumer that – (A) notifies all prospective users of a consumer report

information to consumer reporting agencies under section 623 of the FCRA, 15 U.S.C. 1681s-2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and (3) complying with the prohibitions in section 615 of the FCRA, 15 U.S.C. 1681m, regarding the sale, transfer, and placement for collection of certain debts resulting from identity theft.

- The Commissions request comment on this section of the proposed guidelines.

8. *Proposed Supplement A to the Guidelines*

Proposed Supplement A to the proposed guidelines provides illustrative examples of red flags that financial institutions and creditors would be required to consider incorporating into their Program, as appropriate. These proposed examples are substantially similar to the examples identified in the Agencies' final guidelines, to enhance consistency. The proposed examples are organized under the five categories of red flags that are set forth in section II(c) of the proposed guidelines:

- Alerts, notifications, or warnings from a consumer reporting agency;
- Suspicious documents;
- Suspicious personal identifying information;
- Unusual use of, or suspicious activity related to, the covered account; and
- Notice from others regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.[104]

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relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and (B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report." 15 U.S.C. 1681a(q)(2).

104 *See supra* Section II.B.2.

The Commissions recognize that some of the examples of red flags may be more reliable indicators of identity theft, while others are more reliable when detected in combination with other red flags. It is the Commissions' intention that Supplement A to the proposed guidelines be flexible and allow a financial institution or creditor to tailor the red flags it chooses for its Program to its own operations. Although the proposed rules would not require a financial institution or creditor to justify to the Commissions its failure to include in its Program a specific red flag from the list of examples, a financial institution or creditor would have to account for the overall effectiveness of its Program, and ensure that the Program is appropriate to the entity's size and complexity, and to the nature and scope of its activities.

- The Commissions request comment on Supplement A to the proposed guidelines. Are there any additional examples of red flags that the Supplement should include? For instance, should the Supplement include examples of fraud by electronic mail, such as when a financial institution or creditor receives an urgent request to wire money from a covered account to a remote account from an email address that may have been compromised?[105]

[105] The Federal Bureau of Investigation ("FBI") and other organizations recently issued alerts that warned of thefts of customer money through emails from compromised customer email accounts. *See* FBI and Internet Crime Complaint Center, FRAUD ALERT INVOLVING E-MAIL INTRUSIONS TO FACILITATE WIRE TRANSFERS OVERSEAS, *available at* *http://www.ic3.gov/media/2012/EmailFraudWireTransferAlert.pdf;* FINRA, Regulatory Notice 12-05, CUSTOMER ACCOUNT PROTECTION, VERIFICATION OF EMAILED INSTRUCTIONS TO TRANSMIT OR WITHDRAW ASSETS FROM CUSTOMER ACCOUNTS, *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p125462.pdf (January, 2012); FINRA Investor Alert, EMAIL HACK ATTACK? BE SURE TO NOTIFY BROKERAGE FIRMS AND OTHER FINANCIAL INSTITUTIONS, *available at* http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/FraudsAndScams/P125460.

C. Proposed Card Issuer Rules

Section 615(e)(1)(C) of the FCRA now provides that the CFTC and SEC must "prescribe regulations applicable to card issuers to ensure that, if a card issuer receives a notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card," unless the card issuer applies certain address validation procedures discussed below.[106] Congress singled out this scenario involving card issuers as being a possible indicator of identity theft. Accordingly, the Commissions are proposing the card issuer rules in conjunction with the identity theft red flags rules.

The Commissions are proposing rules that would set out the duties of card issuers regarding changes of address, which would be similar to the final card issuer rules adopted by the Agencies.[107] The proposed rules would provide that the card issuer rules apply only to a person that issues a debit or credit card ("card issuer") and that is subject to the jurisdiction of either Commission.[108]

The CFTC is not aware of any entities subject to its jurisdiction that issue debit or credit cards. The CFTC notes that several of the CFTC regulated-entities that are identified as falling within the scope of the proposed card issuer rules (*e.g.*, FCMs, IBs, CPOs, CTAs, etc.) do not typically engage in the type of activities that are the subject of such rules and guidelines. As a matter of practice, it is highly unlikely that these CFTC regulated-entities would issue debit or

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106 15 U.S.C. 1681m(e)(1)(C).

107 *See* § 162.32 (CFTC) and § 248.202 (SEC).

108 *See supra* Section II.A.1.

credit cards. In fact, there are statutory provisions, regulations, or other laws that expressly prohibit some of these entities from engaging in many of these activities. For example, the Commodity Exchange Act ("CEA") and the CFTC's regulations expressly prohibit an IB from extending credit in connection with their primary business activities.[109] With respect to FCMs, while the CEA permits an FCM to extend credit to customers in lieu of accepting money, securities, or property for the purposes of collecting margin on a commodity interest, the CFTC's regulations prohibit an FCM from doing so.[110] Lastly, the National Futures Association's ("NFA") rules prohibit its members registered as CPOs from making loans to limited partners using interests in the partnerships as collateral.[111]

- The CFTC requests comment on the extent to which the proposed card issuer rules would affect the business operations of entities that would fall under the CFTC's jurisdiction.

The SEC understands that a number of entities under its jurisdiction issue cards in partnership with affiliated or unaffiliated banks and financial institutions. Generally, these cards

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109 *See* 7 U.S.C. 1(a)(31) (An IB is defined as any person that "is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery, security futures product, [...] swap," any foreign exchange transaction, any retail commodity transaction, any authorized commodity option, or any authorized leverage transaction, "and does not accept money securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom."); *see also* 17 CFR 1.57(c) (prohibiting IBs from, among other things, extending credit in lieu of accepting money, securities or property to margin, guarantee or secure any trades or contracts of customers) and 17 CFR 1.56(b) (prohibiting IBs from representing that they will guarantee any person against loss with respect to any commodity interest in any account carried by an FCM for or on behalf of any person).

110 *See* 17 CFR 1.56(b) (prohibiting FCMs from representing that they will guarantee any person against loss with respect to any commodity interest in any account carried by an FCM for or on behalf of any person).

111 *See* NFA Rule 2-45, available at *http://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=RULE%202-45&Section=4*, which provides that "[n]o Member CPO may permit a commodity pool to use any means to make a direct or indirect loan or advance of pool assets to the CPO or any other affiliated person or entity."

are issued by the partner bank, and not by the entity under the SEC's jurisdiction. For example, a broker-dealer may offer automated teller machine (ATM) access to a customer account through a debit card, but the debit card would generally be issued by a partner bank and not by the broker-dealer itself. The SEC therefore expects that few, if any, entities under its jurisdiction would be subject to the proposed card issuer rules. Nonetheless, the SEC is proposing the card issuer rules below so that any entity under its jurisdiction that does issue cards provides appropriate identity theft protection.

- The SEC requests comment on the extent to which the proposed card holder rules may affect the entities under its jurisdiction. Do any SEC-regulated entities issue cards? What types of arrangements are used to establish the card-issuing partnership between SEC-regulated entities and issuing banks? Would the proposed card issuer rules affect those arrangements?

1. *Definition of "Cardholder" and Other Terms*

Section 615(e)(1)(C) of the FCRA uses the term "cardholder" but does not define the term. The legislative history on this provision indicates that "issuers of credit cards and debit cards who receive a consumer request for an additional or replacement card for an existing account" may assess the validity of the request by notifying "the cardholder."[112] The proposed rules provide that the term "cardholder" means a consumer[113] who has been issued a credit or

112 149 Cong. Rec. E2513 (daily ed. Dec. 8, 2003) (statement of Rep. Oxley).

113 A "consumer" means an individual person, as defined in section 603(c) of the FCRA and § 162.2(f) of the CFTC's regulations. *See* 15 U.S.C. 1681a(c) and 76 FR at 43885. As mentioned above, the rules proposed by the CFTC in this release would be a part of part 162 of the CFTC's regulations, and therefore, all definitions in part 162 would apply to these rules. *See* 76 FR at 43884-6. The SEC is proposing to define all terms that are not defined in subpart C (including the term "consumer") to have the same meaning as defined in the FCRA. *See* proposed § 248.202(b)(3).

debit card.[114] Both "credit card" and "debit card" are defined in section 603(r) of the FCRA.[115] "Credit card" is defined by reference to section 103 of the Truth in Lending Act.[116] "Debit card" is defined as any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of a consumer at such financial institution for the purpose of transferring money between accounts or obtaining money, property, labor, or services.[117] The term "clear and conspicuous" is defined in § 162.2(b) of the CFTC's regulations and in the SEC's proposed § 248.202(b)(2) to mean reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice. The proposed definitions of "cardholder" and "clear and conspicuous" are identical to the definitions in the Agencies' final card issuer rules because, upon review, the Commissions believe that the definitions are comprehensive, likely to be relevant to any entities regulated by the Commissions under these proposed rules, and designed to enhance consistency and comparability of regulations and Programs.[118]

- The Commissions' proposed definition of "cardholder" refers to the definition of "credit card" and "debit card" in section 603(r) of the FCRA. Should the proposed definition instead separately define "credit card" and "debit card"?

2. *Address Validation Requirements*

Section 615(e) of the FCRA provides the address validation requirements and methods, and the proposed rules would set out the address validation rules to reflect those requirements

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114 *See* proposed § 162.32(b) (CFTC) and proposed § 248.202(b) (SEC).

115 15 U.S.C. 1681.

116 15 U.S.C. 1601.

117 15 U.S.C. 1681a(r)(3).

118 *See* 2007 Adopting Release, *supra* note 10, at 63733.

and methods.[119] These sections would require a card issuer to establish and implement reasonable written policies and procedures to assess the validity of a change of address if it (1) receives notification of a change of address for a consumer's debit or credit card account and (2) within a short period of time afterwards (during at least the first 30 days after it receives such notification), receives a request for an additional or replacement card for the same account. Under these circumstances, the proposed rules would prohibit the card issuer from issuing an additional or replacement card until, in accordance with its reasonable policies and procedures, it uses one of two methods to assess the validity of the change of address. Under the first method, the card issuer must notify the cardholder of the request either at the cardholder's former address,[120] or by any other means of communication that the card issuer and the cardholder have previously agreed to use.[121] In addition, the card issuer must provide the cardholder with a reasonable means of promptly reporting incorrect address changes. Under the second method, the card issuer would be required to otherwise assess the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to the proposed rules.[122]

The proposed rules would provide card issuers with an alternative time period in which to assess the validation of a cardholder's address.[123] Specifically, this section provides that the card issuer would be able to satisfy the requirements of proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC) if it validates an address pursuant to the methods in proposed

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119 *See* proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC).

