

SECURITIES AND EXCHANGE COMMISSION

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

MARY L. SCHAPIRO, CHAIRMAN

ELISSE B. WALTER, COMMISSIONER

LUIS A. AGUILAR, COMMISSIONER

TROY A. PAREDES, COMMISSIONER

DANIEL M. GALLAGHER, COMMISSIONER

(45 Documents)

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67099 / June 4, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14901

In the Matter of

TIERONE CORPORATION,

Respondent.

ORDER INSTITUTING PROCEEDINGS
PURSUANT TO SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND REVOKING REGISTRATION OF
SECURITIES

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act"), against TierOne Corporation ("TierOne" 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:

A. TierOne Corporation (CIK No. 1170605) was formed as a Wisconsin corporation and is a debtor in bankruptcy in the United States Bankruptcy Court for the District of Nebraska and prior to the bankruptcy filing had its principal place of business in Lincoln, Nebraska. TierOne's common stock is currently registered with the Commission under Exchange Act

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Section 12(g). Prior to May 7, 2010, TierOne's common stock was listed on the NASDAQ GS exchange under the stock symbol "TONE." TierOne's common stock is currently quoted on OTC Link (symbol "TONEQ"), which is operated by OTC Markets Group Inc. On June 4, 2010, TierOne Bank, a wholly-owned subsidiary of TierOne, was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation was named receiver. TierOne subsequently filed for bankruptcy protection on June 24, 2010, and Rick D. Lange was appointed as Chapter 7 Bankruptcy Trustee for TierOne.

B. TierOne has failed to comply with Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, while its common stock was registered with the Commission in that it has not filed an Annual Report on Form 10-K since March 13, 2009, or periodic or quarterly reports on Form 10-Q for any fiscal period subsequent to its fiscal quarter ending June 30, 2009.

C. Rick D. Lange, as Chapter 7 Bankruptcy Trustee, filed a Form 8-K dated July 6, 2010, providing information regarding the TierOne bankruptcy filing and the resignations of certain individuals as directors and other positions.

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
Secretary

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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
Rel. No. 67104 / June 4, 2012

Admin. Proc. File No. 3-14706

In the Matter of
AMSTEM CORPORATION, *et al.*
BALSAM VENTURES, INC.,
Respondent

ORDER DISMISSING PROCEEDING

On January 20, 2012, the Commission instituted an administrative proceeding against Balsam Ventures, Inc. ("Balsam") and three other respondents under Section 12(j) of the Securities Exchange Act of 1934.¹ The Order Instituting Proceedings alleged that Balsam had violated periodic reporting requirements and sought to suspend or revoke the registration of Balsam's securities.

On January 30, 2012, Balsam filed a Form 15 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 Form 15, in this case, April 29, 2012.² On May 1, 2012, the Division of Enforcement filed a motion to dismiss Balsam from this proceeding. Balsam has not responded to the Division's motion.

¹ 15 U.S.C. § 78l(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. Balsam no longer has 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 this proceeding as to Balsam.³

Accordingly, it is ORDERED that this proceeding be, and it hereby is, dismissed with respect to Balsam Ventures, Inc.

By the Commission.

Elizabeth M. Murphy
Secretary


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

³ See, e.g., *SGI Int'l*, Securities Exchange Act Rel. No. 66389 (Feb. 13, 2012), 102 SEC Docket 51193, 51194; *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

Release No. 67109 / June 5, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14902

In the Matter of

**Future Now Group, Inc., and
Global Teledata 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 Future Now Group, Inc. and Global Teledata Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Future Now Group, Inc. (CIK No. 1370555) is a revoked Nevada corporation located in Westbury, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Future Now Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2010, which reported a net loss of over \$55,000 for the prior three months. As of April 20, 2012, the company's stock (symbol "FUTR") was quoted on OTC Link (previously, "Pink Sheets") operated by OTC Markets Group, Inc. ("OTC Link"), had eight market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

2. Global Teledata Corp. (CIK No. 1103866) is a revoked Nevada corporation located in Boca Raton, Florida with a class of securities registered with the Commission

pursuant to Exchange Act Section 12(g). Global Teledata 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, 2003, which reported a net loss of over \$13,000 for the prior twelve months. As of June 1, 2012, the company's stock (symbol "GDAC") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

3. 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.

4. 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.

5. 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. 67110 / June 5, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14903

In the Matter of

Gammacan 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 Gammacan International, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Gammacan International, Inc. (CIK No. 1141222) is a void Delaware corporation located in Kiryat Ono, Israel with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Gammacan International 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 \$3.3 million for the prior nine months. As of June 1, 2012, the company's stock (symbol "GCAN") was quoted on OTC Link (previously, "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).

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B. DELINQUENT PERIODIC FILINGS

2. As discussed in more detail above, the Respondent is delinquent in its periodic filings with the Commission, having repeatedly failed to meet its obligation to file timely periodic reports, and failing to heed delinquency letters sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations or, through its failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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 revoke the registration of each class of securities registered pursuant to Section 12 of the Exchange Act of the Respondent identified in Section II hereof, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate names of the Respondent.

IV.

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

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

If the Respondent fails to file a 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
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

June 5, 2012

In the Matter of

Future Now Group, Inc., and
Gammacon 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 Future Now Group, Inc. because it has not filed any periodic reports since the period ended March 31, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Gammacon International, 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. EDT on June 5, 2012, through 11:59 p.m. EDT on June 18, 2012.

By the Commission.

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Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No.67125 / June 5, 2012

Admin. Proc. File No. 3-14702

In the Matter of

TAPSLIDE, INC., *et al.*,

Respondents.

ORDER DISMISSING PROCEEDING

On January 19, 2012, the Commission instituted an administrative proceeding against TapSlide, Inc. and six other respondents under Section 12(j) of the Securities Exchange Act of 1934.¹ The Order Instituting Proceedings alleged that TapSlide had violated periodic reporting requirements and sought to suspend or revoke the registration of TapSlide's securities.

On February 6, 2012, TapSlide filed a Form 15 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 Form 15, in this case, May 7, 2012.² On that day, the Division of Enforcement filed a motion to dismiss TapSlide from this proceeding. TapSlide has not responded to the Division's motion.

We have determined to grant the Division's motion. TapSlide no longer has 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 this proceeding as to TapSlide.³

¹ 15 U.S.C. § 78l(j). All of the remaining respondents' registrations have already been revoked.

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

³ See, e.g., *SGL Int'l*, Securities Exchange Act Rel. No. 66389 (Feb. 13, 2012), 103 SEC Docket 51193, 51194; *Enamelon, Inc.*, Securities Exchange Act Rel. No. 52956 (Dec. 15, 2005), 86 SEC Docket 2944.

Accordingly, it is ORDERED that this proceeding be, and it hereby is, dismissed with respect to TapSlide, Inc.

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. 3414 / June 5, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14713

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS

In the Matter of

TIMOTHY J. CLYMAN,

Respondent.

I.

The Securities and Exchange Commission ("Commission") instituted administrative proceedings against Timothy J. Clyman ("Respondent") pursuant to Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") on January 25, 2012. *See* Investment Advisers Release No. 3361 (January 25, 2012).

II.

To resolve this proceeding, 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, as set forth below.

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III.

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

1. Clyman is a resident of California. He was a managing member of Seaforth Meridian, Seaforth Management and Seaforth Advisors. Seaforth Advisors was an investment adviser to Seaforth Meridian.

2. On December 2, 2011, a final judgment was entered against Clyman, permanently enjoining him from future violations of Section 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, in the civil action entitled Securities and Exchange Commission v. Seaforth Meridian, et al., Civil Action Number 5:06-CV-4107-RDR, in the United States District Court for the District of Kansas.

3. The Commission's complaint alleged the Seaforth Principals, including Clyman, fraudulently raised approximately \$18 million from nearly 70 - mostly elderly - investors located in several states. The Seaforth Principals enticed investors to purchase limited partnership interests in Seaforth Meridian with offering materials and oral representations that falsely represented and omitted material information regarding investment strategies and risk of loss, the financial controls over investor funds, and the background, experience, and expertise of the Seaforth Principals. Specifically, the Commission alleged that the Seaforth Principals misled investors about the supposed conservative nature of the Seaforth Meridian investment strategy while, in fact, sending almost 75% of the funds raised to two highly suspect, offshore funds. The Commission also alleged that the Seaforth Principals funneled more than \$600,000 to themselves without having adequately accounted for Seaforth Meridian's profits or losses. Further, the Seaforth Principals lulled investors with false monthly account statements and reports that emphasized the safety of the 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 Clyman's Offer.

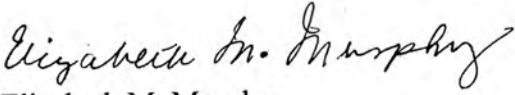
Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Clyman be, and hereby is:

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 3415 / June 5, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14907

In the Matter of

Steven Enrico Lopez, Sr.,

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 Steven Enrico Lopez, Sr. ("Lopez" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

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

1. Steven Enrico Lopez, Sr., age 54, resides in Los Angeles, California. Lopez served as the trader and portfolio manager for Easy Equity Asset Management, Inc., Easy Equity Management, L.P., an investment adviser registered with the State of California, Easy Equity Partners, L.P., and Alero Equities The Real Estate Company, LLC (collectively, "Easy Equity").

2. On March 2, 2012, a final judgment was entered by consent against Lopez, 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. Alero Odell Mack, Jr., et al.*, Civil Action No. 10-8383-DSF (PJWx), in the United States District Court for the Central District of California.

3. The Commission's complaint alleged that, from January 2007 through March 2010, Lopez obtained investor funds through various fraudulent investment schemes that primarily involved the offer and sale of investments in various purported hedge funds, as well as in an investment adviser to a hedge fund. In total, Lopez, along with other defendants, raised approximately \$4 million from at least 25 investors in California and Arizona.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 203(f) of the Advisers Act that Respondent Lopez 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

*Commissioner Aguilar
not participating*

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933
Release No. 9329 / June 6, 2012**

**SECURITIES EXCHANGE ACT OF 1934
Release No. 67142 / June 6, 2012**

**INVESTMENT ADVISERS ACT OF 1940
Release No. 3417 / June 6, 2012**

**INVESTMENT COMPANY ACT OF 1940
Release No. 30099 / June 6, 2012**

**ADMINISTRATIVE PROCEEDING
File No. 3-14909**

In the Matter of

OPPENHEIMERFUNDS, INC.

and

**OPPENHEIMERFUNDS
DISTRIBUTOR, INC.,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTION 15(b)(4) OF THE
SECURITIES EXCHANGE ACT OF 1934,
SECTIONS 203(e) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF 1940,
AND SECTIONS 9(b) AND 9(f) OF THE
INVESTMENT COMPANY ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

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 against OppenheimerFunds, Inc. ("OFI") pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") and against OppenheimerFunds Distributor, Inc. ("OFDI") pursuant to Section 8A of the Securities Act and Section 15(b)(4) of the Securities Exchange Act of 1934 ("Exchange Act").

II.

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In anticipation of the institution of these proceedings, OFI and OFDI (together, "Respondents") have each submitted an Offer of Settlement (the "Offers"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 15(b)(4) of the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

Summary

1. These proceedings arise out of the offer and sale of shares of Oppenheimer Champion Income Fund and Oppenheimer Core Bond Fund (the "Funds"), two fixed income retail mutual funds managed by OppenheimerFunds, Inc. ("OFI"). In 2008, both Funds experienced losses far greater than those suffered by their peer funds, with Champion Income Fund's share price declining nearly 80% (compared to an average decline of approximately 26% among its peers) and Core Bond Fund's share price declining approximately 36% (compared to an average decline of approximately 4% among its peers). The Funds' underperformance was driven primarily by their exposure to AAA-rated commercial mortgage-backed securities ("CMBS").² They obtained that exposure mainly through derivative instruments known as total return swaps ("TRS contracts"), which created substantial leverage in both Funds.

2. In late 2008, the CMBS market crashed, triggering large liabilities on the Funds' TRS contracts and forcing the Funds, particularly Champion Income Fund, to sell large portions of their portfolio securities to meet those liabilities. In response, OFI senior management directed the Funds' portfolio managers to cut the Funds' CMBS exposure, which they did. This action reduced the risk of further CMBS-induced losses, but it also constrained the Funds' ability to recover lost value in the event of a CMBS market recovery. In responding to questions from financial advisers (whose clients were the ultimate shareholders) and shareholders themselves, however, Respondents communicated that the Funds had only suffered paper losses, which, absent actual defaults, could be reversed when credit markets returned to normal.

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

² As used in this Order, "CMBS" refers to the AAA-rated segment of the sector to which the Funds' total return swap contracts were tied.

3. In addition, throughout 2008, Respondents sold shares of the Champion Income Fund under a prospectus that highlighted the fund's cash investments in junk bonds without adequately disclosing the fund's practice of assuming substantial leverage through its use of derivatives. By offering and selling Champion Income shares under a misleading prospectus and making misleading statements in the midst of the Funds' steep declines in late 2008, Respondents violated the federal securities laws, as set forth below.

Respondents

4. **OppenheimerFunds, Inc. ("OFI")**, a Colorado corporation, has been registered as an investment adviser with the Commission at all relevant times. It has operations in New York City and Centennial, Colorado. As of February 2012, OFI provided investment advisory services to approximately 100 investment companies, with approximately \$177 billion in assets under management.

5. **OppenheimerFunds Distributor, Inc. ("OFDI")**, a New York corporation and wholly owned subsidiary of OFI, has been registered as a broker dealer with the Commission at all relevant times. OFDI markets and distributes shares of registered mutual funds managed by OFI.

Other Relevant Entities

6. **Oppenheimer Champion Income Fund ("Champion")** is an open-end management investment company (*i.e.*, a mutual fund) registered with the Commission. At all relevant times, Respondents marketed Champion as a fund that invested primarily in high-yield, lower grade fixed income securities also known as "junk bonds."

7. **Oppenheimer Core Bond Fund ("Core Bond")** is a series of Oppenheimer Integrity Funds, an open-end management investment company registered with the Commission. At all relevant times, Respondents marketed Core Bond as an intermediate-term, investment grade bond fund.

Background

The Funds' Use of TRS Contracts

8. In 2007 and 2008, OFI employed a team of fixed income professionals, known as the "Core Plus Team," to manage a number of taxable fixed income accounts, including the Funds. During the second half of 2007, the Core Plus Team came to believe that CMBS were undervalued in light of the recent and sudden widening of CMBS "spreads."³ To take advantage of what they believed was an attractive opportunity, the team began adding CMBS exposure to the Funds in late 2007.

³ As used in this Order, "spread" refers to the difference between the yield on a bond and some baseline rate, such as the yield on Treasury bonds of like duration. A bond's spread reflects the market's perception of its credit risk—*i.e.*, the wider the spread, the greater the perceived risk of default.

9. Rather than investing directly in CMBS, however, the Core Plus Team increased the Funds' CMBS exposure mainly by entering into TRS contracts with various counterparties. Each of these contracts specified, among other things, a contract duration, a "notional amount," and a particular CMBS spread index, the movements of which dictated the parties' payment obligations. Put simply, the Funds took a "long" position in CMBS (anticipating that CMBS spreads would tighten), while the counterparties on the contracts took a "short" position (anticipating that spreads would widen).⁴ At the beginning of each month through the duration of the contract, the party against whom spreads had moved during the previous month (the Funds, if spreads widened) would be required to make a cash payment to the other party based on the size of the spread change (as measured by the referenced index) and the "notional amount" of the contract.

10. Unlike purchases of actual CMBS, these TRS contracts required no initial commitment of cash; the Funds had to "pay" for their CMBS exposure only to the extent that CMBS spreads moved against their positions. This allowed the Funds to take on large amounts of CMBS exposure without having to liquidate other positions, but it also caused them to take on leverage by adding market exposure on top of the assets on their balance sheets. By March 31, 2008, Champion had net assets of approximately \$2 billion, but, through its TRS contracts, it had additional exposure to approximately \$1 billion of CMBS that it did not actually own. For its part, Core Bond had approximately \$2.2 billion in net assets, plus additional exposure to approximately \$800 million of CMBS through TRS contracts.

Fourth Quarter Spread Widening Drives Down Performance

11. Between mid-September and early November 2008, CMBS spreads widened to unprecedented levels, triggering substantial month-end payment obligations for the Funds on their TRS contracts. Meanwhile, market values for the Funds' portfolio securities also fell, further driving down the Funds' per share net asset values ("NAV"). Between September 14 and November 10, 2008, Champion's NAV fell approximately 50%, while Core Bond's fell more than 20%. Making matters worse, both Funds had to raise cash for anticipated TRS contract payments by selling depressed bonds into an increasingly illiquid market.

12. As the value of the Funds' assets fell, the notional amounts of their TRS contracts remained constant, meaning that their *relative* exposure to CMBS (as compared to other fixed income sectors) actually increased. This was especially true in Champion. By mid-October 2008, Champion's net assets had fallen to approximately \$1 billion, about half the fund's size in March. But the fund *still* had approximately \$1 billion worth of additional CMBS exposure through TRS contracts, meaning that CMBS represented a far larger position for the fund, relative to other sectors, than it had six months earlier, even though the notional size of the position had not changed.

The Core Plus Team Cuts CMBS Exposure as CMBS Spreads Widen To New Levels

⁴ The counterparties also agreed to pay a monthly "carry amount," akin to a bond coupon payment, which could be offset by any amount owed by the Funds due to the widening of CMBS spreads.

13. In late 2008, the combination of increased CMBS volatility and heightened CMBS exposure caused both Funds' risk levels (as measured by OFI) to exceed certain limits set forth in OFI's internal risk management guidelines. Because the Core Plus Team was reluctant to "lock in losses" on their TRS contracts and believed that the CMBS market would rebound, OFI initially allowed the Funds to maintain their elevated risk levels. On or about November 12, however, OFI senior management directed the Core Plus Team to bring the Funds back into compliance with the firm's internal risk management guidelines. Within the next two days, the team developed a CMBS risk-reduction plan that set new, lower CMBS exposure targets for both Funds. Champion's new target required the fund to reduce its then-current CMBS exposure by more than half.

14. The Core Plus Team began executing its CMBS risk-reduction plan immediately, entering into hedging positions that offset a portion of the Funds' exposure on November 14. Just as the team began attempting to trim risk, however, the CMBS market's collapse accelerated over the course of the following week, creating staggering liabilities for Champion and, to a lesser extent, Core Bond on their TRS contracts and driving their NAVs still lower. In the eight days between November 12 and November 20, 2008, Champion's NAV fell approximately 60%, while Core Bond's NAV fell approximately 27%.