120 *See* 15 U.S.C. 1681m(e)(1)(C)(i).

121 *See* 15 U.S.C. 1681m(e)(1)(C)(ii).

122 *See* proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC).

123 *See* proposed § 162.32(d) (CFTC) and proposed § 248.202(d) (SEC).

§§ 162.32(c)(1) or (c)(2) (CFTC) and proposed §§ 248.202(c)(1) or (c)(2) (SEC) when it receives an address change notification, before it receives a request for an additional or replacement card. The proposed rules would not require a card issuer that issues an additional or replacement card to validate an address whenever it receives a request for such a card; section 615(e)(1)(C) of the FCRA (and proposed § 162.32(c) (CFTC) and proposed § 248.202(c) (SEC)) would require the validation of an address only when the card issuer also has received a notification of a change in address. The Commissions believe, however, that a card issuer that does not validate an address when it receives an address change notification may find it prudent to validate the address before issuing an additional or replacement card, even when it receives a request for such a card more than 30 days after the notification of address change. Ultimately, the Commissions expect card issuers to exercise diligence commensurate with (*i.e.*, augmented by) their own experiences with identity theft.

- The Commissions request comment on the proposed address validation requirements for card issuers.

3. *Form of Notice*

To highlight the important and urgent nature of notice that a consumer receives from a card issuer, the Commissions are proposing to require that any written or electronic notice that the card issuer provides under this section would be required to be clear and conspicuous and be provided separately from its regular correspondence with the cardholder.[124] This proposed requirement would be consistent with the requirement in the Agencies' final card issuer rules

[124] *See* proposed § 162.32(e) (CFTC) and proposed § 248.202(e) (SEC). As noted above, "clear and conspicuous" would mean reasonably understandable and designed to call attention to the nature and significance of the information presented in the notice. *See supra* Section II.C.1. *See also* § 162.2(b) (CFTC) and proposed § 248.202(b)(2) (SEC).

because, upon review, the Commissions believe the requirement is comprehensive, relevant to any entities regulated by the Commissions under these proposed rules, and designed to enhance consistency and comparability of regulations and Programs.

- The Commissions request comment on the proposed requirements regarding the form of notice that must be sent to card holders.

D. Proposed Effective and Compliance Dates

The Commissions propose to make the rules and guidelines effective 30 days after the date of publication of final rules in the *Federal Register*. Financial institutions and creditors subject to the Commissions' enforcement authority should already be in compliance with the red flags rules of the FTC or the other Agencies. Newly formed entities under the Commissions' enforcement authority likely comply with the existing rules of the FTC or the other Agencies. The rules and guidelines that the Commissions are proposing today are substantially similar to the existing rules of the Agencies and should not require significant changes to financial institution or creditor policies or operations. As a result, the Commissions do not expect that entities subject to their enforcement authority should have difficulty in complying with the proposed rules and guidelines immediately, and are not proposing a delayed compliance date.

- The Commissions request comment on the proposed effective and compliance dates for the proposed rules and guidelines. Should there be a delayed effective or compliance date? If so, what should the delay be (*e.g.*, 30, 60, or 90 days, or longer)?

III. RELATED MATTERS

A. Cost-Benefit Considerations (CFTC) and Economic Analysis (SEC)

CFTC:

Section 15(a) of the CEA[125] requires the CFTC to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public 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 proposed rules and guidelines are broken down into two categories of requirements. First, the proposed identity theft red flag rules and guidelines found in proposed § 162.30, and second, the proposed card issuer rules found in proposed § 162.32. A Section 15(a) analysis of each category is set out immediately below.

1. *Cost Benefit Considerations of Proposed Identity Theft Red Flag Rules and Guidelines.*

As noted above, the proposed identity theft red flags rules and guidelines would require financial institutions and creditors that are subject to CFTC's enforcement authority under the FCRA[126] and that offer or maintain covered accounts to develop, implement, and administer a written Program. Each Program must be designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. In addition, each Program must be appropriately tailored to the size and complexity of the financial

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125 7 U.S.C. 19(a)

126 As stated above, section 1088(a)(10) of the Dodd-Frank Act amended section 621(b) of the FCRA to add the Commissions to the list of federal agencies responsible for administrative enforcement of the FCRA. *See* Pub. L. 111-203 (2010).

institution or creditor and the nature and scope of its activities. There are various steps that a financial institution or creditor must take in order to comply with the requirements under the proposed identity theft red flags rules, including training staff, providing annual reports to board of directors, and when applicable, monitoring the use of third-party service providers.

As discussed above, the Dodd-Frank Act shifted enforcement authority over CFTC-regulated entities that are subject to section 615(e) of the FCRA from the FTC to the CFTC. Section 615(e) of the FCRA, as amended by the Dodd-Frank Act, requires that the CFTC, jointly with the Agencies and the SEC, adopt identity theft red flags rules and guidelines. To carry out this requirement, the CFTC is proposing § 162.30, which is substantially similar to the identity theft red flags rules and guidelines adopted by the Agencies in 2007.

Proposed § 162.30 would shift oversight of identity theft rules and guidelines of CFTC-regulated entities from the FTC to the CFTC. These entities should already be in compliance with the FTC's existing rules and guidelines, which the FTC began enforcing on December 31, 2010. Because proposed § 162.30 is substantially similar to those existing rules and guidelines, these entities should not bear any new costs in coming into compliance with proposed § 162.30. The new regulation does not contain new requirements, nor does it expand the scope of the rules to include new entities that were not already previously covered by the Agencies' rules. The new regulation does contain examples and minor language changes designed to help guide entities under the CFTC's jurisdiction in complying with the rules.

In the analysis for the Paperwork Reduction Act of 1995 ("PRA") below, the staff identified certain initial and ongoing hour burdens and associated time costs related to compliance with proposed § 162.30. However, these costs are not new costs, but are current costs associated with compliance with the Agencies' existing rules. CFTC-regulated entities will incur these hours and costs regardless of whether the CFTC adopts proposed § 162.30. These hours and costs would be transferred from the Agencies' PRA allotment to the CFTC. No new costs should result from the adoption of proposed § 160.30.

These existing costs related to proposed § 162.30 would include, for newly formed CFTC-regulated entities, the one-time cost for financial institutions and creditors to conduct initial assessments of covered accounts, create a Program, obtain board approval of the Program, and train staff.[127] The existing costs would also include the ongoing cost to periodically review and update the program, report periodically on the Program, and conduct periodic assessments of covered accounts.[128]

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127 CFTC staff estimates that the one-time burden of compliance would include 2 hours to conduct initial assessments of covered accounts, 25 hours to develop and obtain board approval of a Program, and 4 hours to train staff. CFTC staff estimates that, of the 31 hours incurred, 12 hours would be spent by internal counsel at an hourly rate of $354, 17 hours would be spent by administrative assistants at an hourly rate of $66, and 2 hours would be spent by the board of directors as a whole, at an hourly rate of $4000, for a total cost of $13,370 per entity for entities that need to come into compliance with proposed subpart C to Part 162. This estimate is based on the following calculations: $354 x 12 hours = $4,248; $66 x 17 = $1,122; $4,000 x 2 = $8,000; $4,248 + $1,122 + $8,000 = $13,370.

As discussed in the PRA analysis, CFTC staff estimates that there are 702 CFTC-regulated entities that newly form each year and that would fall within the definitions of financial institution or creditor. Of these 702 entities, 54 entities would maintain covered accounts. *See infra* note 153 and text following note 153. CFTC staff estimates that 2 hours of internal counsel's time would be spent conducting an initial assessment to determine whether they have covered accounts and whether they are subject to the proposed rule (or 702 entities). The cost associated with this determination is $497,016 based on the following calculation: $354 x 2 = $708; $708 x 702 = $497,016. CFTC staff estimates that 54 entities would bear the remaining specified costs for a total cost of $683,748 (54 x $12,662 = $683,748). *See* SIFMA "Office Salaries in the Securities Industry 2011.

Staff also estimates that in response to Dodd-Frank, there will be approximately 125 newly registered SDs and MSPs. Staff believes that each of these SDs and MSPs will be a financial institution or creditor with covered accounts. The additional cost of these SDs and MSPs is $1,596,250 (125 x $12,770 = $1,596,250).

128 CFTC staff estimates that the ongoing burden of compliance would include 2 hours to conduct periodic assessments of covered accounts, 2 hours to periodically review and update the Program, and 4 hours to prepare and present an annual report to the board, for a total of 8 hours. CFTC staff estimates that, of the 8 hours incurred, 7 hours would be spent by internal counsel at an

The benefits related to adoption of proposed § 160.30, which already exist in connection with the Agencies' red flags rules and guidelines, would include a reduction in the risk of identity theft for investors (consumers) and cardholders, and a reduction in the risk of losses due to fraud for financial institutions and creditors. It is not practicable for the CFTC to determine with precision the dollar value associated with the benefits that will inure to the public from this proposed rules and guidelines, as the quantity or value of identity theft deterred or prevented is not knowable. The Commission, however, recognizes that the cost of any given instance of identity theft may be substantial to the individual involved. Joint adoption of identity theft red flags rules in a form that is substantially similar to the Agencies' identity theft red flags rules and guidelines might also benefit financial institutions and creditors because entities regulated by multiple federal agencies could comply with a single set of standards, which would reduce potential compliance costs. As is true of the Agencies' rules and guidelines, the CFTC has designed proposed § 162.30 to provide financial institutions and creditors significant flexibility in developing and maintaining a Program that is tailored to the size and complexity of their business and the nature of their operations, as well as in satisfying the address verification procedures.

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hourly rate of $354 and 1 hour would be spent by the board of directors as a whole, at an hourly rate of $4,000, for a total hourly cost of $6,500. This estimate is based on the following calculations rounded to two significant digits : $354 x 7 hours = $2,478; $4,000 x 1 hour = $4,000; $2,478 + $4,000 = $6,478 ≈ $6,500.

As discussed in the PRA analysis, CFTC staff estimates that 3,124 existing CFTC-regulated entities would be financial institutions or creditors, of which 268 maintain covered accounts. CFTC staff estimates that 2 hours of internal counsel's time would be spent conducting periodic assessments of covered accounts and that all financial institutions or creditors subject to the proposed rule (or 3,124 entities) would bear this cost for a total cost of $2,200,000 based on the following calculations rounded to two significant digits: $354 x 2 = $708; $708 x 3,124 = $2,211,792 ≈ $2,200,000. CFTC staff estimates that 268 entities would bear the remaining specified ongoing costs for a total cost of $1,500,000 (268 x $5,770 = $1,546,360 ≈ $1,500,000).