15. To raise cash for anticipated TRS contract payments, the Funds had no choice but to sell more of their portfolio securities. This task became increasingly difficult for Champion due to the size of its projected TRS contract payments and poor liquidity in the high-yield bond market. By November 19, Champion's anticipated TRS contract payments for November (based on then-current CMBS spread levels) totaled approximately one-third of the fund's net assets and almost twice the fund's then-available cash. The situation worsened over the next two days, prompting concerns within OFI about the fund's near-term solvency. On November 21, OFI invested \$150 million in Champion to provide the fund with additional liquidity, and over the next two weeks, the Funds continued to reduce their CMBS exposure to avoid further losses and reduce risk. By December 5, just three weeks after the Core Plus Team was instructed to reduce risk, the team had reduced Champion's net notional CMBS exposure by approximately 80% and Core Bond's net notional CMBS exposure by more than 40%.

Respondents Make Misleading Statements Amidst the Dramatic NAV Declines of November 2008

16. Champion and Core Bond were marketed and sold by OFDI sales personnel called "wholesalers" to independent financial advisers, who, in turn, made recommendations to, and purchased shares on behalf of, or at the direction of, their own clients. As CMBS spread-widening adversely affected the Funds in late 2008, many advisers and shareholders raised questions about the Funds' performance and the outlook ahead. Respondents addressed these questions through a variety of means. In some instances, they provided information to wholesalers, who, in turn, relied on that information in their own communications with financial advisers. In other instances, Respondents provided information directly to financial advisers, both orally and in writing. In one instance, they provided OFDI call center representatives with a set of talking points, which the representatives used to respond to questions from shareholders. As set forth in paragraphs 17 through 20 below, these communications advanced materially

misleading messages, including that the Funds had only suffered paper losses, not "permanent impairments"; that the Funds' holdings and strategies remained intact; and that, absent actual defaults, shareholders could continue to "collect [their] coupon" on the Funds' bonds as they waited for the market prices of those bonds to recover.

17. A November 14 email intended to help wholesalers answer questions from financial advisers misleadingly stressed, for example, that "[w]e still believe [CMBS] represent tremendous value," that their "total return potential" had only been "magnified" by recent spread widening, that "these securities are NOT permanently impaired," and that "you are collecting your coupon as you wait for the credit markets to come back." A November 19 Q&A document prepared for financial advisers repeated essentially the same message, as did a set of talking points utilized by OFDI telephone representatives beginning on or about November 20. The talking points also indicated that the Funds were finding that recent market volatility had created "opportunities" for the Funds to earn higher yields on lower-risk bonds. In fact, at the time of these communications, the Funds were committed to reducing their CMBS exposure and were being forced to *sell* bonds to raise cash for anticipated TRS contract payments, thereby realizing investment losses and forfeiting future income streams on those bonds.

18. During a November 19 conference call with financial advisers, OFI similarly emphasized that the Funds had suffered no "permanent impairments" other than a small amount of exposure related to Lehman Brothers. Responding to questions about Champion's ability to handle redemptions, the representative went on to say that the fund had "pretty significant cash . . . to meet redemptions," and that "we've got nine-and-a-half percent of the fund in cash, so we're not fire selling anything." In fact, the fund had a sizeable cash position only *because* it had been selling depressed bonds to fund anticipated TRS contract payments, and the fund's cash position was inadequate to cover those projected payments, much less any redemptions the fund might face.

19. A set of talking points circulated on November 25 for wholesalers to use in communications with financial advisers also implied that the Funds remained as committed as ever to their CMBS positions and, therefore, that the Funds could still recover their CMBS-induced losses if the CMBS market recovered:

Can the Funds make back the performance it has [sic] lost over the past 6 months?

The funds are constantly changing to reflect the best opportunities in the market currently. Obviously, recent performance has been tightly linked to CMBS such that *the real question is 'can CMBS come back'?* We believe we have made a rational investment case for CMBS *but only time will allow our investment thesis to be tested.*

(Emphasis added). In fact, the Funds were committed to reducing their CMBS exposure and had been doing so for nearly two weeks. And given how much Champion in particular was reducing that exposure, the fund had no realistic prospects for recovering all of its CMBS-induced losses, even if CMBS recovered completely.

20. In conference calls with wholesalers on November 26 and financial advisers on December 9, OFI disclosed that the Funds were reducing CMBS exposure, but stated that they were simply returning to the exposure targets that had been in place all year. In fact, the Funds' new targets were materially lower than their old targets. In addition, OFI downplayed the significance of the decision to cut the Funds' CMBS exposure, suggesting that, if CMBS spreads were to tighten going forward, the Funds could still make back all of their CMBS losses even with reduced exposure. In fact, the Funds' new targets made it highly unlikely that they would recover those losses in the foreseeable future. This was particularly true in Champion, which was poised to move forward with less than half the CMBS exposure it had during the period when it incurred its largest CMBS losses.

Champion's Misleading Prospectus

21. CMBS was, by far, the worst-performing sector to which Champion had investment exposure in 2008: the index to which most of the Funds' TRS positions were tied experienced a total return of approximately -37% for the year. Meanwhile, high-yield bonds, which represented the bulk of Champion's portfolio securities, returned an average of approximately -26%. Champion shareholders, however, saw the value of their fund shares fall nearly 80%, far more than any sector in which the fund invested. This occurred because Champion was substantially leveraged as a result of its use of derivatives, particularly TRS contracts.

22. For most of 2008, Respondents offered shares of Champion under a prospectus dated January 28, 2008 (the "Champion Prospectus"). OFI created the Champion Prospectus, caused it to be filed with the Commission, and caused OFDI to offer fund shares pursuant to it. As described below, the Champion Prospectus was materially misleading insofar as it purported to describe the fund's "main" investments without adequately disclosing the fund's practice of assuming substantial leverage on top of those investments.

23. In its discussion of the Fund's "Investment Objective and Principal Investment Strategies," the Champion Prospectus stated:

WHAT DOES THE FUND MAINLY INVEST IN? The Fund invests in a variety of high-yield, fixed-income securities and related instruments. These investments primarily include:

- Lower-grade corporate bonds.
- Foreign corporate and government bonds.
- Swaps, including single name and index-linked credit default swaps.

Under normal market conditions, *the Fund invests at least 60% of its total assets in high-yield, lower grade, fixed-income securities, commonly called "junk" bonds*

The remainder of the Fund's assets may be invested in other debt securities, common stocks (and other equity securities), or cash or cash equivalents when the Manager believes these investments are consistent with the Fund's objectives.

The Fund may invest in securities of foreign issuers. The Fund currently focuses on debt securities of foreign issuers in developed markets. *The Fund also uses certain derivative investments to try to enhance income or to try to manage investment risk.*

WHO IS THE FUND DESIGNED FOR? *The Fund is designed primarily for investors seeking high current income from a fund that invests primarily in lower-grade domestic and foreign fixed-income securities. Those investors should be willing to assume the greater risks of short-term share price fluctuations and the special credit risks that are typical for a fund that invests mainly in lower-grade domestic and foreign fixed-income securities*

(Emphasis added).

24. This disclosure indicated that Champion's investment returns would mainly be a function of the fund's investments in high-yield bonds (and, to a lesser extent, investments in other debt securities, equity securities, and cash and cash equivalents). In fact, while Champion did invest more than 80% of its net assets in corporate bonds throughout 2008, it also took on significant leverage through TRS contracts that gave it substantial exposure to the CMBS market without requiring any investment of fund assets. By the end of March 2008, Champion, as a result of its TRS contracts, had exposure to \$1 billion worth of CMBS, approximately half the value of the fund's net assets. By mid-October 2008, the fund's CMBS exposure was roughly equal to the value of its net assets.

25. The Champion Prospectus did not adequately disclose to investors that they could be exposed to such substantial leverage. The prospectus disclosed that the fund "invested" in "swaps" and other derivatives "to try to enhance income or to try to manage investment risk" and that derivatives "can increase the volatility of the Fund's share prices." But it did not adequately disclose that Champion could use derivatives to such an extent that the fund's total investment exposure could far exceed the value of its portfolio securities and its investment returns could depend primarily upon the performance of bonds that it did not own. Nor did the prospectus adequately convey to investors the heightened risk of loss associated with the fund's use of leverage. The omission of such disclosure rendered the Champion Prospectus's statements about the fund's "main" investments materially misleading.

OFI's Fees

26. As a result of the misleading Champion Prospectus and Respondents' misleading statements in the midst of the Funds' steep NAV declines in late 2008, the Funds were able to retain existing shareholders and attract new ones. OFI received a benefit from those investments in the form of management fees paid by the Funds. Between February 1 and December 31, 2008, OFI received management fees totaling \$9,278,416 from Champion. For the second half

of November and December 2008, OFI received management fees totaling \$601,290 from Core Bond.

Violations

27. **Champion Prospectus.** By making misleading statements in the Champion Prospectus and causing it to be filed with the Commission, OFI willfully⁵ violated Section 34(b) of the Investment Company Act, which makes it unlawful for any person to make any materially false or misleading statement of fact in a fund document filed with the Commission. By obtaining money in the offer or sale of Champion shares by means of the misleading prospectus, both OFI and OFDI willfully violated Section 17(a)(2) of the Securities Act, which makes it unlawful for any person, directly or indirectly, in the offer or sale of a security, to obtain money or property by means of any materially false statement or materially misleading omission.

28. **Misleading Statements in Midst of NAV Declines.** By disseminating misleading statements about the Funds in the midst of their precipitous NAV declines in late 2008, both OFI and OFDI willfully violated Section 17(a)(2) of the Securities Act as well as Section 17(a)(3) of the Securities Act, which makes it unlawful for any person, in the offer or sale of a security, to engage in any transaction, practice, or course of business that operates or would operate as a fraud or deceit. As a result of that same conduct, OFI also willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-8(a)(1) and (2) thereunder. Section 206(4) makes it unlawful for any investment adviser to engage in any act, practice, or course of conduct that is fraudulent, deceptive, or manipulative, as prescribed by Commission rules. Rule 206(4)-8(a)(1) and (2) prohibit an investment adviser to a pooled investment vehicle from (1) making any materially false or misleading statement to any investor or prospective investor in the pooled investment vehicle or (2) otherwise engaging 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.

Respondents' Cooperation and Remedial Efforts

29. In determining to accept the Offers, the Commission considered cooperation afforded the Commission staff and remedial acts promptly undertaken by Respondents, including the replacement of senior management and portfolio management personnel, enhancements to OFI's risk management structure, enhancements to OFI's Legal Department capabilities, and the implementation of new controls and procedures relating to fund disclosures and marketing communications.

Undertakings

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

30. Ongoing Cooperation. Respondents undertake to cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in this Order or involving, directly or indirectly, the Funds. In connection with such cooperation, Respondents:

a. Shall produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff, or by an administrator to be appointed pursuant to the Order, with a custodian declaration as to their authenticity, if requested;

b. Shall use their best efforts to cause their officers, directors, employees, and former employees to be interviewed by the Commission's staff at such times and places as the staff reasonably may direct.

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

d. Agree that requests for interviews and notices or subpoenas for testimony by Respondents' officers, employees, or directors may be delivered by regular mail, fax, or electronic mail to Catherine Botticelli, Esq., Dechert LLP, 1775 I Street, Washington, DC 20006.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Section 15(b)(4) of the Exchange Act, Sections 203(e) and 203(k) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent OFI cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) and (3) of the Securities Act, Section 206(4) of the Advisers Act and Rule 206(4)-8(a)(1) and (2) thereunder, and Section 34(b) of the Investment Company Act.

B. Respondent OFDI cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act.

C. Respondents OFI and OFDI are censured.

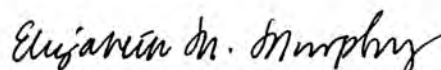
D. Respondent OFI shall, within 10 days of the entry of this Order, pay disgorgement of \$9,879,706, prejudgment interest of \$1,487,190, and a civil money penalty of \$24,000,000 to the Securities and Exchange Commission. If timely payment of disgorgement is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. If timely payment of penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment shall be: (A)

made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies OFI as a Respondent in these proceedings, the file number of these proceedings, copies of which cover letter and money order or check shall be sent to Julie K. Lutz, Associate Director, Mary S. Brady, Assistant Director, and Coates Lear, Staff Attorney, Denver Regional Office, Division of Enforcement, Securities and Exchange Commission, 1801 California St., Suite 1500, Denver, CO 80202.

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

F. The disgorgement, interest, civil penalties, and any other funds which may be paid to the Fair Fund through or as the result of related actions, if any, shall be aggregated in the Fair Fund, which shall be maintained in the type of account directed by Commission staff. The Commission will appoint a Fund Administrator who will develop a distribution plan (the "Plan") and administer the Plan in accordance with the Commission Rules on Fair Fund and Disgorgement Plans. The Fair Fund shall be used to compensate injured customers for any losses resulting from the violations determined herein and to cover the costs of administration of the Fair Fund. Any amount remaining in the Fair Fund after all distributions have been made and costs have been paid shall be transmitted to the Commission for transfer to the U.S. Treasury. Under no circumstances shall any part of the Fair Fund be returned to OFI.

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67140 / June 6, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3416 / June 6, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 30098 / June 6, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14908

In the Matter of

DAVID MARK BUNZEL

Respondent.

**ORDER INSTITUTING ADMINISTRATIVE
AND CEASE-AND-DESIST PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
SECTIONS 203(f) AND 203(k) OF THE
INVESTMENT ADVISERS ACT OF 1940
AND SECTION 9(b) OF THE INVESTMENT
COMPANY ACT OF 1940, MAKING
FINDINGS, AND IMPOSING REMEDIAL
SANCTIONS AND A CEASE-AND-DESIST
ORDER**

I.

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

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proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

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

SUMMARY

These proceedings arise out of violations of the Advisers Act by an unregistered investment adviser, Irvine Capital Management, LLC (“Irvine Management”), and its principal, Respondent Bunzel. Through Irvine Management, Bunzel manages two hedge funds, Irvine Capital Partners, LP (“Irvine I”) and Irvine Capital Partners III, LP (“Irvine III”) (collectively referred to as the “Irvine Funds”). Bunzel knew or should have known that he provided the limited partners in the Irvine Funds with false and misleading information regarding asset valuation, management fees, and fund audits. First, Bunzel knew or should have known that the valuation of the Irvine Funds’ primary asset, a private placement of common stock of a privately-held company (the “Issuer”), as of December 31, 2008, was unreasonable. Second, Bunzel knew or should have known that he charged the limited partners a 2% management fee, which was in excess of the 1.5% disclosed management fee. Third, Bunzel knew or should have known that he failed to cause timely annual fund audits to be performed.

RESPONDENT

1. David Mark Bunzel (“Bunzel”) resides in Suffolk, New York. Bunzel is the sole owner, sole employee and managing member of Irvine Management, an unregistered investment adviser that is the general partner for the Irvine Funds. Bunzel holds series 7 and 63 securities licenses. During the violative conduct, Bunzel was a registered representative associated with a registered broker-dealer.

BACKGROUND

2. Bunzel formed Irvine I in 1994 and Irvine III in 2000. Irvine Management is the general partner for the Irvine Funds, and Bunzel is Irvine Management’s only member. Bunzel, through Irvine Management, has significant ownership interests in the Irvine Funds (20% in Irvine I and 70% in Irvine III). As compensation for operating the Irvine Funds, Irvine Management receives 20% of Irvine Funds’ trading profits each year above a modified high water mark and a 1.5% annual management fee. The Irvine Funds’ largest holding is the Issuer, a privately-held registered investment adviser, which had approximately \$7 billion in assets under management (“AUM”) as of December 31, 2009.

Overvaluation of the Issuer's Shares

3. Irvine Capital was required under the Private Placement Memorandum ("PPM") for the Irvine Funds to value the investment in the Issuer's shares as the "General Partner may reasonably determine in good faith." Bunzel, as Irvine Capital's sole member and owner, made all decisions about determining the value of the Issuer's shares. In 1997, Irvine I initially acquired 104 shares in the Issuer at approximately \$1,000 per share. Over the next decade, Bunzel raised the value of the Issuer's shares based upon the price that the Issuer purchased and sold its shares in private transactions. For example, in December 2006, Bunzel increased the value of the Issuer's shares to approximately \$50,000 per share after the Issuer sold 10% of its shares in a private transaction at that price. Again, in December 2007, Bunzel raised the value of the Issuer's shares to \$60,000 per share based upon the Issuer's purchase of its shares at that price from a shareholder. During this same period, the Irvine Funds acquired or received additional shares in the Issuer. As of January 1, 2008, Irvine I and Irvine III held 112.1 and 31.5 shares in the Issuer, respectively.

4. In August 2008, Bunzel raised the valuation of the Issuer's shares from \$60,000 per share to \$112,800 per share, an increase of 88%. As a result, the assigned value of the Issuer's shares held by Irvine I and Irvine III increased dramatically from \$6.7 million to \$12.6 million and from \$1.9 million to \$3.6 million, respectively. Consequently, as of December 31, 2008, the Irvine Funds held \$21.2 million in total AUM, with the Issuer's shares representing \$16.2 million of their AUM, or 76%, as depicted in the following chart.

Date	AUM for the Irvine Funds (combined)	Value of the Issuer's Shares	2008 Increase in the Value of the Issuer's Shares	Value of the Issuer's Shares as a % of AUM
June 30, 2008	\$28 million	\$8.6 million	NA	30%
December 31, 2008	\$21.2 million	\$16.2 million	88%	76%

5. The increased valuation of the Issuer's shares was reflected within the 2008 Schedule K-1 tax form provided to the limited partners.

6. In August 2008, Bunzel based his increase in the valuation of the Issuer's shares on the following factors: (1) in approximately July 2008, the Issuer's management began discussions about repurchasing 10% of its shares outstanding from an unrelated shareholder at approximately \$120,000 per share, (2) the Issuer's AUM had increased substantially during 2008, (3) the Issuer's revenues were increasing substantially, and (4) Bunzel attempted to value the Issuer by comparing it to established large publicly-traded "money managers" in arriving at his new valuation.

7. However, there was no reasonable basis to support Bunzel's valuation as of December 31, 2008. Specifically, after Bunzel increased his valuation of the Issuer's shares by 88% in August 2008, the economy weakened considerably and the financial markets became

extremely volatile – especially financial sector stocks, such as the Issuer.¹ In addition, the Issuer's discussions to repurchase 10% of its shares had ceased by October 2008. Moreover, in just three months between September and December 2008, the Issuer's AUM had decreased by 33%, which also caused a substantial decrease in revenues. In effect, the four reasons that supported Bunzel's valuation in August 2008 no longer existed as of December 31, 2008.

8. Events that occurred after 2008 further demonstrate the unreasonableness of the valuation of the Issuer's shares as of December 31, 2008. Specifically, during 2010, Bunzel hired two valuation firms to value the Issuer's shares as of December 31, 2008. One of the firms hired by Bunzel was the valuation group within Irvine Funds' auditor. The valuation group never completed the engagement. However, the associate responsible for the valuation did complete a preliminary valuation, which valued the Issuer's shares at approximately \$50,000 per share as of December 31, 2008. The second valuation firm concluded that the Issuer's shares were worth \$60,000 per share as of December 31, 2008. In 2010, Bunzel finally restated the valuation of the Issuer's shares to \$60,000 per share as of December 31, 2008.