Accordingly, as previously discussed, proposed § 162.30 should not result in any significant new costs or benefits, because it generally reflects a statutory transfer of enforcement authority from the FTC to the CFTC, does not include any significant new requirements, and does not include new entities that were not previously covered by the Agencies' rules.

Section 15(a) Analysis. As stated above, the CFTC is required to consider costs and benefits of proposed CFTC action in light of (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. These rules protect market participants and the public by preventing identity theft, an illegal act that may be costly to them in both time and money.[129] Because, however, these proposed rules and guidelines create no new requirements—rather, as explained above, the CFTC is adopting rules that reflect requirements already in place—their cost and benefits have no incremental impact on the five section 15(a) factors. Customers of CFTC-registrants will continue to benefit from these proposed rules and guidelines in the same way they have benefited from the rules as they were administered by the Agencies.

2. *Cost Benefit Considerations of Card Issuer Rules*

With respect to specific types of identity theft, section 615(e) of the FCRA identified the scenario involving debit and credit card issuers as being a possible indicator of identity theft. Accordingly, the proposed card issuer rules in this release set out the duties of card issuers

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129 According to the Javelin 2011 Identity Fraud Survey Report, consumer costs (the average out-of-pocket dollar amount victims pay) increased in 2010. *See Javelin 2011 Identity Fraud Survey Report* (2011). The report attributed this increase to new account fraud, which showed longer periods of misuse and detection and therefore more dollar losses associated with it than any other type of fraud. Notwithstanding the increase in cost, the report stated that the number of identity theft victims has decreased in recent years. *Id.*

regarding changes of address. The proposed card issuer rules will apply only to a person that issues a debit or credit card and that is subject to the CFTC's jurisdiction. The proposed card issuer rules require a card issuer to comply with certain address validation procedures in the event that such issuer receives a notification of a change of address for an existing account from a cardholder, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account. The card issuer may not issue the additional or replacement card unless it complies with those procedures. The procedures include: (1) notifying the cardholder of the request in writing or electronically either at the cardholder's former address, or by any other means of communication that the card issuer and the cardholder have previously agreed to use; or (2) assessing the validity of the change of address in accordance with established policies and procedures.

Proposed § 162.32 would shift oversight of card issuer rules of CFTC-regulated entities from the FTC to the CFTC. These entities should already be in compliance with the FTC's existing card issuer rules, which the FTC began enforcing on December 31, 2010. Because proposed § 162.32 is substantially similar to those existing card issuer rules, these entities should not bear any new costs in coming into compliance. The new regulation does not contain new requirements, nor does it expand the scope of the rules to include new entities that were not already previously covered by the Agencies' card issuer rules.

The existing costs related to proposed § 162.32 would include the cost for card issuers to establish policies and procedures that assess the validity of a change of address notification submitted shortly before a request for an additional card and, before issuing an additional or replacement card, either notify the cardholder at the previous address or through another previously agreed-upon form of communication, or alternatively assess the validity of the address change through existing policies and procedures. As discussed in the PRA analysis, CFTC staff does not expect that any CFTC-regulated entities would be subject to the requirements of proposed § 162.32.

The benefits related to adoption of proposed § 162.32, which already exist in connection with the Agencies' card issuer rules, would include a reduction in the risk of identity theft for cardholders, and a reduction in the risk of losses due to fraud for card issuers. However, it is not practicable for the CFTC to determine with precision the dollar value associated with the benefits that will inure to the public from these proposed card issuer rules. As is true of the Agencies' card issuer rules, the CFTC has designed proposed § 162.32 to provide card issuers significant flexibility in developing and maintaining a Program that is tailored to the size and complexity of their business and the nature of their operations.

Accordingly, as previously discussed, the proposed card issuer rules should not result in any significant new costs or benefits, because they generally reflect a statutory transfer of enforcement authority from the FTC to the CFTC, do not include any significant new requirements, and do not include new entities that were not previously covered by the Agencies' rules.

Section 15(a) Analysis. As stated above, the CFTC is required to consider costs and benefits of proposed CFTC action in light of (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. These proposed rules and guidelines protect market participants and the public by preventing identity theft, an illegal act that may be costly to them in both time and money.[130] Because, however, these rules create no new requirements—rather, as explained above, the CFTC is adopting rules that reflect requirements already in place—their cost and benefits have no incremental impact on the five section 15(a) factors. Customers of CFTC-registrants will continue to benefit from these proposed rules and guidelines in the same way they have benefited from the rules as they were administered by the Agencies.

3. Questions

- The CFTC requests comment on all aspects of this cost-benefit analysis, including identification, quantification, and assessment of any costs and benefits, whether or not discussed in the above analysis. The CFTC encourages commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs and benefits.
- The CFTC requests comment on the accuracy of the cost estimates in each section of this analysis, and requests that commenters provide data that may be relevant to these cost estimates, including quantification.

In addition, the CFTC seeks estimates and views regarding these costs and benefits for all affected entities, including small entities, as well as any other costs or benefits that may result from the adoption of proposed subpart C to Part 162.

SEC:

The SEC is sensitive to the costs and benefits imposed by its rules. Proposed Regulation S-ID would require financial institutions and creditors that are subject to the SEC's enforcement

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130 *See id.*

authority under the FCRA[131] and that offer or maintain covered accounts to develop, implement, and administer a written identity theft prevention Program. A financial institution or creditor would have to design its Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. In addition, a financial institution or creditor would have to appropriately tailor its Program to its size and complexity, and to the nature and scope of its activities. There are various steps that a financial institution or creditor would have to take in order to comply with the requirements under the proposed identity theft red flags rules, including training staff, providing annual reports to board of directors, and, when applicable, monitoring the use of third-party service providers.

Section 615(e)(1)(C) of the FCRA singles out change of address notifications sent to credit and debit card issuers as a possible indicator of identity theft, and requires the SEC to prescribe regulations concerning such notifications. Accordingly, the proposed card issuer rules in this release set out the duties of card issuers regarding changes of address. The proposed card issuer rules would apply only to SEC-regulated entities that issue credit or debit cards.[132] The proposed card issuer rules would require a card issuer to comply with certain address validation procedures in the event that such issuer receives a notification of a change of address for an existing account from a cardholder, and within a short period of time (during at least the first 30 days after it receives such notification) receives a request for an additional or replacement card for the same account. The card issuer may not issue the additional or replacement card unless it complies with those procedures. The procedures include: (1) notifying the cardholder of the request either at the cardholder's former address, or by any other means of communication that

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131 *See supra* note 19.

132 *See* proposed § 248.202(a) (defining scope of proposed rule).

the card issuer and the cardholder have previously agreed to use; or (2) assessing the validity of the change of address in accordance with established policies and procedures.

As discussed above, the Dodd-Frank Act shifted enforcement authority over SEC-regulated entities that are subject to section 615(e) of the FCRA from the FTC to the SEC. Section 615(e) of the FCRA, as amended by the Dodd-Frank Act, requires that the SEC, jointly with the Agencies and the CFTC, adopt identity theft red flags rules and guidelines. To carry out this requirement, the SEC is proposing Regulation S-ID, which is substantially similar to the identity theft red flags rules and guidelines adopted by the Agencies in 2007.

Proposed Regulation S-ID would shift oversight of identity theft rules and guidelines of SEC-regulated entities from the FTC to the SEC. These entities should already be in compliance with the FTC's existing rules and guidelines, which the FTC began enforcing on December 31, 2010. Because proposed Regulation S-ID is substantially similar to those existing rules and guidelines, these entities should not bear any new costs in coming into compliance with proposed Regulation S-ID. The new regulation does not contain new requirements, nor does it expand the scope of the rules to include new entities that were not already previously covered by the Agencies' rules. The new regulation does contain examples and minor language changes designed to help guide entities under the SEC's jurisdiction in complying with the rules.

In the analysis for the Paperwork Reduction Act of 1995 ("PRA") below, the staff identified certain initial and ongoing hour burdens and associated time costs related to compliance with proposed Regulation S-ID.[133] However, these costs are not new costs, but are

133 Unless otherwise stated, all cost estimates for personnel time are derived from SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

current costs associated with compliance with the Agencies' existing rules. SEC-regulated entities will incur these hours and costs regardless of whether the SEC adopts proposed Regulation S-ID. These hours and costs would be transferred from the Agencies' PRA allotment to the SEC. No new costs should result from the adoption of proposed Regulation S-ID.

These existing costs related to § 248.201 of proposed Regulation S-ID would include, for newly formed SEC-regulated entities, the incremental one-time cost for financial institutions and creditors to conduct initial assessments of covered accounts, create a Program, obtain board approval of the Program, and train staff.[134] The existing costs would also include the incremental ongoing cost to periodically review and update the program, report periodically on the Program, and conduct periodic assessments of covered accounts.[135] The existing costs

134 SEC staff estimates that the incremental one-time burden of compliance would include 2 hours to conduct initial assessments of covered accounts, 25 hours to develop and obtain board approval of a Program, and 4 hours to train staff. SEC staff estimates that, of the 31 hours incurred, 12 hours would be spent by internal counsel at an hourly rate of $354, 17 hours would be spent by administrative assistants at an hourly rate of $66, and 2 hours would be spent by the board of directors as a whole, at an hourly rate of $4000, for a total cost of $13,370 per entity for entities that need to come into compliance with proposed Regulation S-ID. This estimate is based on the following calculations: $354 x 12 hours = $4248; $66 x 17 = $1,122; $4000 x 2 = $8000; $4248 + $1,122 + $8000 = $13,370.

As discussed in the PRA analysis, SEC staff estimates that there are 1327 SEC-regulated entities that newly form each year and would be financial institutions or creditors, of which 465 would maintain covered accounts. *See infra* note 153 and following text. SEC staff estimates that 2 hours of internal counsel's time would be spent conducting an initial assessment of covered accounts and that all newly formed financial institutions or creditors subject to the proposed rule (or 1327 entities) would bear this cost for a total cost of $939,516 based on the following calculation: $354 x 2 = $708; $708 x 1327 = $939,516. SEC staff estimates that 465 entities would bear the remaining specified costs for a total cost of $5,887,830 (465 x $12,662 = $5,887,830).