Undisclosed Increase in Annual Management Fee

9. In the Limited Partnership Agreements and PPMs, the Irvine Funds disclosed that Irvine Management would charge an annual 1.5% management fee based upon the AUM. Bunzel distributed these documents to investors, including to investors that purchased the Irvine Funds in 2007 and 2008. Bunzel considered the information contained in these documents to be important. However, in January 2007, Bunzel unilaterally increased the management fee by .5% (from 1.5% to 2%) for the Irvine Funds without notifying all the limited partners or receiving their consent. The limited partners were not given any written disclosure that he had raised the management fee. As a result of the increase, between September 10, 2007 and March 31, 2009, the limited partners accrued an additional \$87,000 in total management fees in excess of the disclosed and agreed upon 1.5% management fee.²

10. Shortly after the Enforcement Staff's investigation began, Bunzel undertook remedial actions by reversing the accruals related to the unapproved management fees increase and crediting back to the limited partners' accounts the \$87,000 and disclosed the accrual and its reversal to the limited partners in July 2009.

¹ For example, on September 15, 2008, Lehman Brothers, a large financial services company, filed for bankruptcy, the largest bankruptcy filing in U.S. history.

² The \$87,000 in management fees only reflects those management fees charged to the capital accounts of the limited partners and not Irvine Management, which has a substantial ownership interest in the Irvine Funds.

Failure to Conduct Timely Audits

11. Pursuant to the Limited Partnership Agreements and PPMs, the Irvine Funds were required to undergo an annual audit. However, between 2007 and 2009, the audits were not conducted and/or completed in a timely manner as indicated in the table below.

Fund	Year	Fiscal Year End	Audit Completed	Time Between Fiscal Year End and the Audit Completion Date
Irvine I	2007	December 31, 2007	October 12, 2010	33 months
Irvine III	2007	December 31, 2007	September 12, 2010	32 months
Irvine I	2008	December 31, 2008	Not Started	NA
Irvine III	2008	December 31, 2008	Not Started	NA
Irvine I	2009	December 31, 2009	Not Started	NA
Irvine III	2009	December 31, 2009	Not Started	NA

If the audits had been conducted, the overstatement of the Issuer's shares at \$112,800 per share may never have occurred because the auditor would have reviewed portfolio valuations for reasonableness, and may have required an independent reasonableness opinion as it had done for prior increases in the valuation of the Issuer's shares. It is important that audits occur in a timely manner because it provides assurance that an independent party has evaluated financial controls and verified the holdings and performance of a fund.

12. As a result of the conduct described above in paragraphs 1 through 11, Bunzel willfully violated and committed and caused violations³ of Section 206(4) of the Advisers Act and Rule 206(4)-8, which prohibit fraudulent, deceptive or manipulative conduct and make it a fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser to a pooled investment vehicle to make an untrue statement of material fact or to omit a material fact to investors or prospective investors in a pooled investment vehicle.⁴

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

⁴ A violation of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder may rest on a finding of simple negligence. *Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles*, IA Rel. No. 2628, at 12-13, n38 (September 10, 2007) (citing *SEC v. Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992)).

IV.

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

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

A. Respondent Bunzel shall cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rule 206(4)-8 thereunder;

B. Respondent Bunzel be, and hereby is, suspended from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent for a period of twelve months;

C. Respondent Bunzel be, and hereby is, prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter for a period of twelve months;

D. Respondent Bunzel be, and hereby is, suspended 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 for a period of twelve months; and

E. Respondent Bunzel shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$100,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Bunzel as a Respondent in these proceedings, the file number of these

proceedings, a copy of which cover letter and money order or check shall be sent to John McCoy, Associate Director, Division of Enforcement, Securities and Exchange Commission, 5670 Wilshire Blvd., Ste. 1100, Los Angeles, CA 90036.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 67146 / June 6, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14910

In the Matter of

**Fashion Fantasia Co.,
Fedders Corp. (n/k/a FC Liquidating, Inc.),
Fifth Dimension, Inc.,
Fischel Holdings, Inc.,
Fortunata, Inc.,
GCA II Acquisition Corp., and
GCA III Acquisition 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 Fashion Fantasia Co., Fedders Corp. (n/k/a FC Liquidating, Inc.), Fifth Dimension, Inc., Fischel Holdings, Inc., Fortunata, Inc., GCA II Acquisition Corp., and GCA III Acquisition Corp.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Fashion Fantasia Co. (CIK No. 1438205) is a New Jersey corporation located in East Brunswick, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fashion Fantasia 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 \$27,000 for the prior nine months.

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2. Fedders Corp. (n/k/a FC Liquidating, Inc.) (CIK No. 744106) is a delinquent Delaware corporation located in Liberty Corner, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fedders 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, 2007, which reported a net loss of over \$31 million for the prior six months. On August 22, 2007, Fedders filed a Chapter 11 petition in the U.S. Bankruptcy court for the District of Delaware, and the case was terminated on March 22, 2011.

3. Fifth Dimension, Inc. (CIK No. 35522) is a New Jersey corporation located in Trenton, New Jersey with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fifth Dimension is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 1998, which reported a net loss of over \$443,000 for the prior six months. On January 6, 1998, Fifth Dimension filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of New Jersey, which was converted to Chapter 7, and the case was terminated on March 10, 2009.

4. Fischel Holdings, Inc. (CIK No. 1374223) 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). Fischel Holdings 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 29, 2006, which reported a net loss of \$421 for the period between its May 10, 2006 inception and June 30, 2006.

5. Fortunata, Inc. (CIK No. 1144466) is a permanently revoked Nevada corporation located in Rocky Point, New York with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fortunata 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 November 7, 2002, which reported a net loss of over \$12,000 for the twelve-month period ended December 31, 2001.

6. GCA II Acquisition Corp. (CIK No. 1379394) 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). GCA II Acquisition 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 August 31, 2008.

7. GCA III Acquisition Corp. (CIK No. 1379395) is a void Delaware corporation located in Minneapolis, Minnesota with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). GCA II 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 November 30, 2007, which reported a net loss of over \$7,000 for the prior six months.

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 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


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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 67151 / June 7, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14911

In the Matter of

**Aegis Assessments, Inc.,
APC Group, Inc.,
Aurelio Resource Corp.,
BioAuthorize Holdings, Inc., and
Fonix Corporation,**

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. Aegis Assessments, Inc. ("AGSI")¹ (CIK No. 1183075) 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). AGSI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended January 31, 2007, which reported a net loss of \$2,456,029 for the prior six months. As of June 5, 2012, the common stock of AGSI 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).

¹The short form of each issuer's name is also its stock symbol.

2. APC Group, Inc. ("APCU") (CIK No. 1354003) is a Nevada corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). APCU 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 August 31, 2009, which reported a net loss of \$327,977 for the prior nine months. As of June 5, 2012, the common stock of APCU 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. Aurelio Resource Corp. ("AULO") (CIK No. 1295803) is a Nevada corporation located in Littleton, Colorado with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AULO 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 net loss of \$2,457,368 for the prior nine months. As of June 5, 2012, the common stock of AULO was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. BioAuthorize Holdings, Inc. ("BAZH") (CIK No. 1129695) is a defaulted Nevada corporation located in Scottsdale, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BAZH 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 net loss of \$66,109 for the prior nine months. As of June 5, 2012, the common stock of BAZH was quoted on OTC Link, had six market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Fonix Corporation ("FNXC") (CIK No. 855585) is a void Delaware corporation located in Lindon, Utah with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). FNXC 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 net loss of \$50,000 for the prior nine months. As of June 5, 2012, the common stock of FNXC was quoted on OTC Link, had eight 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 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 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

June 7, 2012

In the Matter of

**Aegis Assessments, Inc.,
APC Group, Inc.,
Aurelio Resource Corp.,
BioAuthorize Holdings, Inc., and
Fonix Corporation,**

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 Aegis Assessments, Inc. because it has not filed any periodic reports since the period ended January 31, 2007.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of APC Group, Inc. because it has not filed any periodic reports since the period ended August 31, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Aurelio Resource 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 BioAuthorize Holdings, 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 Fonix Corporation because it has not filed any periodic reports since the period ended September 30, 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. EDT on June 7, 2012 through 11:59 p.m. EDT on June 20, 2012.

By the Commission.

Elizabeth M. Murphy
Secretary


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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67164 / June 8, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3388 / June 8, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-13007

_____ : ORDER GRANTING APPLICATION FOR
In the Matter of : REINSTATEMENT TO APPEAR AND PRACTICE
: BEFORE THE COMMISSION AS AN ACCOUNTANT
Kenneth M. Avery, CPA : RESPONSIBLE FOR THE PREPARATION OR
: REVIEW OF FINANCIAL STATEMENTS REQUIRED
_____ : TO BE FILED WITH THE COMMISSION

On April 14, 2008, Kenneth M. Avery, CPA ("Avery") was denied the privilege of appearing or practicing before the Commission as an accountant as a result of settled public administrative proceedings instituted by the Commission against Avery pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.¹ This order is issued in response to Avery's application for reinstatement to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

The Commission found that Avery, an audit partner with the public accounting firm Arthur Andersen LLP ("Andersen"), engaged in improper professional conduct in connection with the audit of the financial statements of WorldCom, Inc. ("WorldCom") for its fiscal year ended December 31, 2001. During 2001, WorldCom improperly removed approximately \$3 billion in line cost expenses from its income statement by improperly and fraudulently characterizing these expenses as "assets" on its balance sheet. Avery failed to comply with Generally Accepted Auditing Standards ("GAAS") by unreasonably: (i) failing to exercise due professional care in the planning and performance of the audit; (ii) failing to exercise an attitude of professional skepticism throughout the audit; (iii) failing to obtain sufficient evidential matter to afford a reasonable basis for Andersen's opinion regarding WorldCom's financial statements; (iv) failing to consider expanding the extent of the audit procedures applied, applying procedures closer to or as of year end, particularly in critical audit areas, or modifying the nature of

¹ See Accounting and Auditing Enforcement Release No. 2809 dated April 14, 2008. Avery was permitted, pursuant to the order, to apply for reinstatement after three years upon making certain showings.

procedures to obtain more persuasive evidence, in light of the significant risks of material misstatement that existed at WorldCom; (v) failing to plan and perform the audit to obtain reasonable assurance about whether the financial statements were free of material misstatement, whether caused by error or fraud; and (vi) issuing an audit report that falsely stated that the audit was conducted in accordance with GAAS and that WorldCom's financial statements were presented in conformity with Generally Accepted Accounting Principles.

In his capacity as a preparer or reviewer, or as a person responsible for the preparation or review, of financial statements of a public company to be filed with the Commission, Avery attests that he will undertake to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, while practicing before the Commission in this capacity. Avery is not, at this time, seeking to appear or practice before the Commission as an independent accountant. If he should wish to resume appearing and practicing before the Commission as an independent accountant, he will be required to submit an application to the Commission showing that he has complied and will comply with the terms of the original suspension order in this regard. Therefore, Avery's suspension from practice before the Commission as an independent accountant continues in effect until the Commission determines that a sufficient showing has been made in this regard in accordance with the terms of the original suspension order.

Rule 102(e)(5) of the Commission's Rules of Practice governs applications for reinstatement, and provides that the Commission may reinstate the privilege to appear and practice before the Commission "for good cause shown."² This "good cause" determination is necessarily highly fact specific.

On the basis of information supplied, representations made, and undertakings agreed to by Avery, it appears that he has complied with the terms of the April 14, 2008 order suspending him from appearing or practicing before the Commission as an accountant, that no information has come to the attention of the Commission relating to his character, integrity, professional conduct, or qualifications to practice before the Commission that would be a basis for adverse action against him pursuant to Rule 102(e) of the Commission's Rules of Practice, and that Avery, by undertaking to have his work reviewed by the independent audit committee of any company for which he works, or in some other manner acceptable to the Commission, in his practice before the Commission as a preparer or reviewer of financial statements required to be filed with the Commission, has shown good cause for reinstatement. Therefore, it is accordingly,

² Rule 102(e)(5)(i) provides:

"An application for reinstatement of a person permanently suspended or disqualified under paragraph (e)(1) or (e)(3) of this section may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown." 17 C.F.R. § 201.102(e)(5)(i).

ORDERED pursuant to Rule 102(e)(5)(i) of the Commission's Rules of Practice that Kenneth M. Avery, CPA is hereby reinstated to appear and practice before the Commission as an accountant responsible for the preparation or review of financial statements required to be filed with the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary

Kevin M. O'Neill

By: Kevin M. O'Neill
Deputy Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

Release No. IA-3418; File No. S7-18-09

RIN 3235-AK39

Political Contributions by Certain Investment Advisers: Ban on Third-Party Solicitation; Extension of Compliance Date

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; extension of compliance date.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is extending the date by which advisers must comply with the ban on third-party solicitation in rule 206(4)-5 under the Investment Advisers Act of 1940, the “pay to play” rule. The Commission is extending the compliance date in order to ensure an orderly transition for advisers and third-party solicitors as well as to provide additional time for them to adjust compliance policies and procedures after the transition.

DATES: *Effective date:* The effective date for this release is [insert date of filing at the Federal Register]. The effective date for the ban on third-party solicitation under rule 206(4)-5 of the Investment Advisers Act of 1940 remains September 13, 2010.

Compliance date: The compliance date for the ban on third-party solicitation is extended until nine months after the compliance date of a final rule adopted by the Commission by which municipal advisor firms must register under the Securities Exchange Act of 1934. Once such final rule is adopted, we will issue the new compliance date for the ban on third-party solicitation in a notice in the Federal Register.

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FOR FURTHER INFORMATION CONTACT: Vanessa M. Meeks, Attorney-Adviser, or Melissa A. Rovers, Branch Chief, at (202) 551-6787 or IARules@sec.gov, Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: On July 1, 2010, the Commission adopted rule 206(4)-5 [17 CFR 275.206(4)-5] (the “Pay to Play Rule”) under the Investment Advisers Act of 1940 [15 USC 80b] (“Advisers Act”) to prohibit an investment adviser from providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees (“covered associates”) make a contribution to certain elected officials or candidates.¹ As adopted, rule 206(4)-5 also prohibited an adviser and its covered associates from providing or agreeing to provide, directly or indirectly, payment to any third-party for a solicitation of advisory business from any government entity on behalf of such adviser, unless such third-party was an SEC-registered investment adviser or a registered broker or dealer subject to pay to play restrictions adopted by a registered national securities association (the “third-party solicitor ban”).² Rule 206(4)-5 became effective on September 13, 2010, and, as adopted, the third-party solicitor ban’s compliance date was September 13, 2011. This compliance date was intended to provide advisers and third-party solicitors with sufficient time to conform their business practices to the rule, and to revise their compliance policies and procedures to prevent a violation. In addition, the transition period was intended to provide an

¹ *Political Contributions by Certain Investment Advisers*, Investment Advisers Act Rel. No. 3043 (July 1, 2010) [75 FR 41018 (July 14, 2010)] (“Pay to Play Release”).

² *See id.* at Section II.B.2.(b). The Commission must find, by order, that those restrictions: (i) impose substantially equivalent or more stringent restrictions on broker-dealers than the Pay to Play Rule imposes on investment advisers; and (ii) are consistent with the objectives of the Pay to Play Rule.

opportunity for a registered national securities association to adopt a pay to play rule and for the Commission to assess whether that rule met the requirements of rule 206(4)-5(f)(9)(ii)(B).³ It was our understanding at the time, and it still is, that FINRA is planning to propose a rule that would meet those requirements, but we also suggested that we may need to take further action to ensure an orderly transition.⁴

Not long after the Pay to Play Rule was adopted, Congress created a new category of Commission registrants called “municipal advisors” in the Dodd-Frank Act. The statutory definition of municipal advisor includes persons that undertake “a solicitation of a municipal entity.”⁵ These solicitors would be registered with us and also subject to regulation by the Municipal Securities Rulemaking Board (“MSRB”). In September 2010, we adopted an interim final rule establishing a temporary means for municipal advisors to satisfy the registration requirement.⁶ In December 2010, we proposed permanent rules and forms that would interpret the term “municipal advisor” and create a new process by which municipal advisors must register with the SEC.⁷ On January 14, 2011, the MSRB requested comment on a draft proposal

³ See note 2. While rule 206(4)-5 applies to any registered national securities association, the Financial Industry Regulatory Authority, or FINRA, is currently the only registered national securities association under section 19(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78s(b)]. As such, for convenience, we will refer directly to FINRA in this Release when describing the exception for certain broker-dealers from the third-party solicitor ban.

⁴ See *id.* at Section III.B.

⁵ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) at section 975.

⁶ The Dodd-Frank Act required municipal advisors to be registered with the Commission by October 2010. See section 975 of the Dodd-Frank Act.

⁷ See *Registration of Municipal Advisors*, Exchange Act Release No. 63576 (Dec. 20, 2010) [76 FR 824, (Jan. 6, 2011)].

to establish a number of rules applicable to municipal advisors, including a pay to play rule.⁸ In December 2011, we extended the expiration date of the interim final rule to September 30, 2012.⁹

With the understanding that municipal advisors would be subject to permanent registration requirements with the Commission and could be subject to an MSRB pay to play rule, on June 22, 2011, we amended the Pay to Play Rule to add municipal advisors to the categories of registered entities—referred to as “regulated persons”—excepted from the rule’s third-party solicitor ban.¹⁰ For a municipal advisor to qualify as a “regulated person,” it must be registered with us as such and subject to a pay to play rule adopted by the MSRB. In addition, the Commission must find, by order, that the MSRB rule: (i) imposes substantially equivalent or more stringent restrictions on municipal advisors than the Pay to Play Rule imposes on investment advisers; and (ii) is consistent with the objectives of the Advisers Act Pay to Play Rule. The Commission also extended the date by which advisers must comply with the ban on third-party solicitation from September 13, 2011 to June 13, 2012 due to the expansion of the definition of “regulated persons.” The extension was intended, again, to provide sufficient time for an orderly transition.¹¹

Soon thereafter, on August 19, 2011, the MSRB filed a proposal with the Commission that included a new pay to play rule regarding the solicitation activities of municipal advisors

⁸ See MSRB, *Request for Comment on Pay to Play Rule for Municipal Advisors*, MSRB Notice 2011-04 (Jan. 14, 2011) available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-04.aspx?n=1>.

⁹ *Extension of Temporary Registration of Municipal Advisors*, Exchange Act Release No. 66020 (Dec. 21, 2011) [76 FR 80733 (Dec. 27, 2011)].

¹⁰ *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Rel. No. 3221 (June 22, 2011) [76 FR 42950 (July 19, 2011)] (“Implementing Release”).