135 SEC staff estimates that the incremental ongoing burden of compliance would include 2 hours to conduct periodic assessments of covered accounts, 2 hours to periodically review and update the Program, and 4 hours to prepare and present an annual report to the board, for a total of 8 hours. SEC staff estimates that, of the 8 hours incurred, 7 hours would be spent by internal counsel at an hourly rate of $354 and 1 hour would be spent by the board of directors as a whole, at an hourly rate of $4000, for a total hourly cost of $6478. This estimate is based on the following calculations: $354 x 7 hours = $2478; $4000 x 1 hour = $4000; $2478 + $4000 = $6478.

related to § 248.202 of proposed Regulation S-ID would include the incremental cost for card issuers to establish policies and procedures that assess the validity of a change of address notification submitted shortly before a request for an additional card and, before issuing an additional or replacement card, either notify the cardholder at the previous address or through another previously agreed-upon form of communication, or alternatively assess the validity of the address change through existing policies and procedures. As discussed in the PRA analysis, SEC staff does not expect that any SEC-regulated entities would be subject to the requirements of § 248.202 of proposed Regulation S-ID.

The benefits related to adoption of Regulation S-ID, which already exist in connection with the Agencies' red flags rules and guidelines, would include a reduction in the risk of identity theft for investors (consumers) and cardholders, and a reduction in the risk of losses due to fraud for financial institutions and creditors. Joint adoption by the Commissions of identity theft red flags rules in a form that is substantially similar to the Agencies' identity theft red flags rules and guidelines might also benefit financial institutions and creditors because entities regulated by multiple federal agencies could comply with a single set of standards, which would reduce potential compliance costs. As is true of the Agencies' rules and guidelines, the SEC has designed proposed Regulation S-ID to provide financial institutions, creditors, and card issuers significant flexibility in developing and maintaining a Program that is tailored to the size and complexity of their business and the nature of their operations, as well as in satisfying the

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As discussed in the PRA analysis, SEC staff estimates that 7978 existing SEC-regulated entities would be financial institutions or creditors under the proposal and 7180 of these entities maintain covered accounts. *See infra* note 156 and following text. SEC staff estimates that 2 hours of internal counsel's time would be spent conducting periodic assessments of covered accounts and that all financial institutions or creditors subject to the proposed rule (or 7978 entities) would bear this cost for a total cost of $5,648,424 based on the following calculations: $354 x 2 = $708; $708 x 7978 = $5,648,424. SEC staff estimates that 7180 entities would bear the remaining specified ongoing costs for a total cost of $41,428,600 (7180 x $5770 = $41,428,600).

address verification procedures.

Accordingly, as previously discussed, proposed Regulation S-ID should not result in any significant new costs or benefits, because it generally reflects a statutory transfer of enforcement authority from the FTC to the SEC, does not include any significant new requirements, and does not include new entities that were not previously covered by the Agencies' rules.

- The SEC requests comment on all aspects of this cost-benefit analysis, including identification and assessment of any costs and benefits not discussed in this analysis. The SEC encourages commenters to identify, discuss, analyze, and supply relevant data regarding any additional costs and benefits.
- The SEC requests comment on the accuracy of the cost estimates in each section of 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 all affected entities, including small entities, as well as any other costs or benefits that may result from the adoption of proposed Regulation S-ID.

B. Analysis of Effects on Efficiency, Competition, and Capital Formation

Section 3(f) of the Securities Exchange Act and section 2(c) of the Investment Company Act require the SEC, whenever it engages in rulemaking and must consider or determine if 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 SEC, when proposing rules under the Exchange Act, to consider the impact the proposed rules may have upon competition. Section 23(a)(2) of the Exchange Act prohibits the SEC from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.[136]

As discussed in the cost benefit analysis above, proposed Regulation S-ID would carry out the requirement in the Dodd-Frank Act that the SEC adopt rules and guidelines governing identity theft protections, pursuant to section 615(e) of the FCRA with regard to entities that are subject to the SEC's jurisdiction. This requirement was designed to transfer regulatory oversight of identity theft rules and guidelines of SEC-regulated entities from the FTC to the SEC. Proposed Regulation S-ID is substantially similar to the identity theft red flags rules and guidelines adopted by the FTC and other regulatory agencies in 2007, and does not contain new requirements. The entities covered by proposed Regulation S-ID should already be in compliance with existing rules and guidelines, which the FTC began to enforce on December 31, 2010.

For the reasons discussed above, proposed Regulation S-ID should not have an effect on efficiency, competition, or capital formation because it does not include new requirements and does not include new entities that were not previously covered by the Agencies' rules.

- The SEC seeks comment on the potential impact of the proposed rules on efficiency, competition, and capital formation. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the SEC also requests information regarding the potential effect of the proposed rules on the U.S. economy on an annual basis. Commenters are requested to provide empirical data to support their views.

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136 *See infra* Section IV (setting forth statutory authority under, among other things, the Exchange Act and Investment Company Act for proposed rules).

C. Paperwork Reduction Act

CFTC:

Provisions of proposed §§ 162.30 and 162.32 would result in new collection of information requirements within the meaning of the PRA. The CFTC, therefore, is submitting this proposal to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB has not yet assigned a control number to the new collection. The title for this collection of information is "Part 162 Subpart C—Identity Theft." If adopted, responses to this new collection of information would be mandatory.

1. *Information Provided by Reporting Entities/Persons*

Under proposed part 162, subpart C, CFTC regulated entities – which presently would include approximately 268 CFTC registrants[137] plus 125 new CFTC registrants pursuant to Title VII of the Dodd-Frank Act[138] – may be required to design, develop and implement reasonable policies and procedures to identify relevant red flags, and potentially notifying cardholders of

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137 *See* the NFA's Internet web site at: *http://www.nfa.futures.org/NFA-registration/NFA-membership-and-dues.HTML* for the most up-to-date number of CFTC regulated entities. For the purposes of the PRA calculation, CFTC staff used the number of registered FCMs, CTAs, CPOs IBs and RFEDs on the NFA's Internet web site as of October 31, 2011. The NFA's site states that there are 3,663 CFTC registrants as of September 30, 2011. Of this total, there are 111 FCMs, 1,441 IBs, 1,054 CTAs, 1,035 CPOs, and 14 RFEDs. CFTC staff has observed that approximately 50 percent of all CPOs are dually registered as CTAs. Based on this observation, CFTC has determined that the total number of entities is 3,124 (518 CPOs that are also registered as CTAs). With respect to RFEDs, CFTC staff also has observed that all entities registering as RFEDs also register as FCMs.

Of the total 3,124 entities, all of the FCMs are likely to qualify as financial institutions or creditors carrying covered accounts, 10 percent of CTAs and CPOs are likely to qualify as financial institutions or creditors carrying covered accounts and none of the IBs are likely to qualify as a financial institution or creditor carrying covered accounts, for a total of 268 financial institutions or creditors that would bear the initial one-time burden of compliance with the CFTC's proposed identity theft rules and guidelines and proposed card issuer rules.

138 CFTC staff estimates that 125 swap dealers and major swap participants will register with the CFTC following the issuance of final rules under the Dodd-Frank Act further defining the terms "swap dealers" and "major swap participants" and setting forth a registration regime for these entities. The CFTC estimates the number of MSPs to be quite small, at six or fewer.

identity theft risks. In addition, CFTC-regulated entities would be required to: (i) collect information and keep records for the purpose of ensuring that their Programs met requirements to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account; (ii) develop and implement reasonable policies and procedures to identify, detect and respond to relevant red flags, as well as periodic reports related to the Program; and (iii) from time to time, notify cardholders of possible identity theft with respect to their accounts, as well as assess the validity of those accounts.

These burden estimates assume that CFTC-regulated entities already comply with the identity theft red flags rules and guidelines jointly adopted by the FTC with the Agencies, as of December 31, 2010. Consequently, these entities may already have in place many of the customary protections addressing identity theft and changes of address proposed by these regulations.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a federal agency. Because compliance with rules and guidelines jointly adopted by the FTC with the Agencies may have occurred, the CFTC estimates the time and cost burdens of complying with proposed part 162 to be both one-time and ongoing burdens. However, any initial or one-time burdens associated with compliance with proposed part 162 would apply only to newly formed entities, and the ongoing burden to all CFTC-regulated entities.

i. Initial Burden

The CFTC estimates that the one-time burden of compliance with proposed part 162 for its regulated entities with covered accounts would be: (i) 25 hours to develop and obtain board approval of a Program, (ii) 4 hours for staff training, and (iii) 2 hours to conduct an initial assessment of covered accounts, totaling 31 hours. Of the 31 hours, the CFTC estimates that 15 hours would involve internal counsel, 14 hours expended by administrative assistants, and 2 hours by the board of directors in total, for those newly-regulated entities.

The CFTC estimates that approximately 702 FCMs, CTAs and CPOs [139] would need to conduct an initial assessment of covered accounts. As noted above, the CFTC estimates that approximately 125 newly registered SDs and MSPs would need to conduct an initial assessment of covered accounts. The total number of newly registered CFTC registrants would be 827 entities. Each of these 827 entities would need to conduct an initial assessment of covered accounts, for a total of 1,654 hours.[140] Of these 827 entities, CFTC staff estimates that approximately 179 of these entities may maintain covered accounts. Accordingly, the CFTC estimates the one-time burden for these 179 entities to be 5,549 hours,[141] for a total burden among newly registered entities of 7,203 hours.[142]

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139 Based on a review of new registrations typically filed with the CFTC each year, CFTC staff estimates that approximately, 7 FCMs, 225 IBs, 400 CTAs, and 140 CPOs are newly formed each year, for a total of 772 entities. CFTC staff also has observed that approximately 50 percent of all CPOs are duly registered as CTAs. Based on this observation, CFTC has determined that the total number of newly formed financial institutions and creditors is 702 (772 – 70 CPOs that are also registered as CTAs). With respect to RFEDs, CFTC staff has observed that all entities registering as RFEDs also register as FCMs. Each of these 702 financial institutions or creditors would bear the initial one-time burden of compliance with the proposed identity theft rules and guidelines and proposed card issuer rules.

Of the total 702 newly formed entities, staff estimates that all of the FCMs are likely to carry covered accounts, 10 percent of CTAs and CPOs are likely to carry covered accounts, and none of the IBs are likely to carry covered accounts, for a total of 54 newly formed financial institutions or creditors carrying covered accounts that would be required to conduct an initial one-time burden of compliance with subpart C or Part 162.

140 This estimate is based on the following calculation: 827 entities x 2 hours = 1,654 hours.

141 This estimate is based on the following calculation: 179 entities x 31 hours = 5,549 hours.

142 This estimate is based on the following calculation: 1,654 hours for all newly registered CFTC registrants + 7,203 hours for the one-time burden of newly registered entities with covered accounts.

The CFTC requests comments on these estimates of numbers of persons affected and the total hours involved.

ii. Ongoing Burden

The CFTC staff estimates that the ongoing compliance burden associated with proposed part 162 would include: (i) 2 hours to periodically review and update the Program, review and preserve contracts with service providers, and review and preserve any documentation received from such providers (ii) 4 hours to prepare and present an annual report to the board, and (iii) 2 hours to conduct periodic assessments to determine if the entity offers or maintains covered accounts, for a total of 8 hours. The CFTC staff estimates that of the 8 hours expended, 7 hours would be spent by internal counsel and 1 hour would be spent by the board of directors as a whole.

The CFTC estimates that approximately 3,249 persons may maintain covered accounts, and that they would be required to periodically review their accounts to determine if they comply with these proposed rules, for a total of 76,498 hours for these entities.[143] Of these 3,249 persons, the CFTC estimates that approximately 393 maintain covered accounts, and thus would need to incur the additional burdens related to complying with the rule, for a total of 2,358.[144] The total ongoing burden for all CFTC registrants is 11,256.[145]

2. *Information Collection Comments*

The CFTC invites the public and other federal agencies to comment on any aspect of the burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the CFTC solicits comments in

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143 This estimate is based on the following calculation: 3,249 entities x 2 hours = 6,498hours.

144 This estimate is based on the following calculation: 393 entities x 6 hours = 2,358 hours.

145 This estimate is based on the following calculation: 6,498hours + 2,358 hours = 8,856 hours.

order to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the CFTC, including whether the information will have practical utility; (ii) evaluate the accuracy of the CFTC'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) 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.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at *OIRAsubmissions@omb.eop.gov.* Please provide the CFTC with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the Addresses section of this notice of proposed rules and guidelines for comment submission instructions to the CFTC. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *RegInfo.gov*. 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 most assured of being fully effective if received by OMB (and the CFTC) within 30 days after publication of this notice of proposed rulemaking.

SEC:

Provisions of proposed §§ 248.201 and 248.202 would result in new collection of information requirements within the meaning of the PRA. The SEC therefore is submitting this proposal to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. OMB has not yet assigned a control number to the new collection. The title for this collection of information is "Part 248, Subpart C – Regulation S-

ID." 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. If the rules are adopted, responses to the new collection of information provisions would be mandatory, and the information, when provided to the Commission in connection with staff examinations or investigations, would be kept confidential to the extent permitted by law.

1. *Description of the Collections*

Under proposed Regulation S-ID, SEC-regulated entities would be required to develop and implement reasonable policies and procedures to identify, detect and respond to relevant red flags and, in the case of entities that issue credit or debit cards, to assess the validity of, and communicate with cardholders regarding, address changes. Proposed § 248.201 of Regulation S-ID would include the following "collections of information" by SEC-regulated entities that are financial institutions or creditors if the entity maintains covered accounts: (1) creation and periodic updating of a Program that is approved by the board of directors; (2) periodic staff reporting on compliance with the identify theft red flags rules and guidelines, as required to be considered by section VI of the proposed guidelines; and (3) training of staff to implement the Program. Proposed § 248.202 of Regulation S-ID would include the following "collections of information" by any SEC-regulated entities that are credit or debit card issuers: (1) establishment of policies and procedures that assess the validity of a change of address notification if a request for an additional card on the account follows soon after the address change, (2) notification of a cardholder, before issuance of an additional or replacement card, at the previous address or through some other previously agreed-upon form of communication, or alternatively, assessment of the validity of the address change request through the entity's established policies and procedures.

SEC staff expects that SEC-regulated entities that would comply with the collections of information required by proposed Regulation S-ID should already be fully in compliance with the identity theft red flags rules and guidelines that the FTC jointly adopted with the Agencies and began enforcing on December 31, 2010. The requirements of those rules and guidelines are substantially similar and comparable to the requirements of proposed Regulation S-ID.[146]

In addition, SEC staff understands that most SEC-regulated entities that are financial institutions or creditors would likely already have in place many of the protections regarding identity theft and changes of address that the proposed regulations would require because they are usual and customary business practices that they engage in to minimize losses from fraud. Furthermore, SEC staff believes that many of them are likely to have already effectively implemented most of the proposed requirements as a result of having to comply (or an affiliate having to comply) with other, existing regulations and guidance, such as the Customer Identification Program regulations implementing section 326 of the USA PATRIOT Act,[147] the Federal Information Processing Standards that implement section 501(b) of the Gramm-Leach-Bliley Act (GLBA),[148] section 216 of the FACT Act,[149] and guidance issued by the Agencies or the Federal Financial Institutions Examination Council regarding information security, authentication, identity theft, and response programs.[150]

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146 *See* 2007 Adopting Release, *supra* note 10; "FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule" at *http://www.ftc.gov/opa/2010/05/redflags.shtm*.

147 31 U.S.C. 5318(l) (requiring verification of the identity of persons opening new accounts).

148 15 U.S.C. 6801.

149 15 U.S.C. 1681w.

150 *See* 2007 Adopting Release, *supra* note 10, at nn. 55-57 (describing applicable regulations and guidance).

As a result, SEC staff estimates of time and cost burdens here represent the incremental one-time burden of complying with proposed Regulation S-ID for newly formed SEC-regulated entities, and the incremental ongoing costs of compliance for all SEC-regulated entities.[151] SEC staff estimates also attribute all burdens to covered entities, which are entities directly subject to the requirements of the proposed rulemaking. A covered entity that outsources activities to an affiliate or a third-party service provider is, in effect, reallocating to that affiliate or service provider the burden that it would otherwise have carried itself. Under these circumstances, the burden is, by contract, shifted from the covered entity to the service provider, but the total amount of burden is not increased. Thus, affiliate and third-party service provider burdens are already included in the burden estimates provided for covered entities. The time and cost estimates made here are based on conversations with industry representatives and on a review of the estimates made in the regulatory analyses of the identity theft red flags rules and guidelines previously issued by the Agencies.

2. *Proposed § 248.201 (duties regarding the detection, prevention, and mitigation of identity theft)*

The collections of information required by proposed § 248.201 would apply to SEC-regulated entities that are financial institutions or creditors.[152] As stated above, SEC staff expects that all existing SEC-regulated entities would already have incurred one-time burdens

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151 Based on discussions with industry representatives and a review of applicable law, SEC staff expects that, of the SEC-regulated entities that fall within the scope of proposed Regulation S-ID, most broker-dealers, many investment companies (including almost all open-end investment companies and employees' securities companies ("ESCs")), and some registered investment advisers would likely qualify as financial institutions or creditors. SEC staff expects that most other SEC-regulated entities described in the scope section of proposed Regulation S-ID, such as transfer agents, NRSROs, SROs, and clearing agencies are unlikely to be financial institutions or creditors as defined in the proposed rule, and therefore we do not include these entities in our estimates.

152 Proposed § 248.201(a).

associated with compliance with proposed Regulation S-ID because they should already be in compliance with the substantially identical requirements of the Agencies' red flags rules and guidelines. Therefore, any initial or one-time burdens associated with compliance with § 248.201 of proposed Regulation S-ID would apply only to newly formed entities. The ongoing burden would apply to all SEC-regulated entities that are financial institutions or creditors.

i. *Initial Burden*

SEC staff estimates that the incremental one-time burden of compliance with proposed § 248.201 for SEC-regulated financial institutions and creditors with covered accounts would be: (i) 25 hours to develop and obtain board approval of a Program, (ii) 4 hours to train staff, and (iii) 2 hours to conduct an initial assessment of covered accounts, for a total of 31 hours. SEC staff estimates that, of the 31 hours incurred, 12 hours would be spent by internal counsel, 17 hours would be spent by administrative assistants, and 2 hours would be spent by the board of directors as a whole for entities that need to come into compliance with proposed Regulation S-ID.

SEC staff estimates that approximately 517 SEC-regulated financial institutions and creditors are newly formed each year.[153] Each of these 517 entities would need to conduct an

153 Based on a review of new registrations typically filed with the SEC each year, SEC staff estimates that approximately 900 investment advisers, 300 broker dealers, 117 open-end investment companies and 10 employees' securities companies typically apply for registration with the SEC or otherwise are newly formed each year, for a total of 1327 entities that would be financial institutions or creditors. The staff estimate of 900 investment advisers is made in light of the recently adopted amendments to rules under the Investment Advisers Act that carry out requirements of the Dodd-Frank Act to transfer oversight of certain investment advisers from the SEC to state regulators and to require certain investment advisers to private funds to register with the SEC. *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011) [76 FR 42950 (July 19, 2011)]. Of these, SEC staff estimates that all of the investment companies and broker-dealers are likely to qualify as financial institutions or creditors, and 10% (or 90) of investment advisers are likely to also qualify, for a total of 517 total newly formed financial institutions or creditors that would bear the initial one-time burden of compliance with proposed Regulation S-ID.

initial assessment of covered accounts, for a total of 1034 hours.[154] Of these, SEC staff estimates that approximately 90% (or 465) maintain covered accounts. Accordingly, SEC staff estimates that the total one-time burden for the 465 entities would be 14,415 hours, and the total one-time burden for all SEC regulated entities would be 15,449 hours.[155]

- The SEC requests comments on these estimates. Is the estimate that 90% of all financial institutions and creditors maintain covered accounts correct?

ii. *Ongoing Burden*

SEC staff estimates that the incremental ongoing burden of compliance with proposed § 248.201 would include: (i) 2 hours to periodically review and update the Program, review and preserve contracts with service providers, and review and preserve any documentation received from service providers, (ii) 4 hours to prepare and present an annual report to the board, and (iii) 2 hours to conduct periodic assessments to determine if the entity offers or maintains covered accounts, for a total of 8 hours. SEC staff estimates that of the 8 hours incurred, 7 hours would be spent by internal counsel and 1 hour would be spent by the board of directors as a whole.

SEC staff estimates that there are 7978 SEC regulated entities that are either financial institutions or creditors, and that all of these would be required to periodically review their accounts to determine if they offer or maintain covered accounts, for a total of 15,956 hours for these entities.[156] Of these 7978 entities, SEC staff estimates that approximately 90 percent, or

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154 This estimate is based on the following calculation: 517 entities x 2 hours = 1034 hours.

155 These estimates are based on the following calculations: 465 entities x 31 hours = 14,415 hours; 14,415 hours + 1034 hours = 15,449 hours.

156 Based on a review of entities that the SEC regulates, SEC staff estimates that, as of the end of December 2010, there are approximately 5063 broker-dealers, 1790 active open-end investment companies and 150 employees' securities companies. In light of recently adopted amendments to

7180, maintain covered accounts, and thus would need to bear the additional burdens related to complying with the rule.[157] Accordingly, SEC staff estimates that the total ongoing burden for the 7180 entities to be 43,080 hours, and the total ongoing burden for all SEC-regulated entities as a whole to be 59,036 hours.[158]

- SEC staff requests comments on these estimates.