¹¹ See *id.* at section II.D.1.

and amendments to several existing MSRB rules related to pay to play practices.¹² On September 9, 2011, the MSRB withdrew the proposals, stating that it intends to resubmit them upon our adoption of a permanent definition of the term “municipal advisor.”¹³

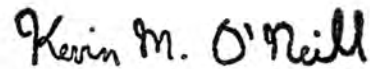
In order to ensure an orderly transition for advisers and third-party solicitors as well as to provide additional time for them to adjust compliance policies and procedures after the transition, we believe that an extension of the compliance date for the Pay to Play Rule’s third-party solicitor ban is appropriate until nine months after the compliance date of a final rule adopted by the Commission by which municipal advisor firms must register under the Securities Exchange Act of 1934. Final rules as to who must register as a municipal advisor, and the process for doing so, will provide clarity to persons who may qualify as municipal advisors, and the investment advisers who may hire them, as to status and registration obligations under these future Commission rules. The new compliance date will also allow all solicitors to assess compliance obligations with pay to play rules that may be adopted by FINRA or the MSRB.

¹² See *Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed New Rule G-42, on Political Contributions and Prohibitions on Municipal Advisory Activities; Proposed Amendments to Rules G-8, on Books and Records, G-9, on Preservation of Records, and G-37, on Political Contributions and Prohibitions on Municipal Securities Business; Proposed Form G-37/G-42 and Form G-37x/G-42x; and a Proposed Restatement of a Rule G-37 Interpretive Notice*, Exchange Act Release No. 65255 (Sept. 2, 2011) [76 FR 55976 (Sept. 9, 2011)]; MSRB, *MSRB Files Pay to Play Rule for Municipal Advisors and Changes to Dealer Pay to Play Rule*, MSRB Notice 2011-46 (Aug. 19, 2011) available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-46.aspx>. The proposal consisted of (i) proposed MSRB Rule G-42 (on political contributions and prohibitions on municipal advisory activities); (ii) proposed amendments that would make conforming changes to MSRB Rules G-8 (on books and records), G-9 (on preservation of records), and G-37 (on political contributions and prohibitions on municipal securities business); (iii) proposed Form G-37/G-42 and Form G-37x/G-42x; and (iv) a proposed restatement of a Rule G-37 interpretive notice issued by the MSRB in 1997.

¹³ See MSRB, *MSRB Withdraws Pending Municipal Advisor Rule Proposals*, MSRB Notice 2011-51 (Sept. 12, 2011) available at <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-51.aspx>.

The Commission finds that, for good cause and the reasons cited above, notice and solicitation of comment regarding the extension of the compliance date for the ban on third-party solicitation under rule 206(4)-5 are impracticable, unnecessary, or contrary to the public interest.¹⁴ In this regard, the Commission also notes that investment advisers need to be informed as soon as possible of the extension in order to plan and adjust their implementation process accordingly.

By the Commission.



Kevin M. O'Neill
Deputy Secretary

Dated: June 8, 2012

¹⁴ See Section 553(b)(3)(B) of the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)) (“APA”) (an agency may dispense with prior notice and comment when it finds, for good cause, that notice and comment are “impracticable, unnecessary, or contrary to the public interest”). This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are “impractical, unnecessary or contrary to the public interest,” a rule “shall take effect at such time as the federal agency promulgating the rule determines”). Also, because the Regulatory Flexibility Act (5 U.S.C. 601 – 612) only requires agencies to prepare analyses when the APA requires general notice of rulemaking, that Act does not apply to the actions that we are taking in this release. The change to the compliance date is effective upon publication in the Federal Register. This date is less than 30 days after publication in the Federal Register, in accordance with the APA, which allows effectiveness in less than 30 days after publication for “a substantive rule which grants or recognizes an exemption or relieves a restriction.” See 5 U.S.C. 553(d)(1).

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-67177; File No. S7-05-12

STATEMENT OF GENERAL POLICY ON THE SEQUENCING OF THE COMPLIANCE DATES FOR FINAL RULES APPLICABLE TO SECURITY-BASED SWAPS ADOPTED PURSUANT TO THE SECURITIES EXCHANGE ACT OF 1934 AND THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

AGENCY: Securities and Exchange Commission.

ACTION: Notice of statement of general policy with request for public comment.

SUMMARY: We are requesting public comment on a statement of general policy (“Statement”) on the anticipated sequencing of the compliance dates of final rules to be adopted by the Securities and Exchange Commission pursuant to certain provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Securities Exchange Act of 1934, as amended by those provisions (“Exchange Act”). These provisions establish a framework for the regulation of security-based swaps and security-based swap market participants under the Exchange Act. The Statement presents a sequencing of the compliance dates for these final rules by grouping the rules into five categories and describes the interconnectedness of the compliance dates for these rules, both within and among the five categories. The Statement also describes the timing of the expiration of the relief previously granted by the Commission that provided exemptions from certain provisions of the Exchange Act, the Securities Act of 1933, and the Trust Indenture Act of 1939.

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

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

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Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/policy.shtml>);
- Send an email to rule-comments@sec.gov. Please include File Number S7-05-12 on the subject line; or
- Use the Federal Rulemaking portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File No. S7-05-12. 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. We will post all comments on the Commission's Internet website (<http://www.sec.gov>). Comments also are available for website viewing and printing at the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Ann Parker McKeehan, Special Counsel, Office of Derivatives Policy, Division of Trading and Markets, at (202) 551-5797, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, or, with respect to the Securities Act of 1933, the Trust Indenture Act of 1939, and Exchange Act section 12, Andrew Schoeffler, Special Counsel, Office of Capital Markets Trends, Division of Corporation Finance,

at (202) 551-3860, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND AND OVERVIEW OF STATEMENT

A. Background

On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Act”) into law.¹ The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.² Title VII of the Dodd-Frank Act (“Title VII”) establishes a regulatory regime applicable to the over-the-counter (“OTC”) derivatives markets by providing the Securities and Exchange Commission (“Commission” or “we”) and the Commodity Futures Trading Commission (“CFTC”) with authority to oversee these heretofore largely unregulated markets.³ Title VII provides that the CFTC will regulate “swaps,” the Commission will regulate “security-based swaps,” and the CFTC and the Commission will jointly regulate “mixed swaps.”⁴

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² See, e.g., Pub. L. No. 111-203, Preamble.

³ Generally, Subtitle A of Title VII creates and relates to the regulatory regime for swaps, while Subtitle B of Title VII creates and relates to the regulatory regime for security-based swaps.

⁴ Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System, shall further define the terms “swap,” “security-based swap,” “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” “eligible contract participant,” and “security-based swap agreement.” These terms are defined in sections 721 and 761 of the Dodd-Frank Act and the Commission and the CFTC have proposed to further define these terms in joint rulemakings. See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, Release No. 34-63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010) (“Entity Definitions Proposing Release”); and Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Release No. 33-9204 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011), corrected in Release No. 33-9204A (June 1, 2011), 76 FR 32880 (June 7, 2011) (“Product Definitions Proposing Release”). The rules further defining the terms “swap dealer,” “major swap participant,” “security-based swap dealer,” “major security-based

Title VII amends the Securities Act of 1933 (“Securities Act”)⁵ and the Exchange Act⁶ to substantially expand the regulation of the security-based swap (“SB swap”) market by establishing a new regulatory framework intended to make this market more transparent, efficient, fair, accessible, and competitive.⁷ The Title VII amendments to the Exchange Act require, among other things, the following: (1) registration and comprehensive oversight of security-based swap dealers (“SBSDs”) and major security-based swap participants (“MSBSPs”);⁸ (2) reporting of SB swaps to a registered security-based swap data repository (“SDR”), or to the Commission (if the SB swap is uncleared and no SDR will accept the SB swap), and dissemination of SB swap information to the public;⁹ (3) clearing of SB swaps at a registered clearing agency (or a clearing agency that is exempt from registration) if the Commission makes a determination that such SB swaps are required to be cleared, unless an exception from the mandatory clearing requirement applies;¹⁰ and (4) if an SB swap is subject to

swap participant,” and “eligible contract participant” were adopted by the Commission on April 27, 2012 and published in the Federal Register on May 23, 2012. See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, Release No. 34-66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (“Entity Definitions Adopting Release”).

⁵ 15 U.S.C. 77a et seq.

⁶ 15 U.S.C. 78a et seq.

⁷ See generally Subtitle B of Title VII.

⁸ See section 15F of the Exchange Act, 15 U.S.C. 78o-10.

⁹ See section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75) (defining the term “security-based swap data repository”); section 13(m) of the Exchange Act (regarding public availability of SB swap data); section 13(n) of the Exchange Act (regarding requirements related to SDRs); and section 13A of the Exchange Act (regarding reporting and recordkeeping requirements for certain SB swaps). See also Security-Based Swap Data Repository Registration, Duties, and Core Principles, Release No. 34-63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010); corrected at 75 FR 79320 (Dec. 20, 2010) and 76 FR 2287 (Jan. 13, 2011) (“SDR Proposing Release”); and Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, Release No. 34-63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) (“Regulation SBSR Proposing Release”).

¹⁰ See section 3C(a)(1) of the Exchange Act, 15 U.S.C. 78c-3(a)(1). See also Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical

the clearing requirement, execution of the SB swap transaction on an exchange, on a security-based swap execution facility (“SB SEF”) registered under the Exchange Act,¹¹ or on an SB SEF that has been exempted from registration by the Commission under the Exchange Act,¹² unless no SB SEF or exchange makes such SB swap available for trading.¹³ Title VII also amends the Securities Act and the Exchange Act to include “security-based swaps” in the definition of “security” for the purposes of those statutes.¹⁴ As a result, “security-based swaps” are subject to the provisions of the Securities Act and the Exchange Act and the rules thereunder applicable to “securities.”

Since the Dodd-Frank Act was enacted, the Commission has adopted joint rules with the CFTC further defining the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant”¹⁵ and has proposed rules in the following twelve areas required by Title VII:

1. Rules prohibiting fraud and manipulation in connection with SB swaps;¹⁶

Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010) (“Clearing Procedures Proposing Release”).

¹¹ 15 U.S.C. 78c-4.

¹² Id. at 78c-4(e).

¹³ See section 3C(g) of the Exchange Act, 15 U.S.C. 78c-3(g) and section 3C(h) of the Exchange Act, 15 U.S.C. 78c-3(h). See also section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(77) (defining the term “security-based swap execution facility”). See also Registration and Regulation of Security-Based Swap Execution Facilities, Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (“SB SEF Proposing Release”).

¹⁴ See sections 761(a)(2) and 768(a)(1) of the Dodd-Frank Act (amending sections 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), and 2(a)(1) of the Securities Act, 15 U.S.C. 77b(a)(1), respectively). The Dodd-Frank Act also amended the Securities Act to provide that SB swaps could not be used by an issuer, its affiliates, or underwriters to circumvent the registration requirement of section 5 of the Securities Act with respect to the issuer’s securities underlying the SB swap. See section 768(a) of the Dodd-Frank Act (amending section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3)).

¹⁵ See Entity Definitions Adopting Release.

¹⁶ See Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Release No. 34-63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010) (“SB Swap Antifraud Proposing Release”).

2. Rules regarding trade reporting and real-time public dissemination of trade information for SB swaps that would lay out who must report SB swaps, what information must be reported, and where and when such information must be reported;¹⁷
3. Rules regarding the SDR registration process and the obligations of SDRs, including confidentiality and other requirements with which they must comply;¹⁸
4. Rules relating to mandatory clearing of SB swaps that would specify the process for a registered clearing agency's submission for review of SB swaps that the clearing agency plans to accept for clearing and rules to establish a process for a registered clearing agency to file advance notices with the Commission pursuant to Title VIII of the Dodd-Frank Act;¹⁹
5. Rules regarding the steps that a party electing to use the end-user exception to the mandatory clearing requirement must follow to notify the Commission of how it generally meets its financial obligations associated with non-cleared SB swap transactions when it is using SB swaps to hedge or mitigate commercial risk;²⁰
6. Rules regarding the confirmation of SB swap transactions that would govern the way in which certain of these transactions are acknowledged and verified by the parties who enter into them;²¹
7. Rules defining and regulating SB SEFs, which would specify their registration requirements, establish the duties, and implement the core principles for SB SEFs specified in Title VII;²²

¹⁷ See Regulation SBSR Proposing Release.

¹⁸ See SDR Proposing Release.

¹⁹ See Clearing Procedures Proposing Release.

²⁰ See End-User Exception of Mandatory Clearing of Security-Based Swaps, Release No. 34-63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) (“End-User Exception Proposing Release”).

²¹ See Trade Acknowledgment and Verification on Security-Based Swap Transactions, Release No. 34-63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) (“Trade Documentation Proposing Release”).

8. Rules regarding certain standards that clearing agencies would be required to maintain with respect to, among other things, their risk management and operations;²³
9. Joint rules with the CFTC further defining the terms “swap,” “security-based swap,” and “security-based swap agreement” and regarding the regulation of mixed swaps and SB swap agreement recordkeeping;²⁴
10. Rules regarding business conduct that would establish certain minimum standards of conduct for SBSDs and MSBSPs, including in connection with their dealings with “special entities,” which include municipalities, pension plans, endowments and similar entities;²⁵
11. Rules regarding the registration process for SBSDs and MSBSPs;²⁶ and
12. Rules intended to mitigate conflicts of interest at SB swap clearing agencies, SB SEFs, and exchanges that trade SB swaps.²⁷

In addition, the Commission intends to propose rules establishing capital, margin, and segregation requirements applicable to SBSDs and MSBSPs pursuant to Exchange Act sections 3E²⁸ and 15F(e)²⁹ and rules regarding the reporting and recordkeeping requirements to which

²² See SB SEF Proposing Release.

²³ See Clearing Agency Standards for Operation and Governance, Release No. 34-64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011) (“Clearing Agency Standards Proposing Release”).

²⁴ See Product Definitions Proposing Release.

²⁵ See Business Conduct Standards for Security-Based Swaps Dealer and Major Security-Based Swap Participants, Release No. 34-64766 (June 29, 2011), 76 FR 42396 (July 18, 2011) (“Business Conduct Standards Proposing Release”).

²⁶ See Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Release No. 34-65543 (Oct. 12, 2011), 76 FR 65784 (Oct. 24, 2011) (“SB Swap Participant Registration Proposing Release”).

²⁷ See Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC, Release No. 34-63107, (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) (“Proposed Regulation MC”).

²⁸ 15 U.S.C. 78c-5.

SBSDs and MSBSPs will be subject pursuant to Exchange Act section 15F(f).³⁰ The Commission also intends to address the international implications of Title VII in a single proposal that would present an approach to the registration and regulation of foreign entities engaged in cross-border SB swap transactions, among other areas.³¹

Moreover, while not mandated by Title VII, the Commission has adopted exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act of 1939 (“Trust Indenture Act”) for SB swaps issued by certain clearing agencies satisfying specified conditions to facilitate the intent of Title VII with respect to the clearing of SB swaps.³²

The provisions of Title VII were generally effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act, the “Effective Date”), unless a provision required a rulemaking, in which case such provision would go into effect “not less than” 60 days after publication of the related final rules in the Federal Register or on July 16, 2011, whichever is

²⁹ Id. at 78o-10(e).

³⁰ Id. at 78o-10(f).

³¹ The Commission also adopted an interim final temporary rule that required counterparties to SB swaps entered into prior to the date of enactment of the Dodd-Frank Act, the terms of which had not expired as of that date, to report certain information relating to such SB swaps to a registered SDR, after such registered SDR is operational, or to the Commission and to report information relating to such SB swaps to the Commission upon request. The Commission also issued an interpretive note to the rule requiring counterparties to retain information relating to the terms of such SB swaps. See Reporting of Security-Based Swap Transaction Data, Release No. 34-63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010). This interim final temporary rule was to remain in effect until the earlier of the operative date of the permanent recordkeeping and reporting rules for SB swap transactions to be adopted by the Commission or January 12, 2012. Commission staff currently is considering what further action, if any, to recommend the Commission take with regard to the interim final temporary rule and interpretive note.

³² See Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33-9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). These exemptions supplant the temporary exemptions the Commission adopted to facilitate the operation of clearing agencies as central counterparties for eligible credit default swaps. See Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009). See also Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9232 (Jul. 1, 2011), 76 FR 40223 (Jul. 8, 2011) (extending the expiration date of the temporary exemptions until April 16, 2012).

later.³³ Because the Commission did not complete its rulemaking prior to the Effective Date, we took a number of actions intended to clarify which U.S. securities laws would apply to security-based swaps as of July 16, 2011 and to provide exemptions from certain provisions of the Securities Act, the Exchange Act, and the Trust Indenture Act.

First, the Commission provided guidance as to which of the requirements of the Exchange Act, as amended by Title VII, would apply to SB swap transactions as of the Effective Date and granted temporary relief to market participants from compliance with certain of those requirements.³⁴ As a result, SB swap market participants were not required to comply with substantially all of Title VII's requirements applicable to SB swaps under the Exchange Act. The expiration dates of the temporary exemptions granted pursuant to the Effective Date Order are triggered by the effective or compliance dates for certain final rules required to be adopted by the Commission pursuant to Title VII.³⁵

Second, the Commission approved an order granting temporary relief and providing interpretive guidance to make it clear that a substantial number of the requirements of the Exchange Act would not apply to SB swaps when the revised definition of "security" went into effect on July 16, 2011.³⁶ Additionally, this order provided temporary relief from provisions of the Exchange Act that allow the voiding of contracts made in violation of those laws.³⁷ The

³³ See section 774 of the Dodd-Frank Act, 15 U.S.C. 77b note.

³⁴ Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, and Request for Comment, Release No. 34-64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) ("Effective Date Order").

³⁵ See Effective Date Order at 36306-7.

³⁶ Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment, Release No. 34-64795 (July 1, 2011), 76 FR 39927 (July 7, 2011) ("Exchange Act Exemptive Order").

³⁷ Id. at 39930, 39940.

exemptions granted will expire upon the compliance dates of certain of the rules required to be promulgated pursuant to Title VII, including rules further defining the terms “security-based swap” and “eligible contract participant”³⁸ and the rules regarding the registration of SB SEFs.³⁹

Third, the Commission provided, until the compliance date for the final rules to be adopted by the Commission further defining the terms “security-based swap” and “eligible contract participant,”⁴⁰ interim exemptions from all provisions of the Securities Act (other than the section 17(a) antifraud provisions), the registration requirements of the Exchange Act relating to classes of securities, and the indenture provisions of the Trust Indenture Act for those SB swaps that would have been, prior to the Effective Date, within the definition of “security-based swap agreement” under Securities Act section 2A⁴¹ and Exchange Act section 3A⁴² and are entered into solely between eligible contract participants (as defined prior to the Effective Date).⁴³ As a result, pursuant to the interim exemptions, the offer and sale of such SB swaps between eligible contract participants may be made pursuant to exemptions under the Securities

³⁸ Id. at 39938.

³⁹ Id. at 39939.

⁴⁰ Further definition of the term “security-based swap” was proposed in the Product Definitions Proposing Release and the term “eligible contract participant” was further defined in the Entity Definitions Adopting Release.

⁴¹ 15 U.S.C. 77b(b)-1.

⁴² Id. at 78c-1.

⁴³ Exemptions for Security-Based Swaps, Release No. 33-9231 (July 1, 2011), 76 FR 40605 (July 11, 2011) (“SB Swaps Interim Final Rule”). These interim exemptions will expire upon the compliance date for the final rules further defining the terms “security-based swap” and “eligible contract participant.” Further, the Division of Corporation Finance issued a no-action letter that addressed the availability of these interim exemptions to offers and sales of SB swaps that are based on or reference only loans or indexes only of loans. See Cleary Gottlieb Steen & Hamilton LLP (July 15, 2011) (“Clearly Gottlieb Letter”). We understand that Commission staff intends to withdraw the Cleary Gottlieb Letter upon the expiration of these interim exemptions.

Act without registration of the class under Exchange Act sections 12(a) and 12(g), and without qualification of an indenture under the Trust Indenture Act.⁴⁴

As previously announced, the Commission has been considering how to implement the new requirements that will be applicable to SB swaps pursuant to the rules described above in a practical and efficient manner that avoids unnecessary disruption to the SB swap market.⁴⁵ As noted in the Effective Date Order, the Commission has the ability to establish effective dates and compliance dates – which may be later than the effective dates – for provisions of Title VII that are subject to rulemaking.⁴⁶ Given this ability, the Commission seeks to sequence the implementation of the final rules to be adopted pursuant to Title VII of the Dodd-Frank Act in an appropriate manner.

To engage the public on these issues, the staffs of the Commission and the CFTC held a two-day joint public roundtable on May 2 – 3, 2011, to discuss the sequencing of the implementation of the final rules to be adopted under Title VII.⁴⁷ In connection with this roundtable, the Commission and the CFTC solicited comment on issues pertaining to the phased implementation of Title VII's final rules.⁴⁸ Additionally, the Commission and the CFTC have received comment letters in response to specific rules proposed under and orders issued in connection with Title VII that address implementation issues pertaining to those rules, as well as implementation issues more generally.

⁴⁴ SB Swaps Interim Final Rule at 40611-2.

⁴⁵ See Financial Regulatory Reform: The International Context: Hearing Before the H. Comm. on Fin. Serv., 112th Cong. 18 (2011) (statement of Mary L. Schapiro, Chairman of the Commission).

⁴⁶ See Effective Date Order at 36289.

⁴⁷ See Joint Public Roundtable on Issues Related to the Schedule for Implementing Final Rules for Swaps and Security-Based Swaps Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Release No. 34-64314 (Apr. 20, 2011), 76 FR 23221 (Apr. 26, 2011) (Request for Comment; Notice of Roundtable Discussion).

⁴⁸ See id.

Many commenters have noted that the Commission and the CFTC have the flexibility to phase in or sequence the issuance of final rules, as well as the compliance dates for those rules, in a manner that produces an orderly implementation plan,⁴⁹ as opposed to a “big bang” approach where all of the rules to be adopted under Title VII go into effect simultaneously.⁵⁰ Commenters have advocated that such an implementation plan should allow market participants enough time to come into compliance with rules to be adopted under Title VII⁵¹ and be sequenced in some manner to provide for differing compliance dates depending upon the requirements involved.⁵²

⁴⁹ See, e.g., letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 1 (CFTC only letter; stating that the CFTC “should phase in the implementation of the Dodd-Frank Act rules over time”); letter from Edison Electric Institute (June 3, 2011), 76 FR 25274, at 7 (CFTC only letter); letter from Morgan Stanley (Nov. 1, 2010), File No. S7-16-10, at 6 (noting that “Dodd-Frank does not require application of the various requirements across all over-the-counter products on a single effective date or a limited range of effective dates. To the contrary, the statute permits and even contemplates that implementation of the requirements will be phased in over time, as appropriate and necessary to the continued operation of the markets.”); letter from NextEra Energy Resources, LLC (Mar. 11, 2011), 75 FR 80174, at 4 (CFTC only letter; noting that “[t]he market place is far better served if the [CFTC] considers all of the final rules in a comprehensively organized and logical fashion.”).

⁵⁰ See, e.g., letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 1 (CFTC only letter; “we believe that market participants should be given sufficient time to properly understand and prepare themselves to comply with the new regulatory requirements.”); letter from Managed Funds Association, MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act (Mar. 24, 2011), 76 FR 3698, at 1 (CFTC only letter); letter from Tradeweb Markets LLC (June 3, 2011), 76 FR 25274, at 2 (CFTC only letter; “[a]t the outset, we encourage the [CFTC] to implement the regulatory requirements over time rather than all at once because a ‘big bang’ approach to implementation would be too disruptive to the marketplace – particularly given the breadth and complexity of the new rules to be implemented and the varying states of readiness of market participants.”).

⁵¹ See, e.g., letter from American Bankers Association, ABA Securities Association, The Clearing House Association L.L.C., Financial Services Forum, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Managed Funds Association, and Securities Industry and Financial Markets Association (Dec. 6, 2010) (“December Trade Association Letter”), Commission “Other Comments” file, at 3 (stating that “[t]o implement a complex new regulatory structure without adequate time to adapt, prepare, and test systems also could lead to an ineffective or poorly designed reporting, clearing, and exchange infrastructure...”); letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 1 (CFTC only letter; noting that “market participants should be given sufficient time to properly understand and prepare themselves to comply with the new regulatory requirements.”); letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 4-5; letter from Investment Company Institute (June 10, 2011), 75 FR 76139, at 6 (“[p]hasing in the rules will provide market participants with essential time to identify the cumulative impact of the rule changes, build upon the actions of other market participants, and manage the cumulative costs of the rule changes.”).

⁵² See, e.g., letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 7-8 (recommending that Title VII’s requirements be phased in by asset class and market participant type);

In September 2011, the CFTC published two notices of proposed rulemakings⁵³ that propose to phase in compliance with the swap clearing, trading, trade documentation, and margining requirements of Subtitle A of Title VII of the Dodd-Frank Act⁵⁴ by category of market participant in the following manner:

- Category 1 Entities, which would include swap dealers, SBSBs, major swap participants and MSBSPs that will be required to register with the CFTC or the Commission and “active funds” (defined as any private fund, as defined in section 202(a) of the Investment Advisers Act of 1940,⁵⁵ that is not a third-party subaccount and that executes 20 or more swaps per month based upon a monthly average over the 12 months preceding the CFTC issuing a mandatory clearing determination), would be required to comply with the clearing, trading, trade documentation and margining requirements for swaps entered into by Category 1 Entities within 90 days (1) after the CFTC issues any clearing determination or 30 days after a swap is made available to trade, whichever is later; and (2) after the adoption of the final trade documentation or margining rule, as relevant.

letter from Investment Company Institute (June 10, 2011), 75 FR 76139, at 11; letter from Swaps & Derivatives Market Association (June 1, 2011), File No. S7-06-11, at 2, 5 (recommending that at each phase of implementation (namely, clearing, trading and data reporting), compliance should be further sequenced by market participant, with “those with the highest volume share....lead[ing] the implementation, allowing less frequent users more time to comply.”).

⁵³ Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA (Sept. 8, 2011), 76 FR 58186 (Sept. 20, 2011) (“CFTC Clearing and Trade Execution Implementation Proposal”); Swap Transaction Compliance and Implementation Schedule: Trading Documentation and Margining Requirements under Section 4s of the CEA (Sept. 8, 2011), 76 FR 58176 (Sept. 20, 2011) (“CFTC Trading Documentation and Margining Implementation Proposal”).

⁵⁴ The analogues to the CFTC Clearing and Trade Execution Implementation Proposal and the trade documentation portion of the CFTC Trading Documentation and Margining Implementation Proposal are the Commission’s rule proposals set forth in the Clearing Procedures Proposing Release, the SB SEF Proposing Release, and the Trade Documentation Proposing Release. The analogue to the margining proposals in the CFTC Trading Documentation and Margining Implementation Proposal is the Commission’s forthcoming proposed rules on margin requirements for SBSBs and MSBSPs.

⁵⁵ 15 U.S.C. 80b-2(a).

- Category 2 Entities, which would include commodity pools, a private fund as defined in section 202(a) of the Investment Advisers Act of 1940⁵⁶ other than an active fund, employee benefit plans as defined under the Employee Retirement Income Security Act (“ERISA”),⁵⁷ and persons predominantly engaged in activities that are financial in nature as defined under the Bank Holding Company Act,⁵⁸ provided that the entity is not a third-party subaccount, would be required to comply with the clearing, trading, trade documentation and margining requirements for swaps entered into by Category 2 Entities within 180 days (1) after the CFTC issues any clearing determination or 30 days after a swap is made available to trade, whichever is later; and (2) after the adoption of the final trade documentation or margining rule, as relevant.
- Category 3 Entities, which would include third party sub-accounts and “all other swap transactions not excepted from the mandatory clearing requirement”, would be required to comply with the clearing, trading, trade documentation and margining requirements for swaps entered into by Category 3 Entities within 270 days (1) after the CFTC issues any clearing determination or 30 days after a swap is made available to trade, whichever is later; and (2) after the adoption of the final trade documentation or margining rule, as relevant.
- With regard to the trade documentation and margining requirements, the CFTC Trading Documentation and Margining Implementation Proposal adds an additional fourth category of entities – Category 4 Entities – for any persons not included in Categories 1 through 3.

⁵⁶ Id.

⁵⁷ Pub. L. No. 93-406, 88 Stat. 829 (1974).

⁵⁸ 12 U.S.C. 1841 et seq.

Under this proposal, Category 4 Entities would be subject to the same compliance date scheduling as Category 3 Entities.

In its Clearing and Trade Execution Implementation Proposal and its Trading Documentation and Margining Implementation Proposal, the CFTC did not propose specific adoption or compliance dates for rules, but did note that certain final rules must be adopted before compliance with others would be required. For example, the CFTC noted in its Clearing and Trade Execution Implementation Proposal that before the mandatory clearing of swaps begins, the final rules establishing the product and entity definitions, the end-user exception from mandatory clearing, and pertaining to the segregation of customer collateral must be adopted and that before swap market participants could be required to comply with a trade execution requirement, the CFTC must adopt final rules related to swap execution facilities and designated contract markets.⁵⁹

B. Overview of Statement

In order to better effectuate the purposes of Title VII and to address the comments received from market participants, the Commission has developed, and is seeking public comment on, this Statement, which discusses issues pertaining to, and presents a general sequence for, the anticipated compliance dates of final rules to be adopted by the Commission under Subtitle B of Title VII. The issues discussed in this Statement are set out in relation to the following five categories of rules:⁶⁰ (1) the rules further defining the terms “security-based swap,” “security-based swap agreement,” “mixed swap,” “security-based swap dealer,” “major

⁵⁹ See CFTC Clearing and Trade Execution Implementation Proposal at 58188-9.

⁶⁰ For the purposes of this Statement, the Commission has categorized the twelve rule proposals and one adopting release the Commission has published pursuant to Title VII (other than the SB Swap Antifraud Proposing Release, compliance with which will be addressed in the release adopting the final rules contemplated therein) along with the proposals the Commission has yet to publish, as described above, into five categories.

security-based swap participant,” and “eligible contract participant,” (the “Definitional Rules”) and the rules concerning the treatment of cross-border SB swap transactions and non-U.S. persons acting in capacities regulated under Subtitle B of Title VII (the “Cross-Border Rules”); (2) rules pertaining to the registration and regulation of SDRs, the reporting of SB swap transaction data to SDRs, and the public dissemination of SB swap transaction data; (3) rules pertaining to the mandatory clearing process of SB swap transactions, clearing agency standards, and the end-user exception from mandatory clearing; (4) rules pertaining to the registration and regulation of SBSs and MSBSPs; and (5) rules pertaining to the mandatory trading of SB swap transactions, including the rules pertaining to the registration and regulation of SB SEFs.

The first category of rules affects compliance with rules in the other four categories. As a result, the Commission believes the Definitional Rules would need to be adopted and effective prior to requiring compliance with any of the other rules to be adopted under Title VII of the Dodd-Frank Act. The Definitional Rules would help inform market participants as to whether they will be subject to the requirements of Subtitle B of Title VII, section 12 of the Exchange Act, and the relevant provisions of the Securities Act and the Trust Indenture Act. Additionally, the Commission generally believes the Cross-Border Rules should be proposed before final rules with cross-border implications are adopted. We believe the Commission would benefit by being able to take into account comments on its proposed approach to cross-border issues before final rules with cross-border implications are adopted.⁶¹

With regard to the rules in the remaining four categories, the Statement describes the interconnectedness of the compliance dates of the final rules within one category, and where

⁶¹ For example, before requiring compliance with the registration requirements for SBSs, the Commission believes the proposed applicability of such registration requirements to non-U.S. persons should be addressed and subject to public comment.

applicable, the impact of compliance dates of final rules within one category upon those of another category. The Statement also discusses the dependencies that exist between the categories of rules. The Statement does not provide specific compliance dates for the final rules to be adopted under Subtitle B of Title VII, nor does it provide a conclusive sequencing of compliance dates. However, the Statement does explain how such dates could be sequenced in relative terms and, in this way, seeks to give SB swap market participants clarity into and an opportunity to comment upon the general order in which they might expect to consider and prepare for compliance with these final rules. The Statement also discusses the relief the Commission has previously granted by providing exemptions from certain provisions of the Securities Act, the Exchange Act, and the Trust Indenture Act for certain SB swaps and when these exemptions will expire.

In general, in formulating the sequencing of compliance dates described herein, the Commission has taken into consideration four principles in addition to the primacy of the Definitional Rules and Cross-Border Rules described above: (1) compliance with the final rules establishing the registration process and duties of SDRs and the rules governing the reporting of SB swap transaction data should be the next step in the implementation process, following the adoption and effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, so that the Commission would be able to begin utilizing comprehensive SB swap transaction data reported to registered SDRs in making certain determinations required by Subtitle B of Title VII;⁶² (2) before SB swaps are required to be cleared, the Commission intends to determine

⁶² See Letter from Managed Funds Association, MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act (Mar. 24, 2011), 76 FR 3698, at 1 (CFTC only letter; noting that certain rules should be delayed “in favor of obtaining market data or allowing time for the build out of necessary systems prior to adoption (e.g., position limits and real-time reporting).”); but cf., letter from Swaps & Derivatives Market Association (June 1, 2011), File No. S7-06-11, at 2 (stating that “[c]entral clearing paves the way for electronic trading, which facilitates trade reporting and data gathering.”).

whether to propose amendments to its rules regarding net capital and customer protection specifically with regard to SB swap clearing activity in a broker-dealer and whether margin for SB swaps that are required to be cleared can be calculated on a portfolio margining basis with swaps;⁶³ (3) the Dodd-Frank Act establishes a sequencing of the mandatory clearing and mandatory trading requirements of Subtitle B of Title VII, as only SB swaps that the Commission requires to be cleared will be required to be traded on an exchange or SB SEF, provided that an exchange or SB SEF makes such SB swaps available to trade, and the implementation process should take this sequencing into account;⁶⁴ and (4) without unnecessarily delaying the implementation of Title VII's reforms of the SB swap market, at all stages of the implementation process, persons regulated pursuant to Subtitle B of Title VII should be given adequate, but not excessive, time to come into compliance with the final rules applicable to them, which includes (a) having an appropriate amount of time to analyze and understand the final rules to be adopted pursuant to Title VII, (b) having an appropriate amount of time to develop and test new systems required as a result of the new regulatory requirements for SB swaps, and (c) being subject to a phasing in of the requirements arising from the final rules to be adopted pursuant to Title VII, as appropriate.⁶⁵

The Commission is seeking public comment on all aspects of this Statement. The Commission appreciates the importance of SB swap market participants having the opportunity

⁶³ See *infra* note 138.

⁶⁴ See, e.g., letter from Wholesale Market Brokers' Association (June 3, 2011), 76 FR 1214, at 5 (noting that "upon the plain language of the Dodd-Frank Act, the mandatory trade execution requirement will become effective at the time that swaps are deemed 'clearable' by the appropriate Commission.").

⁶⁵ Any potential phasing in of any such requirements could take a variety of forms, including, for example, the further sequencing of the compliance dates of a particular final rule by SB swap asset class, SB swap market participant type, and/or the specific requirements arising from such rule.

to comment upon the sequencing discussed herein.⁶⁶ Comments received will be addressed in the relevant final rulemakings to which they pertain.

II. STATEMENT ON THE SEQUENCING OF THE COMPLIANCE DATES FOR FINAL RULES APPLICABLE TO SECURITY-BASED SWAPS ADOPTED PURSUANT TO THE SECURITIES EXCHANGE ACT OF 1934 AND THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

A. Definitional and Cross-Border Rules

(i) Definitional Rules

The Commission believes the Definitional Rules, the rules further defining the terms “security-based swap,” “security-based swap agreement,” and “mixed swap” and the rules further defining “security-based swap dealer,” and “major security-based swap participant,” should be the earliest of the final rules of Subtitle B of Title VII that are adopted and effective.

As noted above, the Commission already has adopted joint rules with the CFTC further defining the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant”.⁶⁷

Many commenters have noted the importance of the early finalization of the these definitional rules, as they provide the foundation for the remainder of Title VII’s rules by providing further guidance as to what products constitute SB swaps and which participants

⁶⁶ See, e.g., letter from Investment Company Institute (June 10, 2011), 75 FR 76139, at 2 (requesting that the Commission and the CFTC “publish for comment their proposed timelines to phase in implementation of the new swaps rules.”); letter from International Swaps and Derivatives Association, Inc. (June 2, 2011), 76 FR 25274, at 4 (CFTC only letter; recommending that the CFTC “propose a step-by-step implementation schedule upon which the public may comment that builds on the discussions currently underway between the financial regulators and the industry.”); letter from BlackRock, Inc. (June 3, 2011), 76 FR 25274, at 1 – 2 (CFTC only letter; noting that “[a] proper sequencing of the [CFTC’s] consideration of final rules and a phased, publicly-vetted schedule for implementation of compliance with such final rules will promote a more orderly transition from the current OTC bilateral market and will allow for the development of a new market structure for cleared derivatives where the interdependent and interoperable relationships among the various entities and market participants (including some new participants) is well thought through so as to preserve and even enhance liquidity.”); letter from Bloomberg L.P. (Apr. 4, 2011), File No. S7-06-11, at 7.