3. *Proposed § 248.202 (duties of card issuers regarding changes of address).*

The collections of information required by proposed § 248.202 would apply only to SEC-regulated entities that issue credit or debit cards.[159] SEC staff understands that SEC-regulated entities generally do not issue credit or debit cards, but instead partner with other entities, such as banks, that issue cards on their behalf. These partner entities, which are not regulated by the SEC, are already subject to substantially similar change of address obligations pursuant to the Agencies' identity theft red flags rules and guidelines. In addition, SEC staff understands that card issuers already assess the validity of change of address requests and, for the most part, have automated the process of notifying the cardholder or using other means to assess the validity of

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rules under the Investment Advisers Act that carry out requirements of the Dodd-Frank Act to transfer oversight of certain investment advisers from the SEC to state regulators and to require certain investment advisers to private funds to register with the SEC, SEC staff estimates that, when these amendments become effective, there will be approximately 9750 investment advisers registered with the SEC. *See supra* note 153. Of these, SEC staff estimates that all of the broker-dealers, open-end investment companies and employees' securities companies are likely to qualify as financial institutions or creditors, and 10% (or 975) of investment advisers are likely to qualify, for a total of 7978 total financial institutions or creditors that would bear the ongoing burden of compliance with proposed Regulation S-ID. The SEC staff estimates that the other types of entities that are covered by the scope of the SEC's proposed rule would not be financial institutions or creditors that maintain covered accounts. *See* proposed § 248.201(a). This estimate is based on the following calculation: (7978 entities x 2 hours = 15,956 hours).

157 If a financial institution or creditor does not maintain covered accounts, there would be no ongoing annual burden for purposes of the PRA.

158 These estimates are based on the following calculations: (7180 entities x 6 hours = 43,080 hours; 43,080 hours + 15,956 hours = 59,036 hours).

159 Proposed § 248.202(a).

changes of address. Therefore, implementation of this requirement would pose no further burden.

SEC staff does not expect that any SEC-regulated entities would be subject to the information collection requirements of proposed § 248.202. Accordingly, SEC staff estimates that there will be no hourly or cost burden for SEC-regulated entities related to proposed § 248.202.[160]

- SEC staff requests comment on this estimate. Are there any SEC-regulated entities that issue credit or debit cards? If so, what incremental time or cost burden would be imposed by proposed § 248.202 of Regulation S-ID?

4. *Request for Comment*

The SEC requests comment on the accuracy of the estimates provided in this description of collections of information. Pursuant to 44 U.S.C. 3506(c)(2)(B), the SEC solicits comments in order to: (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the SEC, including whether the information will have practical utility; (ii) evaluate the accuracy of the SEC's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

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160 When the Agencies adopted their red flags rules, they estimated that it would require approximately 4 hours to develop policies and procedures to assess the validity of changes of address, and that there would be no burden associated with notifying cardholders because all entities already have such a process in place. *See* 2007 Adopting Release, *supra* note 10, at text following n.57. SEC staff estimates that if any SEC-regulated entities do issue cards, the burden for complying with proposed § 248.202 would be comparable to the Agencies' estimates.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments 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 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. S7-02-12. 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. Requests for materials submitted to OMB by the SEC with regard to these collections of information should be in writing, refer to File No. S7-02-12, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE, Washington, DC 20549-0213.

D. Regulatory Flexibility Act

CFTC:

The Regulatory Flexibility Act ("RFA")[161] requires that federal agencies consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[162] The regulations proposed by the CFTC shall affect FCMs, retail foreign exchange dealers, IBs, CTAs, CPOs, swap dealers, and major swap participants. The CFTC has determined that the requirements on financial institutions and creditors, and card issuers set forth

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161 *See* 5 U.S.C. 601 et seq.

162 *See* 5 U.S.C. 601 et seq.

in the proposed identity theft red flags rules and guidelines and the proposed card issuer rules, respectively, will not have a significant economic impact on a substantial number of small entities because many of these entities are already complying with the final rules and guidelines of the Agencies. Moreover, the CFTC believes that the proposed rules and guidelines include a great deal of flexibility to assist its regulated entities in complying with such rules and guidelines.

Notwithstanding this determination, the CFTC previously determined that FCMs and CPOs are not small entities for the purposes of the RFA.[163] Similarly, in another proposed rulemaking promulgated under the Dodd-Frank Act, the CFTC determined that swap dealers and major swap participants are not, in fact, "small entities" for the purposes of the RFA.[164]

Accordingly, the Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules and guidelines will not have a significant impact on a substantial number of small entities.

- The CFTC invites public comments on its certification.

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163 *See* the CFTC's previous determinations for FCMs and CPOs at 47 FR 18618, 18619 (Apr. 30, 1982).

164 *See* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519 (Dec. 28, 2010), in which the CFTC reasoned that swap dealers will be subject to minimum capital and margin requirements and are expected to comprise the largest global financial firms. As a result, swap dealers are not likely to be small entities for the purposes of the RFA. In addition, the CFTC reasoned that major swap participants, by statutory definition, maintain substantial positions in swaps or maintain outstanding swap positions that create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets. Based on this analysis, the CFTC concluded that major swap participants are not likely to be small entities for the purposes of the RFA.

SEC:

The SEC's Initial Regulatory Flexibility Analysis ("IRFA") has been prepared in accordance with 5 U.S.C. 603. It relates to the SEC's proposed identity theft red flags rules and guidelines in proposed Regulation S-ID under section 615(e)(1)(C) of the FCRA.[165]

1. *Reasons for, and Objectives of, the Proposed Actions*

The FACT Act, which amended FCRA, was enacted in part to help prevent the theft of consumer information. The statute contains several provisions relating to the detection, prevention, and mitigation of identity theft. Section 1088(a) of the Dodd-Frank Act amended section 615(e) of the FCRA by adding the SEC (and CFTC) to the list of federal agencies required to prescribe rules related to the detection, prevention, and mitigation of identity theft. The SEC is proposing rules to implement the statutory directives in section 615(e) of the FCRA, which require the SEC to prescribe identity theft regulations jointly with other agencies.

Section 615(e) requires the SEC to prescribe regulations that require financial institutions and creditors to establish policies and procedures to implement guidelines established by the SEC that address identity theft with respect to account holders and customers. Section 615(e) also requires the SEC to adopt regulations applicable to credit and debit card issuers to implement policies and procedures to assess the validity of change of address requests.

2. *Legal Basis*

The SEC is proposing Regulation S-ID under the authority set forth in 15 U.S.C. 78q, 78q-1, 78*o*-4, 78*o*-5, 78w,, 80a-30, 80a-37, 80b-4, 80b-11, 1681m(e), 1681s(b), 1681s-3 and note, 1681w(a)(1), 6801-6809, and 6825; Pub. L. 111-203, sec. 1088(a)(8), (a)(10), and sec. 1088(b).

[165] 15 U.S.C. 1681m(e).

3. *Small Entities Subject to the Rule*

For purposes of the RFA, 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. SEC staff estimates that approximately 122 investment companies of the 1790 total registered on Form N-1A meet this definition.[166]

Under SEC rules, for purposes of the Advisers Act and the RFA, 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.[167] Based on information in filings submitted to the SEC, 570 of the approximately 11,500 investment advisers registered with the SEC are small entities.[168]

For purposes of the RFA, a broker-dealer is a small business if it had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to rule 17a-5(d) of the Exchange Act or, if not required to file such statements, a broker-dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter) and if it is not an affiliate of an

166 This information is based on staff analysis of information from filings on Form N-SAR and from databases compiled by third-party information providers, including Lipper Inc.

167 Rule 0-7(a).

168 This information is based on data from the Investment Adviser Registration Depository.

entity that is not a small business.[169] SEC staff estimates that approximately 879 broker-dealers meet this definition.[170]

4. *Reporting, Recordkeeping, and Other Compliance Requirements*

Section 615(e) of the FCRA, as amended by section 1088 of the Dodd-Frank Act, requires the SEC to prescribe regulations that require financial institutions and creditors to establish reasonable policies and procedures to implement guidelines established by the SEC and other federal agencies that address identity theft with respect to account holders and customers. Section 248.201 of proposed Regulation S-ID would implement this mandate by requiring a covered financial institution or creditor to create an Identity Theft Prevention Program that detects, prevents, and mitigates the risk of identity theft applicable to its accounts.

Section 615(e) also requires the SEC to adopt regulations applicable to credit and debit card issuers to implement policies and procedures to assess the validity of change of address requests. Section 248.202 of proposed Regulation S-ID would implement this requirement by requiring credit and debit card issuers to establish reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a credit or debit card account and within a short period of time afterwards (within 30 days or more), the issuer receives a request for an additional or replacement card for the same account.

Because all SEC-regulated entities, including small entities, should already be in compliance with the substantially similar red flags rules and guidelines that the FTC began enforcing on December 31, 2010, proposed Regulation S-ID should not impose new compliance, recordkeeping, or reporting burdens. If for any reason an SEC-regulated small entity is not

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169 17 CFR 240.0–10.

170 This estimate is based on information provided in FOCUS Reports filed with the Commission. There are approximately 5063 broker-dealers registered with the Commission.

already in compliance with the existing red flags rules and guidelines issued by the Agencies, the burden of compliance with proposed Regulation S-ID should be minimal because entities already engage in various activities to minimize losses due to fraud as part of their usual and customary business practices. In particular, the rule will direct many of these entities to consolidate their existing policies and procedures into a written Program and may require some additional staff training. Accordingly, the impact of the proposed requirements would be merely incremental and not significant.

The SEC has estimated the costs of proposed Regulation S-ID for all entities (including small entities) in the PRA and cost benefit analyses included in this release. No new classes of skills would be required to comply with proposed Regulation S-ID. SEC staff does not anticipate that small entities would face unique or special burdens when complying with proposed Regulation S-ID.

5. *Duplicative, Overlapping, or Conflicting Federal Rules*

SEC staff has not identified any federal rules that duplicate, overlap, or conflict with the proposed rule or rule or form amendments.

6. *Significant Alternatives*

The Regulatory Flexibility Act directs the SEC to consider significant alternatives that would accomplish our stated objective, while minimizing any significant economic impact on small issuers. In connection with proposed Regulation S-ID, the SEC considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance requirements under the proposal for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposal, or any part thereof, for small entities.