⁶⁷ See Entity Definitions Adopting Release.

constitute SBSs and MSBSs.⁶⁸ Once adopted and effective, the Definitional Rules should help provide certainty to market participants with regard to whether the products in which they transact and the activities they undertake will be subject to the regulatory regime to be established through Subtitle B of Title VII and the rules to be adopted by the Commission pursuant to it. Except as otherwise noted below with regard to section 6(l) of the Exchange Act, upon their effectiveness, the Definitional Rules will not, on their own, impose upon market participants engaged in SB swaps any of the new requirements to be adopted under Subtitle B of Title VII.⁶⁹

Upon the compliance date of the final rules further defining the term “security-based swap” and “eligible contract participant,” two of the temporary exemptions granted by the Commission pursuant to the Exchange Act Exemptive Order will expire:⁷⁰

- The exemption for any person meeting the definition of “eligible contract participant” that was in effect prior to the enactment of the Dodd-Frank Act, other than a registered broker-dealer or a self-regulatory organization, from the provisions of the

⁶⁸ See, e.g., December Trade Association letter at 2; letter from American Gas Association (June 3, 2011), 76 FR 25274, at 2 (CFTC only letter; stating that “any sequencing of final rules must begin with the foundational definitions of ‘swap,’ ‘swap dealer,’ and ‘major swap participant.’” Industry participants must understand whether and to what extent their activities will be regulated before they can assess how those activities should be regulated.”); letter from Edison Electric Institute (June 3, 2011), 76 FR 25274, at 7 (CFTC only letter; advocating that the implementation process “start with basic definitions of ‘swap,’ ‘swap dealer,’ and ‘major swap participant’”); letter from Managed Funds Association, MFA Recommended Timeline for Adoption and Implementation of Final Rules Pursuant to Title VII of the Dodd-Frank Act (Mar. 24, 2011), 76 FR 3698, at 3 (CFTC only letter); letter from NextEra Energy Resources, LLC (Mar. 11, 2011), 75 FR 80174, at 6 (CFTC only letter); letter from Alternative Investment Management Association (June 10, 2011), 75 FR 80174, at 3 (CFTC only letter; “[i]t is essential that the definitions of products and the categories of firms to whom final rules will apply are finalised before implementation of any of the other final rules.”); letter from CME Group, Inc. (June 3, 2011), 76 FR 25274, at 3 (CFTC only letter).

⁶⁹ As of the Effective Date of the Dodd-Frank Act, SB swaps, as securities, were subject to the general antifraud and anti-manipulation provisions of the federal securities laws and the regulations thereunder. See, e.g., Exchange Act section 10(b), 15 U.S.C. 78j, and Securities Act section 17(a), 15 U.S.C. 77q(a).

⁷⁰ The Commission has subsequently received and is considering a request for certain permanent exemptions upon the expiration of the temporary exemptions contained in the Exchange Act Exemptive Order. See SIFMA SBS Exemptive Relief Request (Dec. 5, 2011), <http://www.sec.gov/comments/s7-27-11/s72711-10.pdf>.

Exchange Act and the rules and regulations thereunder (other than those provisions expressly excluded pursuant to the Exchange Act Exemptive Order), in connection with a person's activities involving SB swaps;⁷¹ and

- The exemption for a broker or dealer registered under section 15(b) of the Exchange Act⁷² from certain provisions of the Exchange Act and the rules and regulations thereunder with respect to SB swaps.⁷³

At the same time, the following exemptions granted pursuant to the SB Swaps Interim Final Rule⁷⁴ will expire, unless the Commission extends or modifies the exemptions or adopts other exemptions:⁷⁵

- The exemption pursuant to Securities Act rule 240 (“Rule 240”) from all provisions of the Securities Act, except the anti-fraud provisions of section 17(a), subject to certain conditions, of the offer and sale of those SB swaps that under pre-Dodd-Frank Act law were “security-based swap agreements” (which, under that definition, must be entered into between eligible contract participants and subject to individual negotiation) and that were defined as “securities” under the Securities Act on the Effective Date solely due to the provisions of Title VII;⁷⁶

⁷¹ Exchange Act Exemptive Order at 39938-40.

⁷² 15 U.S.C. 78o(a).

⁷³ Id. at 39939-40.

⁷⁴ See supra note 43.

⁷⁵ The interim exemptions provide that upon their expiration, the Commission must publish a rule to remove the interim exemptions from the Code of Federal Regulations. See, e.g., 17 CFR 230.240. Further, we understand that Commission staff intends to withdraw the Cleary Gottlieb Letter upon the expiration of these interim exemptions.

⁷⁶ SB Swaps Interim Final Rule at 40611.

- The exemptions from the provisions of Exchange Act sections 12(a)⁷⁷ and 12(g)⁷⁸ for any SB swaps offered and sold in reliance on Rule 240;⁷⁹ and
- The exemption from the provisions of the Trust Indenture Act for any SB swaps offered and sold in reliance on Rule 240.⁸⁰

In light of the fact that these exemptions expire upon the compliance date of the final rules further defining the term “security-based swap” and “eligible contract participant,” the Commission is considering what the appropriate compliance date for the rules further defining the term “security-based swap” should be.

Additionally, upon the effective date of the final rules further defining the term “eligible contract participant,” the limited exemption granted pursuant to the Effective Date Order permitting compliance with section 6(l) using the definition of “eligible contract participant” as set forth in section 1a(12) of the Commodity Exchange Act (as in effect on July 20, 2010),⁸¹ as opposed to the definition of “eligible contract participant” as amended by the Dodd-Frank Act, will expire.⁸² Section 6(l) of the Exchange Act makes it unlawful for any person to effect a transaction in an SB swap with or for a person that is not an “eligible contract participant,” unless such transaction is effected on a national securities exchange registered pursuant to section 6(b) of the Exchange Act.⁸³ Upon the effective date of the final rules further defining the

⁷⁷ 15 U.S.C. 78l(a).

⁷⁸ 15 U.S.C. 78l(g).

⁷⁹ *Id.* at 40612.

⁸⁰ *Id.*

⁸¹ 7 U.S.C. 1a(12).

⁸² Effective Date Order at 36307.

⁸³ 15 U.S.C. 78f(l).

term “eligible contract participant,” which will be 60 days after the rule’s publication in the Federal Register, or July 23, 2012,⁸⁴ section 6(l) of the Exchange Act will apply to persons in connection with SB swap transactions with counterparties that do not meet the “eligible contract participant” definition, as amended by the Dodd-Frank Act and as further defined by such rules.

(ii) Cross-Border Rules

The Commission expects to propose the Cross-Border Rules as a single release addressing the application of the requirements of Subtitle B of Title VII to cross-border SB swap transactions and non-U.S. persons acting in capacities regulated under Subtitle B of Title VII. The Cross-Border Rules, which the Commission expects to propose prior to adopting any rules other than the Definitional Rules (except as otherwise noted in sections II.C.(i) and (ii) below), generally would not propose to impose additional requirements or obligations upon SB swap market participants, but rather would propose to address the extent to which non-U.S. SB swap market participants would be subject to the requirements arising from Subtitle B of Title VII by defining the scope of Title VII as it applies to these market participants and their SB swap transactions involving the U.S. market. Because the Cross-Border Rules are expected to be directly related to, among other things, SB swap data reporting, clearing and trading, as well as various registration categories under Title VII, the Commission anticipates that certain rulemakings that are affected by the Cross-Border Rules would address comments received on the relevant proposals in the Cross-Border Rules. In other substantive areas, the Commission could address comments received by adopting final rules addressing cross-border issues in a complementary separate rulemaking. In either case, the Commission does not expect to require

⁸⁴ See *supra* note 4.

compliance by participants in the U.S. SB swap market with the final rules arising under the Exchange Act before addressing the cross-border aspects of such rules.⁸⁵

(iii) Request for Comment

- In addition to the Definitional Rules and the Cross-Border Rules, are there any other rules arising under Title VII that should be proposed or adopted before all other Title VII rules? If so, which ones, and why?
- Are there any sets of rules included in this first category that should not be? If so, which ones, and why?

B. SDR Registration and SB Swap Transaction Reporting

Following the adoption and effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, the Commission believes the next step in the implementation process should be requiring SDRs to register with the Commission and comply with applicable duties and core principles. Compliance earlier in the implementation process should facilitate the development and utilization of SDRs in a regulated manner and facilitate the reporting of SB swap transaction data by SB swap market participants to registered SDRs, as well as the public dissemination of SB swap data by registered SDRs. Because the Regulation SBSR Proposing Release links the timeframes for reporting and publicly disseminating SB swap transaction data to the registration of SDRs,⁸⁶ the Commission anticipates that the sooner SDRs are required to register with the Commission and comply with applicable duties and core principles, the sooner SB swap transaction data on all SB swaps can be promptly reported to such SDRs and

⁸⁵ For example and as noted above, before requiring compliance with the registration requirements for SBSDs, the Commission believes the applicability of such registration requirements to non-U.S. persons should be addressed.

⁸⁶ Regulation SBSR Proposing Release at 75187-8.

disseminated to the public. The Commission also believes it should require the reporting of SB swap transactions to registered SDRs earlier in the implementation process, as has been suggested by commenters, to enable the Commission to utilize the data reported to registered SDRs to inform other aspects of the Commission's efforts with respect to Title VII.⁸⁷

The Commission further believes compliance with final rules resulting from the SDR Proposing Release should be required as soon as practicable after the effectiveness of the Definitional Rules and proposal of the Cross-Border Rules, taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them, to facilitate the establishment and utilization of registered SDRs. Furthermore, the Commission believes compliance with final rules resulting from the Regulation SBSR Proposing Release should be required at approximately the same time as compliance with final rules resulting from the SDR Proposing Release, also taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them. As a result, the requirement to report SB swap transactions to registered SDRs would facilitate the comprehensiveness of SB swap data contained in SDRs. Accordingly, except as otherwise noted in sections II.C.(i) and (ii) below, the final rules resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release would be the first sets of rules with which compliance

⁸⁷ See, e.g., letter from MarkitSERV (June 10, 2011), 75 FR 63113, at 2 – 3 (CFTC only letter; noting that “[d]ata reporting to the Commission will provide the Commission with the significant amount of market data needed before it can determine which swaps should be subject to the clearing mandate, which ones are ‘available to trade’, and what are the appropriate thresholds for block trade sizes.”); letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 2, 5-6 (noting that “the Commissions will be in a better position to adopt rules that achieve Dodd-Frank’s goals while maintaining active and viable [SB swap] markets” if SDRs are required to register and data reporting is enabled).

would be required by the Commission, following the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules.

The following subsections discuss certain additional issues concerning the compliance dates for final rules resulting from (i) the SDR Proposing Release and (ii) the Regulation SBSR Proposing Release.

(i) SDR Proposing Release

In accordance with section 763(i) of Title VII, the Commission issued the SDR Proposing Release, which proposed new rules under the Exchange Act governing the SDR registration process, duties, and core principles. This subsection discusses issues surrounding the timing of the SDR registration process and compliance with the duties, core principles, and other requirements resulting from these proposed rules, as well as the relationship of certain of the proposed rules in the Regulation SBSR Proposing Release to those in the SDR Proposing Release.

a. Registration and Compliance with Regulatory Requirements

The Regulation SBSR Proposing Release would require that an entity registered with the Commission as an SDR also register with the Commission as a securities information processor (“SIP”) on existing Form SIP.⁸⁸ The Commission anticipates that the timeframe within which persons seeking to operate as SDRs will be required to register with the Commission would be established in the release adopting final rules resulting from the SDR Proposing Release. As noted above, the Commission believes compliance with final rules resulting from the SDR Proposing Release should be required as soon as practicable after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, taking into account the necessity

⁸⁸ Regulation SBSR Proposing Release at 75211.

of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them. Accordingly, the Commission anticipates that the final rules governing the SDR registration process and applicable duties, core principles, and other requirements, as explained immediately below, would be one component of the two sets of rules with which compliance would be required first.

Proposed rules 13n-4 through 13n-11 are intended to implement the duties and core principles established by section 763(i) of the Dodd-Frank Act, which amended the Exchange Act to add Exchange Act section 13(n).⁸⁹ An SDR would be required to comply with the final rules establishing the duties and core principles resulting from proposed rules 13n-4 through 13n-11 as soon as the Commission approves the SDR's application for registration.⁹⁰

b. Expiration of Exemptions Granted Pursuant to the Effective Date Order

The Effective Date Order granted temporary exemptions from compliance with a number of provisions of section 13(n) of the Exchange Act that apply to SDRs generally, as they do not require a rulemaking or other Commission action or do not apply only to registered SDRs. Specifically, the Effective Date Order provided temporary exemptions from compliance with the following sections:

⁸⁹ SDR Proposing Release at 77367-9.

⁹⁰ 15 U.S.C. 78m(n). Proposed rule 13n-1(c) provides that the Commission shall grant the registration of an SDR if the Commission finds that such SDR is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Exchange Act section 13(n) and the rules and regulations thereunder. See SDR Proposing Release at 77313.

- Section 13(n)(5)(D)(i) of the Exchange Act,⁹¹ which would require an SDR to provide direct electronic access to the Commission or any designee of the Commission;
- Section 13(n)(5)(F) of the Exchange Act,⁹² which would require an SDR to maintain the privacy of any and all SB swap transaction information that the SDR receives from an SBSB, counterparty, or other registered entity;
- Section 13(n)(5)(G) of the Exchange Act,⁹³ which would require an SDR, on a confidential basis and after notifying the Commission of the request, to make available all data obtained by the SDR, including individual counterparty trade and position data, to certain enumerated entities;
- Section 13(n)(5)(H) of the Exchange Act,⁹⁴ which would require an SDR, before sharing information with certain enumerated entities, to (1) receive a written agreement from each such entity that the entity will abide by certain confidentiality provisions relating to the information on SB swap transactions that is provided and (2) have each such entity agree to indemnify the SDR and the Commission for any expenses arising from litigation relating to the information provided;
- Section 13(n)(7)(A) of the Exchange Act,⁹⁵ which would prohibit an SDR from adopting any rule or taking any action that results in any unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions;

⁹¹ 15 U.S.C. 78m(n)(5)(D)(i).

⁹² Id. at 78m(n)(5)(F).

⁹³ Id. at 78m(n)(5)(G).

⁹⁴ Id. at 78m(n)(5)(H).

⁹⁵ Id. at 78m(n)(7)(A).

- Section 13(n)(7)(B) of the Exchange Act,⁹⁶ which would require an SDR to establish transparent governance arrangements for certain enumerated reasons; and
- Section 13(n)(7)(C),⁹⁷ which would require an SDR to establish rules to minimize conflicts of interest and establish a process for resolving conflicts of interest.

These temporary exemptions will expire upon the earlier of: (1) the date the Commission grants registration to the SDR; and (2) the earliest compliance date set forth in any of the final rules regarding the registration of SDRs. In setting the compliance dates of final rules resulting from the SDR Proposing Release, the Commission intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to any of the above-described exemptions.

(ii) Regulation SBSR Proposing Release

In accordance with sections 763 and 766 of the Dodd-Frank Act, the Commission issued the Regulation SBSR Proposing Release, which, among other things, proposed timeframes for the reporting of SB swap information to registered SDRs or to the Commission and for the public dissemination of SB swap transaction, volume, and pricing information.⁹⁸ As noted in the Regulation SBSR Proposing Release, the Commission understands that market participants would need a reasonable period of time in which to acquire or configure the necessary systems, engage and train the necessary staff, and develop and implement the necessary policies and procedures that would be required by the final rules regarding SB swap transaction reporting.⁹⁹ Accordingly, through proposed rule 910, as set forth in the Regulation SBSR Proposing Release,

⁹⁶ Id. at 78m(n)(7)(B).

⁹⁷ Id. at 78m(n)(7)(C).

⁹⁸ See Regulation SBSR Proposing Release at 75287-8.

⁹⁹ Id. at 75242.

the Commission aimed to provide clarity as to SB swap reporting and public dissemination timelines by establishing a phased-in compliance schedule for those requirements.¹⁰⁰ The following section discusses certain issues concerning the timing-related aspects of the Regulation SBSR Proposing Release.

A. Reporting Requirements for Pre-Enactment SB Swaps

Proposed rule 910(a) would have required reporting parties to report any pre-enactment SB swaps required to be reported pursuant to proposed rule 901(i) to a registered SDR no later than January 12, 2012 (180 days after the effective date of the Dodd-Frank Act), pursuant to the requirement of section 3C(e)(1) of the Exchange Act.¹⁰¹ However, as acknowledged by the Commission in the Effective Date Order, “even after an SDR is registered, market participants will need additional time to establish connectivity and develop appropriate policies and procedures to be able to deliver information to the registered SDR.”¹⁰² Accordingly, pursuant to the Effective Date Order, the Commission granted temporary exemptive relief such that no person would be required to report pre-enactment SB swaps pursuant to section 3C(e)(1) of the Exchange Act to a registered SDR until six months after the SDR that is capable of accepting the asset class of the pre-enactment SB swap is registered by the Commission.¹⁰³ The Regulation SBSR Proposing Release proposed to define pre-enactment SB swaps as those entered into before July 21, 2010 the terms of which had not expired as of that date.¹⁰⁴

¹⁰⁰ Id. at 75242-4.

¹⁰¹ Id. at 75243. Section 3C(e)(1) of the Exchange Act requires SB swaps entered into before the date of enactment of section 3C to be reported to a registered SDR or the Commission no later than 180 days after the effective date of section 3C (i.e., no later than January 12, 2012). 15 U.S.C. 78c-3(e)(1).

¹⁰² Effective Date Order at 36291.

¹⁰³ Id. at 36291.

¹⁰⁴ Regulation SBSR Proposing Release at 75209, 75223-4.

B. Compliance with Other Reporting Requirements

As discussed in section B.(i) above, the Commission believes SDRs should be required to register with the Commission and comply with the duties, core principles and other requirements applicable to SDRs, as soon as practicable after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules, taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them. The Commission also believes compliance with final rules resulting from the Regulation SBSR Proposing Release should be required as soon as practicable after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules. Accordingly, the reporting of SB swap transaction information to registered SDRs and the dissemination of SB swap transaction information to the public pursuant to the implementation timeframes that would be set forth by the Commission final rules resulting from the Regulation SBSR Proposing Release would begin as soon as practicable after the registration of SDRs, also taking into account the necessity of SB swap market participants having an appropriate amount of time to analyze and understand the final rules and develop and test new policies and systems required as a result of them, which would be the triggering event for the reporting obligations contemplated by the Regulation SBSR Proposing Release.¹⁰⁵

C. Establishment of Block Trade Thresholds

With respect to defining block trade thresholds for SB swaps, the Commission stated in the Regulation SBSR Proposing Release that “it would be appropriate to seek additional comment from the public, as well as to collect and analyze additional data on the [SB swap]

¹⁰⁵ *Id.* at 75243 n.156.

market, in the coming months” before proposing specific block trade thresholds.¹⁰⁶ The Commission further noted its intent to propose specific block trade thresholds simultaneously with the adoption of final rules resulting from the Regulation SBSR Proposing Release.¹⁰⁷

The Commission recognizes that current data on the nature and size of SB swap transactions reflects a market that is not yet subject to any of the requirements to be adopted under Title VII, including the requirement that such SB swap transaction data be disseminated to the public. Data collected after these requirements are implemented may provide additional insight into the SB swap market, including whether these requirements are associated with a change in the nature and size of SB swap transactions. The Commission therefore is considering various means of how to approach establishing block trade thresholds, including, for example, establishing an initial period during which information regarding SB swaps would be reported (and subsequently disseminated publicly) on a delayed basis, while giving reporting parties the option of reporting their trades on a shorter timeframe.

The Commission continues to analyze the comments it received relating to block trade issues, and to consider how to implement the reporting and dissemination requirements of sections 763 and 766 of the Dodd-Frank Act in an appropriate manner. The Commission notes that it already has proposed a staged implementation schedule for the final rules resulting from the Regulation SBSR Proposing Release via proposed rule 910.¹⁰⁸ The Commission also is considering whether and how it might revise that schedule in light of comments received, and whether certain issues relating to block trades – such as the required time delays – should be

¹⁰⁶ Id. at 75228.

¹⁰⁷ Id.

¹⁰⁸ See id. at 75243-4.

reopened for comment in connection with the future Commission proposal regarding how to define block thresholds.

(iii) Request for Comment

- Should the Commission adopt a phase-in of the SDR duties, core principles and other requirements resulting from the SDR Proposing Release that includes sequenced effective and compliance dates aimed at providing time for SDRs to complete their analysis of the final rules, develop and test systems, submit a completed Form SDR, and be in a position to demonstrate compliance with the federal securities laws and the rules and regulations thereunder? How would such a phase-in period affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages or disadvantages of such a phase-in period? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission offer SDRs an avenue to secure a grace period to defer compliance with some or all requirements of section 13(n) of the Exchange Act and the SDR duties, core principles and other requirements resulting from the SDR Proposing Release, in order for SDRs to obtain additional time to demonstrate compliance with the SDR duties, core principles and other requirements and to obtain registration with the Commission? If so, for which requirements should a grace period be made available and how long should such a grace period be? Should such a grace period be conditioned on any steps taken by the SDR, such as submission of a complete Form SDR within a certain time-frame? Would there be potential advantages or disadvantages of such a grace period? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?

- Should SDRs be in compliance with all duties, core principles and other requirements resulting from the SDR Proposing Release at the time they seek to register with the Commission? Why or why not? Should compliance with some of these requirements be delayed until a later point in time? If so, for which requirements, until what point, and why should compliance be delayed? How would such delayed compliance affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages and disadvantages of such delayed compliance? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Is it appropriate for the final rules pertaining to the registration and regulation of SDRs resulting from the SDR Proposing Release and the final rules pertaining to the reporting and dissemination of SB swap transaction data resulting from the Regulation SBSR Proposing Release to be the first rules (except as otherwise noted in sections II.C.(i) and (ii) below) after the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules with which compliance is required? Why or why not?
- In determining when SDRs should be required to register with the Commission, should the Commission take into account other authorities', including the CFTC's, timing for a parallel or similar requirement? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- In determining when SB swap transaction data should be reported to registered SDRs, should the Commission take into account other authorities', including the CFTC's, timing for a parallel or similar requirement? Why or why not? If so, what is the most

appropriate manner of sequencing in relation to those potentially differing timelines?
What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

- Should the Commission defer its proposed rulemaking regarding block thresholds until after SDRs register with the Commission and the Commission begins to receive and analyze data required to be reported under final rules resulting from the Regulation SBSR Proposing Release? Why or why not? If yes, how many months of data would be sufficient? How would such a deferral affect the goals of Title VII's reforms of the SB swap market? Would there be potential advantages and disadvantages of such a deferral? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission defer its proposed rulemaking regarding block thresholds until after SB swap transaction information begins to be publicly disseminated? Why or why not? If yes, how many months of public dissemination would be sufficient? How would such a deferral affect the goals of Title VII's reforms of the SB swap market? Would there be potential disadvantages of such a deferral? If so, what would they be and what steps could be taken to mitigate them?
- In the absence of the definition of any block trade thresholds by the Commission, what form could SB swap transaction data dissemination take? For example, should all trades be disseminated with a delay? If so, how long should that delay be? Furthermore, could the public dissemination of SB swap transaction data be phased such that initially, public dissemination is limited only to certain SB swap instruments? If so, which instruments? If not, why not? Alternatively, should the Commission set initial block thresholds based

upon data currently available about the SB swap market and undertake a study to determine whether the thresholds should be modified as a result of how the market develops? How would each of these approaches affect the goals of Title VII's reforms of the SB swap market? What are the potential advantages and disadvantages of each of these approaches? If there are potential disadvantages, what steps could be taken to mitigate them?

- Can the impact of post-trade transparency on market behavior be inferred from data collected before post-trade transparency is required? Why or why not?
- In determining when SB swap transaction data should be disseminated to the public, should the Commission take into account other authorities', including the CFTC's, timing for a parallel or similar requirement? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

C. Mandatory Clearing

The following discussion explains the sequencing of compliance dates of the final rules regarding mandatory clearing of SB swaps pursuant to section 3C of the Exchange Act.¹⁰⁹ These rules include the process for submitting SB swaps for mandatory clearing determinations, the standards with which clearing agencies must comply, and the end-user exception to mandatory clearing. As explained below, the Commission believes it may be appropriate for the procedural rules related to mandatory clearing determinations to be adopted before the rules further defining the terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap"

¹⁰⁹ 15 U.S.C. 78c-3.

are adopted and/or effective or before the Cross-Border Rules are proposed. However, given the dependency of the SB swap mandatory clearing regime upon other Title VII final rules yet to be adopted, the Commission believes SB swaps should not be required to be cleared until after the later of: (1) the compliance date of certain of the final rules resulting from the Clearing Agency Standards Proposing Release; (2) the compliance date of final rules resulting from the End-User Clearing Exception Proposing Release; and (3) the Commission determining whether to propose amendments to the existing net capital and customer protection requirements applicable to broker-dealers with regard to SB swap clearing through such broker-dealers and whether to address portfolio margining with swaps.

(i) Clearing Procedures Proposing Release

The Commission believes it may be appropriate for final rules resulting from the Clearing Procedures Proposing Release to be adopted before the rules further defining the terms “swap,” “security-based swap,” “security-based swap agreement,” and “mixed swap” are adopted and/or effective or before the Cross-Border Rules are proposed. The Commission, in the Clearing Procedures Proposing Release, also proposed rule and form amendments to implement the requirement that any financial market utility (“FMU”), which may include registered clearing agencies, that is designated as systemically important by the Financial Stability Oversight Council (“FSOC”) pursuant to Title VIII of the Dodd-Frank Act provide 60 days advance notice to the Commission of changes to its rules, procedures, or operations that could materially affect the nature or level of risks presented by the FMU.¹¹⁰ These final rule and form amendments would need to be effective for registered clearing agencies designated by the FSOC as systemically important because such clearing agencies would be required to begin complying

¹¹⁰ See Clearing Procedures Proposing Release at 82501-3.

with the advance notice requirement as soon as they are designated as systemically important.¹¹¹ To fully capture the efficiencies contemplated by this effort to produce a single package of clearing procedural rules, it therefore might be appropriate to adopt the mandatory clearing submission process rules earlier in the implementation process.

However, given the number of final rules the Commission contemplates would need to be in place before the first SB swap mandatory clearing determination can be made, the Commission is considering bifurcating the effectiveness of final rules resulting from the Clearing Procedures Proposing Release for the purposes of Titles VII and VIII of the Dodd-Frank Act such that the mandatory clearing process for the purposes of Title VII would be effective upon a date later than the rules relating to advance notice under Title VIII. Under such an approach, the Commission would not begin reviewing SB swaps to determine whether such SB swaps are required to be cleared until such later date.

(ii) Clearing Agency Standards

The Commission appreciates the views of commenters who have suggested that market participants that perform central clearing services, like clearing agencies, be required to be in compliance with the rules resulting from the Clearing Agency Standards Proposing Release pertaining to their governance and operation before compliance is required with mandatory clearing requirements.¹¹² As discussed in the Clearing Agency Standards Proposing Release, the rules proposed in that release are aimed at reducing risk within the financial system by

¹¹¹ The Commission understands that the FSOC currently is in the process of considering which FMUs to designate as systemically important in accordance with Title VIII of the Dodd-Frank Act and the rules of the FSOC adopted in July 2011. See Authority to Designate Financial Market Utilities as Systemically Important, 76 FR 44763 (July 27, 2011).

¹¹² See, e.g., letter from Committee on Capital Markets Regulation (June 24, 2011), 76 FR 25274, at 2 (CFTC only letter; recommending that before requiring “mandatory central clearing, the CFTC first needs to finalize the rules for clearinghouses, including margin, governance, financial resources, and conflicts of interest. This will enable clearinghouses to be in compliance before mandatory clearing begins.”).

facilitating prompt and accurate clearance and settlement of all securities transactions and the safety and soundness of clearing agencies.¹¹³ Given that, the Commission believes clearing agencies should be required to be in compliance with certain key requirements resulting from the Clearing Agency Standards Proposing Release before counterparties are required to clear any SB swaps.

To facilitate this ordering, the Commission believes the compliance dates of final rules resulting from the Clearing Agency Standards Proposing Release should be tranching and broadly sequenced by rule type. Taking into consideration comments received to date by the Commission, we believe the first subset of final rules with which compliance should be required are those resulting from proposed rule 17Ad-22 of the Clearing Agency Standards Proposing Release because this rule would address issues central to clearing agency governance, operation, participation standards, and risk management practices.¹¹⁴ The Commission anticipates that compliance with this subset of final rules would be necessary before any SB swaps are required to be cleared.

Additionally, the Commission understands that the final rules resulting from proposed rule 17Ad-22 should be effective at the time, or soon after, registered clearing agencies are designated by the FSOC as systemically important.¹¹⁵ Under such an approach, these rules, together with the final rules resulting from the Clearing Procedures Proposing Release that relate to the advance notice requirement of Title VIII of the Dodd-Frank Act, might need to be adopted

¹¹³ Clearing Agency Standards Proposing Release at 14474.

¹¹⁴ Proposed rule 17Ad-22 would augment the existing statutory requirements for clearing agencies under the Exchange Act by establishing minimum requirements regarding how clearing agencies must maintain effective risk management procedures and controls as well as meet the statutory requirements under the Exchange Act on an ongoing basis. See Clearing Agency Standards Proposing Release at 14476-14492, 14537-14539.

¹¹⁵ See Dodd-Frank Act section 805, 12 U.S.C. 5464.

before the rules further defining the terms “swap,” “security-based swap,” “security-based swap agreement,” and “mixed swap” are adopted and/or effective or before the Cross-Border Rules are proposed.

We believe compliance with a second subset of rules for clearing agencies – those focusing more specifically on matters of governance and mitigation of conflicts of interest – should be complied with subsequently, followed by compliance with a third subset composed of the requirements that address more specific components of a clearing agency’s internal operations and administrative practices and other rules concerning clearance and settlement services. The Commission preliminarily believes the clearing of SB swaps could commence before compliance is required with these two subsets of rules.

The Commission understands the views of those commenters that indicate that clearing agencies will need sufficient time to adjust their current practices and establish new policies, procedures, and processes necessary to comply with final rules resulting from the Clearing Agency Standards Proposing Release.¹¹⁶ Accordingly, the Commission anticipates that the compliance dates set forth in such final rules would reflect these considerations by providing clearing agencies with an appropriate amount of time to comply with these final rules.

(iii) End-User Exception from Mandatory Clearing

Before SB swaps are required to be cleared, the Commission believes compliance with final rules resulting from the End-User Clearing Exception Proposing Release should be

¹¹⁶ See, e.g., letter from The Options Clearing Corporation (Apr. 29, 2011), 76 FR 14472, at 17 (noting that Subtitle B of Title VII of the Dodd-Frank Act will require clearing agencies, at a minimum, to “develop[] extensive new policies and procedures, draft[], propos[e] and obtain[] approval of necessary rules and rules changes, execut[e] plans to raise additional financial resources, conduct[] extensive internal training, hir[e] additional compliance personnel, and many other tasks.”).

required.¹¹⁷ Section 3C(g)(1)(C) requires that a counterparty electing the end-user exception notify the Commission as to how it generally meets its financial obligations associated with non-cleared SB swaps.¹¹⁸ The End-User Exception Proposing Release proposed that a counterparty that invokes the clearing exception under section 3C(g)(1) of the Exchange Act would satisfy the notice requirement of section 3C(g)(1)(C) by delivering or causing such notice to be delivered to a registered SDR (or to the Commission if no SDR is available) in the form and manner required by final rules resulting from the Regulation SBSR Proposing Release¹¹⁹ together with additional information that is intended to affirm compliance with particular requirements of the Exchange Act and to aid the Commission in its efforts to prevent abuse of the end-user exception.¹²⁰

As described in section B above, the Commission anticipates that final rules establishing the SDR registration and regulation regime resulting from the SDR Proposing Release and final rules resulting from the Regulation SBSR Proposing Release would be the first sets of final rules under Title VII with which compliance would be required, following the effectiveness of the Definitional Rules and the proposal of the Cross-Border Rules. Given this, compliance with final rules resulting from the Regulation SBSR Proposing Release likely would be required before SB swaps are required to be cleared and before the compliance date of final rules resulting from the End-User Clearing Exception Proposing Release. The Commission believes an appropriate amount of time should be provided between the compliance dates of final rules resulting from the Regulation SBSR Proposing Release and the compliance date of final rules resulting from the End-User Clearing Exception Proposing Release so that SB swap

¹¹⁷ Section 3C(g)(1) of the Exchange Act, 15 U.S.C. 78c-3(g)(1).

¹¹⁸ 15 U.S.C. 78c-3(g)(1)(C).

¹¹⁹ See End-User Exception Proposing Release at 80011.

¹²⁰ See *id.* at 79995.

counterparties that seek to avail themselves of the end-user clearing exception would already be submitting SB swap transaction information to registered SDRs.

(iv) Mandatory Clearing Determinations

As described above, upon the compliance date of the mandatory clearing submission process rules for SB swap submissions under Title VII of the Dodd-Frank Act, the Commission would begin reviewing SB swaps submitted by clearing agencies to determine whether such SB swaps would be required to be cleared. Pursuant to section 3C(b)(3) of the Exchange Act,¹²¹ the Commission is required to make such determinations not later than 90 days after the submission has been made, or has been considered to have been made,¹²² unless the submitting clearing agency agrees to an extension.

Section 3C(b)(2) of the Exchange Act requires that a clearing agency submit to the Commission the SB swaps it plans to accept for clearing in order for the Commission to determine whether the SB swaps described in the submission are required to be cleared.¹²³ Additionally, pursuant to section 3C(b)(1) of the Exchange Act, on an ongoing basis, the Commission shall review SB swaps to make a determination of whether such SB swaps should be required to be cleared.¹²⁴

¹²¹ 15 U.S.C. 78c-3(b)(3).

¹²² Section 3C(b)(2)(B) of the Exchange Act provides that any security-based swap or group, category, type, or class of security-based swaps listed for clearing by a clearing agency as of the enactment of section 3C(b)(2)(B) shall be considered submitted to the Commission. 15 U.S.C. 78c3(b)(2)(B).

¹²³ *Id.* at 78c-3(b)(2). As provided in Exchange Act section 3C(b)(2), such submissions and determinations can be made on an individual basis or by group, category, type, or class of SB swaps. *Id.*

¹²⁴ *Id.* at 78c-3(b)(1). As provided in Exchange Act section 3C(b)(1), such determinations can be made on an individual basis or by group, category, type, or class of SB swaps. *Id.*

The Commission recognizes the importance of communicating clearly and in a timely fashion to SB swap market participants which SB swaps will be required to be cleared.¹²⁵ One way in which the Commission could help facilitate such communication is to require the mandatory clearing of SB swaps only some specified amount of time after publishing its determination that such SB swaps are required to be cleared so that SB swap market participants are given appropriate notice of the Commission's SB swap clearing determinations. This approach would afford the clearing agency and its members time to prepare to accommodate the SB swaps that will be required to be cleared. Doing so also would allow SB swap market participants time to establish appropriate clearing arrangements with the clearing agency or indirect clearing arrangements with members of the clearing agency.¹²⁶ Furthermore, the Commission believes early designation of the SB swaps that will be required to be cleared would facilitate the voluntary clearing of such products prior to the compliance date of the clearing requirement.

(v) Expiration of Exemptions Granted Pursuant to the Effective Date Order

The Effective Date Order granted a temporary exemption from compliance with Exchange Act section 3C(g)(5)(B), which would permit a counterparty to an SB swap that is not subject to the mandatory clearing requirement to elect to require the clearing of such SB swap in certain circumstances.¹²⁷ In granting this exemption, the Commission noted the exemption was

¹²⁵ See, e.g., letter from the International Swaps and Derivatives Association, Inc. (Feb. 14, 2011), File No. S7-44-10, at 10-11 (recommending that the Commission consider an extended period between a determination being made that a SB swap is required to be cleared and clearing becoming mandatory on that product, as "[t]his period would provide market participants the opportunity to make themselves appropriately ready to clear mandated transactions without risking either (i) disruption to their use of derivatives for hedging or (ii) noncompliance with the law.").

¹²⁶ See, e.g., letter from Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 5; letter from The Financial Services Roundtable (May 12, 2011), File No. 4-625, at 8-10.

¹²⁷ Effective Date Order at 36291.

needed because there currently are no central counterparties offering customer clearing of SB swaps and because additional action by the Commission would be necessary to address segregation and other customer protection issues.¹²⁸ The exemption from compliance with the requirements of section 3C(g)(5)(B) will expire upon the earliest compliance date set forth in any of the final rules regarding section 3C(b) of the Exchange Act,¹²⁹ which pertains to the mandatory clearing submission process.¹³⁰ In setting the compliance date for the final rules pertaining to the mandatory clearing submission process, the Commission intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to this temporary exemption.

The Effective Date Order also granted a temporary exemption from compliance by registered clearing agencies with Exchange Act section 3C(j) until the earliest compliance date set forth in any of the final rules regarding section 3C(j)(2) of the Exchange Act.¹³¹ Exchange Act section 3C(j) requires registered clearing agencies to designate a chief compliance officer and establishes the duties of the chief compliance officer.¹³² The Clearing Agency Standards Proposing Release contained proposed rules regarding section 3C(j)(2) of the Exchange Act.¹³³ In setting the compliance date for the final rules regarding section 3C(j)(2), the Commission intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to this temporary exemption.

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ 15 U.S.C. 78c-3(b).

¹³¹ Effective Date Order at 36291-2.

¹³² 15 U.S.C. 78c-3(j).

¹³³ Clearing Agency Standards Proposing Release at 14499-14500.