The proposed rules would require financial institutions and creditors to create an identity theft prevention Program and report to the board of directors, a committee of the board, or senior management at least annually on compliance with the regulations. Credit and debit card issuers would be required to respond to a change of address request by notifying the cardholder or using other means to assess the validity of a change of address.

The standards in proposed Regulation S-ID are flexible, and take into account a covered entity's size and sophistication, as well as the costs and benefits of alternative compliance methods. An identity theft prevention Program under proposed Regulation S-ID would be tailored to the risk of identity theft in a financial institution or creditor's covered accounts, thereby permitting small entities whose accounts pose a low risk of identity theft to avoid much of the costs of compliance. Because small entities maintain covered accounts that pose a risk of identity theft for consumers just as larger entities do, we do not believe that providing an exemption from proposed Regulation S-ID for small entities would comply with the intent of section 615(e), and could subject consumers with covered accounts at small entities to a higher risk of identity theft.

Pursuant to the mandate of section 615(e) of the FCRA, as amended by section 1088 of the Dodd-Frank Act, the SEC and the CFTC are proposing identity theft red flags rules and guidelines jointly, and they would be substantially similar and comparable to the identity theft red flags rules and guidelines previously adopted by the Agencies. Providing a new exemption for small entities, or further consolidating or simplifying the regulations for small entities could result in significant differences between the identity theft red flags rules proposed by the Commissions and the rules adopted by the Agencies. Because all SEC-regulated entities, including small entities, should already be in compliance with the substantially similar red flags rules and guidelines that the FTC began enforcing on December 31, 2010, SEC staff does not expect that small entities would need a delayed effective or compliance date.

- The SEC seeks comment and information on any need for alternative compliance methods that, consistent with the statutory requirements, would reduce the economic impact of the rule on such small entities, including whether to delay the rule's effective date to provide additional time for small business compliance.

7. *General Request for Comment*

The SEC requests comments regarding this analysis. It requests comment on the number of small entities that would be subject to the proposed rules and guidelines and whether the proposed rules and guidelines would have any effects that have not been discussed. The SEC requests that commenters describe the nature of any effects on small entities subject to the rules and provide empirical data to support the nature and extent of such effects. It also requests comment on the compliance burdens and how they would affect small entities.

IV. STATUTORY AUTHORITY AND TEXT OF PROPOSED AMENDMENTS

The CFTC is proposing to amend Part 162 under the authority set forth in sections 1088(a)(8), 1088(a)(10) and 1088(b) of the Dodd-Frank Act, Pub.L.111-203, 124 Stat.1376 (2010) and; sections 615(e) [15 U.S.C 1681m(e)], 621(b) [15 U.S.C 1681s(b)], 624 [15 U.S.C 1681s-3 and note], 628 [15 U.S.C. 1681w(a)(1)] of the Fair Credit Reporting Act.

The SEC is proposing Regulation S-ID under the authority set forth in Section 1088(a)(8) of the Dodd-Frank Act,[171] Section 615(e) of the FCRA,[172] Sections 17 and 36 of the Exchange

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171 Pub. L. No. 111-203, Section 1088(a)(8), 124 Stat. 1376 (2010).

172 15 U.S.C. 1681m(e).

Act,[173] Sections 31 and 38 of the Investment Company Act,[174] and Sections 204 and 211 of the Investment Advisers Act.[175]

List of Subjects

17 CFR Part 162

Cardholders, Card issuers, Commodity pool operators, Commodity trading advisors, Confidential business information, Consumer reports, Credit, Creditors, Consumer, Customer, Fair and Accurate Credit Transactions Act, Fair Credit Reporting Act, Financial institutions, Futures commission merchants, Gramm-Leach-Bliley Act, Identity theft, Introducing brokers, Major swap participants, Privacy, Red flags, Reporting and recordkeeping requirements, Retail foreign exchange dealers, Self-regulatory organizations, Service provider, Swap dealers.

17 CFR Part 248

Affiliate marketing, Brokers, Cardholders, Card issuers, Confidential business information, Consumer reports, Credit, Creditors, Dealers, Fair and Accurate Credit Transactions Act, Fair Credit Reporting Act, Financial institutions, Gramm-Leach-Bliley Act, Identity theft, Investment advisers, Investment companies, Privacy, Reporting and recordkeeping requirements, Securities, Security measures, Self-regulatory organizations, Transfer agents.

TEXT OF PROPOSED RULES

Commodity Futures Trading Commission

For the reasons stated above in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 162 to read as follows:

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[173] 15 U.S.C. 78q and 78mm.

[174] 15 U.S.C. 80a-30 and 80a-37.

[175] 15 U.S.C. 80b-4 and 80b-11.

1. Add subpart C to part 162 read as follows:

Subpart C—Identity Theft Red Flags

Subpart C—Identity Theft Red Flags

§ 162.30 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope of this subpart.* This section applies to financial institutions or creditors that are subject to administrative enforcement of the FCRA by the Commission pursuant to Sec. 621(b)(1) of the FCRA, 15 U.S.C. 1681s(b)(1).

(b) *Special definitions for this subpart.* For purposes of this section, and Appendix B, the following definitions apply:

(1) Account means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes an extension of credit, such as the purchase of property or services involving a deferred payment.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated senior management employee.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a margin account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning in Sec. 603(r)(5) of the FCRA, 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4), and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that regularly extends, renews, or continues credit; regularly arranges for the extension, renewal, or continuation of credit; or in acting as an assignee of an original creditor, participates in the decision to extend, renew, or continue credit.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t) and includes any futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, swap dealer, or major swap participant that directly or indirectly holds a transaction account belonging to a consumer.

(8) *Identifying information* means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any—

(i) Name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(ii) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(iii) Unique electronic identification number, address, or routing code; or

(iv) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

(9) *Identity theft* means a fraud committed or attempted using the identifying information of another person without authority.

(10) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(11) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(c) *Periodic identification of covered accounts*. Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor shall conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program* – (1) Program requirement. Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Identity Theft Prevention Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Identity Theft Prevention Program.* The Identity Theft Prevention Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Identity Theft Prevention Program;

(ii) Detect Red Flags that have been incorporated into the Identity Theft Prevention Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Identity Theft Prevention Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Identity Theft Prevention Program.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must provide for the continued administration of the Identity Theft Prevention Program and must:

(1) Obtain approval of the initial written Identity Theft Prevention Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Identity Theft Prevention Program;

(3) Train staff, as necessary, to effectively implement the Identity Theft Prevention Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement an Identity Theft Prevention Program must consider the guidelines in appendix B of this part and include in its Identity Theft Prevention Program those guidelines that are appropriate.

§ 162.31 [Reserved]

§ 162.32 Duties of card issuers regarding changes of address.

(a) *Scope.* This section applies to a person described in § 162.30(a) of this part that issues a debit or credit card (card issuer).

(b) *Definition of cardholder.* For purposes of this section, a cardholder means a consumer who has been issued a credit or debit card.

(c) *Address validation requirements.* A card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1)(i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the policies and procedures the card issuer has established pursuant to § 162.30 of this part.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and provided separately from its regular correspondence with the cardholder.

2. Add Appendix B to part 162 to read as follows:

Appendix B to Part 162—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Section 162.30 of this part requires each financial institution or creditor that offers or maintains one or more covered accounts, as defined in § 162.30(b)(3) of this part, to develop and provide for the continued administration of a written Identity Theft Prevention Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of an Identity Theft Prevention Program that satisfies the requirements of § 162.30 of this part.

I. The Identity Theft Prevention Program

In designing its Identity Theft Prevention Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) *Risk factors*. A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags*. Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable supervisory guidance.

(c) *Categories of Red Flags*. The Identity Theft Prevention Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix B.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. Detecting Red Flags

The Identity Theft Prevention Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account; and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. Preventing and Mitigating Identity Theft

The Identity Theft Prevention Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution or creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent Internet website. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;

(f) Closing an existing covered account;

(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;

(h) Notifying law enforcement; or

(i) Determining that no response is warranted under the particular circumstances.

V. Updating the Identity Theft Prevention Program

Financial institutions and creditors should update the Identity Theft Prevention Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;

(b) Changes in methods of identity theft;

(c) Changes in methods to detect, prevent, and mitigate identity theft;

(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and

(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. Methods for Administering the Identity Theft Prevention Program

(a) *Oversight of Identity Theft Prevention Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated senior management employee should include:

(1) Assigning specific responsibility for the Identity Theft Prevention Program's implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with § 162.30 of this part; and

(3) Approving material changes to the Identity Theft Prevention Program as necessary to address changing identity theft risks.

(b) *Reports*. (1) *In general*. Staff of the financial institution or creditor responsible for development, implementation, and administration of its Identity Theft Prevention Program should report to the board of directors, an appropriate committee of the board, or a designated senior management employee, at least annually, on compliance by the financial institution or creditor with § 162.30 of this part.

(2) *Contents of report*. The report should address material matters related to the Identity Theft Prevention Program and evaluate issues such as: The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Identity Theft Prevention Program.

(c) *Oversight of service provider arrangements*. Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c-1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s-2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix B

In addition to incorporating Red Flags from the sources recommended in Section II(b) of the Guidelines in Appendix B of this part, each financial institution or creditor may consider incorporating into its Identity Theft Prevention Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings from a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy, as defined in Sec. 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)).

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15 The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions or creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement means of accessing the account or for the addition of an authorized user on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example:

a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (e.g., electronics equipment or jewelry); or

b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns;

d. A material change in electronic fund transfer patterns in connection with a deposit account; or

e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice from Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

Securities and Exchange Commission

For the reasons stated above in the preamble, the Securities and Exchange Commission proposes to amend 17 CFR part 248 to read as follows:

1. The authority citation for part 248 is revised to read as follows:

Authority: 15 U.S.C. 78q, 78q-1, 78*o*-4, 78*o*-5, 78w, 80a-30, 80a-37, 80b-4, 80b-11, 1681m(e), 1681s(b), 1681s-3 and note, 1681w(a)(1), 6801-6809, and 6825; Pub. L. 111-203, sec. 1088(a)(8), (a)(10), and sec. 1088(b).

2. Revise the heading for part 248 to read as follows:

Part 248 – REGULATIONS S-P, S-AM, AND S-ID

3. Add subpart C to part 248 to read as follows:

Sec.

Subpart C – Regulation S-ID: Identity Theft Red Flags

§ 248.201 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) *Scope.* This section applies to a *financial institution* or *creditor*, as defined in the Fair Credit Reporting Act (15 U.S.C. 1681), that is:

(1) A broker, dealer or any other person that is registered or required to be registered under the Securities Exchange Act of 1934;

(2) An investment company that is registered or required to be registered under the Investment Company Act of 1940, that has elected to be regulated as a business development company under that Act, or that operates as an employees' securities company under that Act; or

(3) An investment adviser that is registered or required to be registered under the Investment Advisers Act of 1940.

(b) *Definitions.* For purposes of this subpart, and Appendix A of this subpart, the following definitions apply:

(1) *Account* means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business

purposes. Account includes a brokerage account, a *mutual fund* account (*i.e.*, an account with an open-end investment company), and an investment advisory account.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a non U.S. based financial institution or creditor, the managing official of that branch or agency; and

(ii) In the case of a financial institution or creditor that does not have a board of directors, a designated employee at the level of senior management.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a brokerage account with a broker-dealer or an account maintained by a mutual fund (or its agent) that permits wire transfers or other payments to third parties; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681m(e)(4), and includes lenders such as brokers or dealers offering margin accounts, securities lending services, and short selling services.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t).

(8) *Identifying information* means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any—

(i) Name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(ii) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(iii) Unique electronic identification number, address, or routing code; or

(iv) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

(9) *Identity theft* means a fraud committed or attempted using the identifying information of another person without authority.

(10) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(11) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(12) *Other definitions.*

(i) *Broker* has the same meaning as in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

(ii) *Commission* means the Securities and Exchange Commission.

(iii) *Dealer* has the same meaning as in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)).

(iv) *Investment adviser* has the same meaning as in section 202(a)(11) of the Investment

Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)).

(v) *Investment company* has the same meaning as in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), and includes a separate series of the investment company.

(vi) Other terms not defined in this subpart have the same meaning as in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(c) *Periodic Identification of Covered Accounts*. Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program* –

(1) *Program requirement*. Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) *Elements of the Program*. The Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Program;

(ii) Detect Red Flags that have been incorporated into the Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) *Administration of the Program.* Each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and must:

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;

(3) Train staff, as necessary, to effectively implement the Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) *Guidelines.* Each financial institution or creditor that is required to implement a Program must consider the guidelines in Appendix A to this subpart and include in its Program those guidelines that are appropriate.

§ 248.202 Duties of card issuers regarding changes of address.

(a) *Scope.* This section applies to a person described in § 248.201(a) that issues a credit or debit card (card issuer).

(b) *Definitions*. For purposes of this section:

(1) *Cardholder* means a consumer who has been issued a *credit card* or *debit card* as defined in 15 U.S.C. 1681a(r).

(2) *Clear and conspicuous* means reasonably understandable and designed to call attention to the nature and significance of the information presented.

(3) Other terms not defined in this subpart have the same meaning as in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*).

(c) *Address validation requirements*. A card issuer must establish and implement reasonable written policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account. Under these circumstances, the card issuer may not issue an additional or replacement card, until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

(1) (i) Notifies the cardholder of the request:

(A) At the cardholder's former address; or

(B) By any other means of communication that the card issuer and the cardholder have previously agreed to use; and

(ii) Provides to the cardholder a reasonable means of promptly reporting incorrect address changes; or

(2) Otherwise assesses the validity of the change of address in accordance with the

policies and procedures the card issuer has established pursuant to § 248.201 of this part.

(d) *Alternative timing of address validation.* A card issuer may satisfy the requirements of paragraph (c) of this section if it validates an address pursuant to the methods in paragraph (c)(1) or (c)(2) of this section when it receives an address change notification, before it receives a request for an additional or replacement card.

(e) *Form of notice.* Any written or electronic notice that the card issuer provides under this paragraph must be clear and conspicuous and be provided separately from its regular correspondence with the cardholder.

4. Add Appendix A to subpart C of part 248 to read as follows:

Appendix A to Subpart C of Part 248—Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Section 248.201 of this part requires each financial institution and creditor that offers or maintains one or more covered accounts, as defined in § 248.201(b)(3) of this part, to develop and provide for the continued administration of a written Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that satisfies the requirements of § 248.201 of this part.

I. The Program

In designing its Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) *Risk Factors.* A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

(1) The types of covered accounts it offers or maintains;

(2) The methods it provides to open its covered accounts;

(3) The methods it provides to access its covered accounts; and

(4) Its previous experiences with identity theft.

(b) *Sources of Red Flags.* Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

(1) Incidents of identity theft that the financial institution or creditor has experienced;

(2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and

(3) Applicable regulatory guidance.

(c) *Categories of Red Flags.* The Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix A.

(1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;

(2) The presentation of suspicious documents;

(3) The presentation of suspicious personal identifying information, such as a suspicious

address change;

(4) The unusual use of, or other suspicious activity related to, a covered account; and

(5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. Detecting Red Flags

The Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

(a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing 31 U.S.C. 5318(*l*) (31 CFR 1023.220 (broker-dealers) and 1024.220 (mutual funds)); and

(b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. Preventing and Mitigating Identity Theft

The Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent website. Appropriate responses may include the following:

(a) Monitoring a covered account for evidence of identity theft;

(b) Contacting the customer;

(c) Changing any passwords, security codes, or other security devices that permit access to a covered account;

(d) Reopening a covered account with a new account number;

(e) Not opening a new covered account;

(f) Closing an existing covered account;

(g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;

(h) Notifying law enforcement; or

(i) Determining that no response is warranted under the particular circumstances.

V. Updating the Program

Financial institutions and creditors should update the Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

(a) The experiences of the financial institution or creditor with identity theft;

(b) Changes in methods of identity theft;

(c) Changes in methods to detect, prevent, and mitigate identity theft;

(d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and

(e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. Methods for Administering the Program

(a) *Oversight of Program.* Oversight by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management should include:

(1) Assigning specific responsibility for the Program's implementation;

(2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with § 248.201 of this part; and

(3) Approving material changes to the Program as necessary to address changing identity theft risks.

(b) *Reports.*

(1) *In general.* Staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with § 248.201 of this part.

(2) *Contents of report.* The report should address material matters related to the Program and evaluate issues such as: the effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements;

significant incidents involving identity theft and management's response; and recommendations for material changes to the Program.

(c) *Oversight of service provider arrangements.* Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

(a) For financial institutions and creditors that are subject to 31 U.S.C. 5318(g), filing a Suspicious Activity Report in accordance with applicable law and regulation;

(b) Implementing any requirements under 15 U.S.C. 1681c-1(h) regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;

(c) Implementing any requirements for furnishers of information to consumer reporting agencies under 15 U.S.C. 1681s-2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and

(d) Complying with the prohibitions in 15 U.S.C. 1681m on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix A

In addition to incorporating Red Flags from the sources recommended in section II.b. of the Guidelines in Appendix A to this subpart, each financial institution or creditor may consider incorporating into its Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings from a Consumer Reporting Agency

1. A fraud or active duty alert is included with a consumer report.

2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.

3. A consumer reporting agency provides a notice of address discrepancy, as referenced in Sec. 605(h) of the Fair Credit Reporting Act (15 U.S.C. 1681c(h)).

4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:

a. A recent and significant increase in the volume of inquiries;

b. An unusual number of recently established credit relationships;

c. A material change in the use of credit, especially with respect to recently established credit relationships; or

d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

5. Documents provided for identification appear to have been altered or forged.

6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or by other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions and creditors that use challenge questions, the person

opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement means of accessing the account or for the addition of an authorized user on the account.

20. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

a. Nonpayment when there is no history of late or missed payments;

b. A material increase in the use of available credit;

c. A material change in purchasing or spending patterns; or

d. A material change in electronic fund transfer patterns in connection with a deposit account.

21. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

22. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

23. The financial institution or creditor is notified that the customer is not receiving paper account statements.

24. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice from Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

25. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.

By the Commodity Futures Trading Commission.

February 28, 2012

David A. Stawick

David A. Stawick,
Secretary of the Commodity Futures Trading Commission

By the Securities and Exchange Commission.

February 28, 2012

Elizabeth M. Murphy

Elizabeth M. Murphy,
Secretary of the Securities and Exchange Commission

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 66490 / February 29, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14781

In the Matter of

Far Vista Interactive Corp.,
Herzog International Holdings, Inc.,
Tatonka Oil & Gas Company, Inc.,
Green Capital Group, Inc.,
Lone Star International Energy Inc.,
Wintech Digital System Technology Corp.,
House of Brussels Chocolates, Inc.

Respondents.

ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934 AND NOTICE OF HEARING

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against Respondents Far Vista Interactive Corp., Herzog International Holdings, Inc., Tatonka Oil & Gas Company, Inc., Green Capital Group, Inc., Lone Star International Energy Inc., Wintech Digital System Technology Corp., House of Brussels Chocolates, Inc.

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II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Far Vista Interactive Corp. (CIK No. 0000860401) is a Nevada corporation located in Saskatoon, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Far Vista is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on November 22, 2010. As of December 12, 2011 the common stock of Far Vista (symbol "FVSTA") was quoted on the Pink Sheets operated by Pink OTC Markets, Inc. ("Pink Sheets").

2. Herzog International Holdings, Inc. (CIK No. 0000853464) is an active Nevada corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Herzog is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q on November 13, 1996. Herzog's securities are not currently publicly quoted or traded.

3. Tatonka Oil & Gas Company, Inc. (CIK No. 0001220819) is a Colorado corporation located in Denver, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tatonka is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 8-K on July 2, 2008. As of December 12, 2011, the common stock of Tatonka (symbol "TTKA") was quoted on the Pink Sheets.

4. Green Capital Group, Inc. (CIK No. 0000866678) is a Nevada corporation located in Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Green Capital is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 8-K on April 7, 1999. Green Capital's securities are not publicly quoted or traded.

5. Lone Star International Energy Inc. (CIK No. 0000841282) is a Nevada corporation located in Weatherford, Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Lone Star is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB on November 19, 1998. Lone Star's securities are not currently publicly quoted or traded.

6. Wintech Digital System Technology Corp. (CIK No. 0001113226) is an active Nevada corporation located in Texas with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wintech Digital is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-KSB on November 3, 2006. As of December 12, 2011, the common stock of Wintech (symbol "WDSP") was quoted on the Pink Sheets.

7. House of Brussels Chocolates, Inc. (CIK No. 0001072367) is a Nevada corporation located in British Columbia, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). House of Brussels is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 8-K on January 26, 2007. As of December 12, 2011, the common stock of House of Brussels (symbol "HBSL") was quoted on the Pink Sheets.

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 domestic 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 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 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 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, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of 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's Rules of Practice.

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

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

By the Commission.

Elizabeth M. Murphy
Secretary

Jill M. Peterson

By: Jill M. Peterson
Assistant Secretary