(vi) **Request for Comment**

- Are there other final rules or sets of final rules beyond those resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release with which compliance should be required before compliance is required with final rules resulting from the End-User Clearing Exception Proposing Release? If so, which ones, and why? Alternatively, should compliance with final rules resulting from the End-User Clearing Exception Proposing Release be accelerated to allow for the use of the exception to be established by those rules before compliance with final rules resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release is required? For example, should the Commission consider temporarily de-linking the notice requirement of the end-user clearing exception from certain of the final rules resulting from the SDR Proposing Release and the Regulation SBSR Proposing Release, such that it could be utilized earlier in the implementation process? Why or why not? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Would there be positive or negative consequences of the Commission determining what SB swaps will be subject to mandatory clearing and allowing a period of time prior to requiring the clearing of such SB swaps? If so, what are the consequences, why would they occur, and if there are negative consequences, what steps could be taken to mitigate them? How would the allowance of such a period of time affect the goals of Title VII's reforms of the SB swap market?
- Has the Commission appropriately identified in the discussion above those rules with which compliance should be required before SB swaps are required to be cleared? Why or why not?

- Are there other rules or sets of rules with which compliance should be required before SB swaps are required to be cleared? If so, which ones, and why?
- Should the Commission require the mandatory clearing of SB swaps for a subset of SB swap market participants, such as SBSBs and their affiliates, before all of the final rules regarding the SBSB registration and regulation regime are in place? If so, which subset of SB swap market participants and why? Would doing so affect the goals of the Title VII reforms of the SB swap market?
- Should the Commission consider further phasing in such submissions and determinations by type of SB swap? If so, what further phasing in should occur? For example, should the Commission implement the mandatory clearing submission process for credit-related SB swaps, then for other SB swaps?¹³⁴ Would such phasing in affect the goals of the Title VII reforms of the SB swap market? Would there be potential advantages and disadvantages of such phasing in? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission phase in mandatory clearing by type of market participant? For example, should the Commission phase these requirements in the manner proposed by the CFTC in its Clearing and Trade Execution Implementation Proposal?¹³⁵ What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

¹³⁴ “Credit-related SB swaps” means any SB swap that is based, in whole or in part, on one or more instruments of indebtedness (including loans), or on a credit event relating to one or more issuers or securities, including but not limited to any SB swap that is a credit default swap, total return swap on one or more debt instruments, debt swaps, debt index swaps, or credit spread. “Other SB swaps” means any SB swap not described in the preceding sentence.

¹³⁵ See *supra* note 53 and the accompanying text for a discussion of the CFTC Clearing and Trade Execution Implementation Proposal.

- In determining when SB swaps would be required to be cleared, should the Commission take into account the mandatory clearing timelines of other authorities? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

D. SBSB and MSBSP Registration and Regulation

Pursuant to sections 3E¹³⁶ and 15F¹³⁷ of the Exchange Act, the Commission must adopt rules pertaining to the regulation of SBSBs and MSBSPs in the following areas:

- Registration of SBSBs and MSBSPs;
- Business conduct standards for SBSBs and MSBSPs;
- Trade acknowledgment and verification of SB swap transactions by SBSBs and MSBSPs;
- Capital, margin and segregation requirements applicable to SBSBs and MSBSPs;¹³⁸ and

¹³⁶ 15 U.S.C. 78c-5.

¹³⁷ 15 U.S.C. 78o-10.

¹³⁸ In addition, the Commission intends to determine whether to propose amendments to its rules regarding net capital and customer protection requirements, Exchange Act Rule 15c3-1 and Rule 15c3-3, respectively, specifically with regard to SB swap activity in a broker-dealer. The Commission understands that many members of clearing agencies are dually-registered broker-dealers and futures commission merchants and that much of the clearing of SB swaps may occur through such dually-registered entities. See, e.g., letter to the Commission from ICE Clear Credit LLC, dated November 7, 2011 (“ICE Clear Credit Letter”), available at: <http://www.sec.gov/rules/petitions/2011/petn4-641.pdf> (requesting exemptive relief from the application of section 15(c)(3) of the Exchange Act and Rule 15c3-3 thereunder to allow ICE Clear Credit, and its members that are dually-registered broker-dealers and futures commission merchants, to, among other things: (1) hold customer assets used to margin, secure, or guarantee customer positions consisting of cleared credit default swaps that include swaps and SB swaps in a commingled customer omnibus account subject to section 4d(f) of the Commodity Exchange Act; and (2) calculate margin for this commingled customer account on a portfolio margin basis); see also Commodity Exchange Act section 4d(F)(1) (making it unlawful for any person to, among other things, accept money and securities from a swaps customer for a cleared swap unless such person has registered with the CFTC as a futures commission merchant). In light of the role broker-dealers perform in clearing SB swaps, the Commission recognizes the importance of considering net capital and customer protection requirements with regard to SB swap clearing through a broker-dealer prior to requiring that SB swaps be cleared.

- Reporting and recordkeeping requirements applicable to SBSBs and MSBSBs.

The Commission understands that SBSBs and MSBSBs would need an appropriate amount of time to determine whether they are required to register with the Commission and if so, to put into place the necessary infrastructure and documentation to comply with requirements ultimately applicable to such entities.¹³⁹ The following section discusses the timing of the implementation of these requirements, the proposed registration process set forth in the SB Swap Participant Registration Proposing Release, and other related issues.

(i) SBSB and MSBSB Registration and Regulatory Requirements

In the SB Swap Participant Registration Proposing Release, the Commission proposed that SBSBs and MSBSBs conditionally register with the Commission, and then convert such conditional registration to “ongoing registration” by filing a certification on or before the “last compliance date”.¹⁴⁰ The SB Swap Participant Registration Proposing Release also requested comment as to whether the Commission should delay requiring registration until after the last compliance date, rather than adopting a conditional registration process.¹⁴¹

The Commission also recognizes the importance of determining whether margin for SB swaps that are required to be cleared can be calculated on a portfolio margining basis, as there might be customer capital-related efficiencies that result from holding SB swap and swap positions in a single account as opposed to multiple accounts. See ICE Clear Credit Letter at 6, 13-14. Commission staff currently is evaluating the separate statutory and bankruptcy regimes that apply to SB swaps and swap, and is working with the CFTC staff to develop recommendations on any next steps.

¹³⁹ See, e.g., letter from Financial Services Roundtable (May 12, 2011), File No. 4-625, at 7-8, 11; letter from Financial Services Forum, Future Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 9; letter from International Swaps and Derivatives Association, Inc. (Jan. 24, 2011), 75 FR 71379, at 2 (CFTC only letter).

¹⁴⁰ The term “last compliance date” is defined, in proposed rule 15Fb2-1(e), to mean the latest date, designated by the Commission, by which SBSBs and MSBSBs must comply with any of the initial rules promulgated under section 15F of the Securities Exchange Act of 1934, 15 U.S.C. 78o-10.

¹⁴¹ See SB Swap Participant Registration Release at 65788, question #4.

A number of sequencing issues arise in relation to compliance with the requirements applicable to SBSBs and MSBSPs pursuant to sections 3E and 15F of the Exchange Act that are relevant to both conditional and non-conditional registration processes. Specifically, the Commission understands that some of the requirements that would be applicable to SBSBs and MSBSPs could be complied with by SBSBs and MSBSPs in a relatively shorter amount of time, while others would require more time. This, in turn, counsels against imposing all of the compliance dates for these requirements at once and instead suggests phasing in compliance by considering the amount of time estimated to be required for compliance with the relevant provisions. For example, the Commission understands from commenters that SBSBs and MSBSPs might need a shorter amount of time to come into compliance with certain recordkeeping rules applicable to such persons, as these rules likely may not necessitate extensive modifications to SBSBs' and MSBSPs' business practices.¹⁴²

Some commenters have indicated that SBSBs and MSBSPs might need more time to come into compliance with final rules resulting from the Business Conduct Standards Proposing Release, as adherence to these standards and duties could involve changes to the practices, policies, and procedures of SBSBs and MSBSPs.¹⁴³ Among other things, these proposed rules would require SBSBs and MSBSPs to communicate with their SB swap counterparties in a fair

¹⁴² See, e.g., letter from The Financial Services Roundtable (May 12, 2011), File No. 4-625, at 5 (stating that "recordkeeping may rely on internal resources, and therefore may be able to be implemented more quickly....").

¹⁴³ See, e.g., letter from the Futures Industry Association, the International Swaps and Derivatives Association, and the Securities Industry and Financial Markets Association (Aug. 26, 2011), 76 FR 42396; letter from Managed Funds Association (Aug. 29, 2011), 76 FR 42396, at 6-7 (noting that the requirements proposed in the Business Conduct Standards Proposing Release would require MSBSPs to implement new processes and procedures, which could result in "substantial costs" and expenditure of "substantial resources").

and balanced manner¹⁴⁴ and to make certain disclosures to such counterparties,¹⁴⁵ and would impose additional requirements for dealings with “special entities.”¹⁴⁶

In addition, the Commission understands from commenters that compliance with documentation standards resulting from the Trade Documentation Proposing Release, which include standards relating to confirmation, processing, netting, documentation, and valuation of all SB swap transactions,¹⁴⁷ may require more time for full implementation. Documentation would need to be developed and processes would need to be established to enable SBSBs and MSBSPs to document, implement, and monitor these new requirements as applied to all SB swap transactions.¹⁴⁸ However, the Commission believes that some of these documentation standards may require less time for compliance than others.¹⁴⁹

The Commission also understands that capital, margin, and segregation requirements could have a significant impact upon the business structure of SBSBs and MSBSPs and this impact could influence the decision of whether a person registers with the Commission as such

¹⁴⁴ See proposed rule 15Fh-3(g), Business Conduct Standards Proposing Release at 42418-19, 42455 (proposing to require SBSBs and MSBSPs to communicate with counterparties in a fair and balanced manner based on principles of fair dealing and good faith).

¹⁴⁵ See, e.g., proposed rule 15Fh-3(b), *id.* at 42405-10, 42454 (proposing rules that would require disclosures by SBSBs and MSBSPs to counterparties of information related to material risks and characteristics the SB swap and material incentives or conflicts of interest that an SBSB or MSBSP may have in connection with the SB swap).

¹⁴⁶ See, e.g., proposed rule 15Fh-5(a), *id.* at 42425-26, 42457 (proposing to require any SBSB or MSBSP that offers to enter into or enters into an SB swap with a special entity to have a reasonable basis to believe that the special entity has an “independent representative” that meets certain specified requirements).

¹⁴⁷ See *supra* note 21.

¹⁴⁸ See, e.g., letter from the International Swaps and Derivatives Association (Feb. 22, 2011), 76 FR 3859 (noting, for example, the “heavy documentation burden” that would be placed upon the inception of transactions by the proposed rules); letter from MarkitSERV (Feb. 22, 2011), 76 FR 3859, at 11 (noting that “the proposed requirements regarding the confirmation process and time periods for such confirmations would be demanding in many cases.”).

¹⁴⁹ As one commenter has noted, there are aspects of SB swap transaction documentation that are easier to implement, and thus could be implemented earlier, and others that may require a longer implementation window, as “aspects of the trade documentation rules... would represent a significant shift from current industry best practices.” Letter from The Financial Services Roundtable (May 12, 2011), File No. 4-625, at 4.

or whether it restructures its SB swap business such that registration is not required.

Commenters have noted that the capital and margin requirements required to be adopted by Title VII may result in significant changes to the financial arrangements of the impacted persons and, as a result, should be sequenced in a manner that allows impacted persons enough time to plan to accommodate such changes.¹⁵⁰ Commenters also have noted that ample time would be needed to adhere to the segregation requirements applicable to customer collateral collected for cleared and uncleared SB swaps because these requirements would necessitate the establishment of policies and procedures related to the collection and maintenance of collateral.¹⁵¹ Accordingly, the Commission preliminarily believes the compliance date of these rules should reflect the amount of time that SBSs and MSBSPs might need to come into compliance with these new requirements and plans to address this issue in the relevant final rules.

Moreover, in the Cross-Border Rules, the Commission intends to address the extent to which non-U.S. SB swap market participants would be subject to the SBS and MSBSP registration and regulatory requirements. Such market participants would need time to consider the extent to which these requirements apply to their SB swap business.

(ii) Other Timing Issues and Expiration of the Exemption Granted Pursuant to the Effective Date Order

There are additional timing issues that are relevant regardless of whether a conditional registration process is employed. Upon registration, SBSs and MSBSPs would be required to

¹⁵⁰ See, e.g., *id.* at 11 (noting that “capital and margin changes may lead to significant changes in available cash resources that will have broader financial repercussions for affected organizations, including end-users” and recommending that the Commission “recognize the significance of these issues and allow market participants sufficient time to revise their financial planning to accommodate them.”).

¹⁵¹ See, e.g., letter from the Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (May 4, 2011), File No. S7-27-10, at 5 (noting that “[l]egal documentation, treatment of collateral, margin requirements, account setup, and fee negotiations...between Swap clearing houses and their clearing members will take significant time.”).

adhere to certain self-operating provisions of section 15F of the Exchange Act,¹⁵² specifically, the requirement to designate a chief compliance officer pursuant to section 15F(k)(1) of the Exchange Act¹⁵³ and the obligation of the chief compliance officer to adhere to the duties set forth in section 15F(k)(2) of the Exchange Act.¹⁵⁴ However, the chief compliance officer may not be required to prepare and submit annual reports to the Commission pursuant to section 15F(k)(3) of the Exchange Act, as the process for doing so is subject to rulemaking by the Commission¹⁵⁵ and such rules may not have been adopted by the Commission and/or require compliance at that time.¹⁵⁶

The Effective Date Order granted a temporary exemption from compliance with section 3E(f) of the Exchange Act, which requires SBSDs and MSBSPs to segregate initial margin amounts delivered by their counterparties in uncleared SB swaps if requested to do so by such counterparties.¹⁵⁷ This temporary exemption will expire on the date upon which the rules adopted by the Commission to register SBSDs and MSBSPs become effective.¹⁵⁸

If the Commission adopts a conditional SBSD and MSBSP registration process and this temporary exemption expires, SBSDs and MSBSPs would be required to segregate initial margin amounts delivered by their counterparties in uncleared SB swaps before the capital, margin, and segregation rules are adopted or before compliance with such rules is required. However, the

¹⁵² SB Swap Participant Registration Proposing Release at 65787.

¹⁵³ 15 U.S.C. 78o-10(k)(1).

¹⁵⁴ Id. at 78o-10(k)(2).

¹⁵⁵ See id. at 78o-10(k)(3)(A).

¹⁵⁶ These rules have been proposed as part of the Business Conduct Standards Proposing Release. See proposed rule 15Fk-1(c), Business Conduct Standards Proposing Release at 42459.

¹⁵⁷ 15 U.S.C. 78c-5(f).

¹⁵⁸ Effective Date Order at 36294.

Commission believes it would not be appropriate to require SBSBs and MSBSBs to comply with Exchange Act section 3E(f) before the Commission adopts and requires compliance with the rules pertaining to the segregation of margin pursuant to section 3E of the Exchange Act.¹⁵⁹ Given this, if the Commission determines to adopt a conditional registration regime, the Commission will consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to extend the exemption from compliance with section 3E(f) of the Exchange Act until the later of: (1) the date upon which SBSBs and MSBSBs are required to register with the Commission; and (2) the last compliance date of any of the final rules to be adopted under sections 3E and 15F of the Exchange Act.

(iii) Request for Comment

- Should the registration of SBSBs and MSBSBs be required before compliance with some, but not all, of the rules to be adopted under sections 3E and 15F of the Exchange Act is required? Why or why not? If yes, what would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?
- What would be the advantages and disadvantages of requiring SBSBs and MSBSBs to register with the Commission prior to the compliance date of the capital, margin, and segregation requirements? If there are potential disadvantages, what steps could be taken to mitigate them? Would SBSBs and MSBSBs be subject to additional costs or other burdens if the Commission were to require such persons to register with the Commission prior to the compliance date for the capital, margin, and segregation requirements? Why or why not? What would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?

¹⁵⁹ 15 U.S.C. 78c-5.

- In determining when SBSBs and MSBs should be required to register with the Commission, should the Commission take into account the CFTC's timing for its parallel requirement and/or the timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- What would be the advantages and disadvantages of requiring SBSBs and MSBs to comply with final rules resulting from the Business Conduct Standards Proposing Release prior to the compliance date of the capital, margin, and segregation requirements and vice versa? If there are potential disadvantages, what steps could be taken to mitigate them? Would SBSBs and MSBs be subject to additional costs or other burdens if the Commission were to require compliance with final rules resulting from the Business Conduct Standards Proposing Release prior to the compliance date of the capital, margin, and segregation requirements? Why or why not? What would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?
- Would SBSBs and MSBs be subject to additional costs or other burdens if the Commission were to require compliance with the capital, margin, and segregation requirements prior to the compliance date of the business conduct standards? Why or why not? What would the impact of doing so be upon the goals of Title VII's reforms of the SB swap market?
- Should compliance with the final rules to be adopted under sections 3E and 15F of the Exchange Act be further sequenced in some manner beyond the estimated amount of time needed for compliance, such as by SB swap market participant type (i.e., SBSB or

MSBSP)? If so, how? Are there other factors that should be considered in establishing the compliance dates for these rules?

- In determining when SBSBs and MSBs should be subject to the final rules to be adopted under sections 3E and 15F of the Exchange Act, should the Commission take into account the CFTC's timing for its parallel requirements and/or the timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission phase the introduction of the SB swap trade documentation and margining requirements by type of SB swap market participant? For example, should the Commission phase these requirements in the manner proposed by the CFTC in its Trading Documentation and Margining Implementation Proposal?¹⁶⁰ What would the potential advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

E. SB SEF Registration and Regulation and the Mandatory Trade Execution Requirement

The following section discusses timing issues pertaining to the implementation of the registration requirements and core principles applicable to SB SEFs as set forth in section 3D of the Exchange Act¹⁶¹ and the mandatory trade execution requirement as set forth in section 3C(h)

¹⁶⁰ See *supra* note 53 and the accompanying text for a discussion of the CFTC Clearing and Trade Execution Implementation Proposal.

¹⁶¹ 15 U.S.C. 78c-4.

of the Exchange Act.¹⁶² This section also discusses the timing of the compliance dates of final rules resulting from Proposed Regulation MC that would be applicable to SB SEFs and the sequencing of the mandatory trade execution requirement as it relates to both the mandatory clearing requirement and the exception from the mandatory trade execution requirement for any SB swap that is not made available to trade by an exchange or SB SEF. Finally, this section discusses the timing of the expiration of the temporary exemptions granted in the Effective Date Order¹⁶³ and the Exchange Act Exemptive Order¹⁶⁴ that permit certain persons that engage in SB swap activities to continue to do so until the earliest compliance date set forth in any final rules regarding the registration of SB SEFs.

(i) SB SEF Registration and Core Principles

The Dodd-Frank Act amended the Exchange Act to add new section 3D.¹⁶⁵ Section 3D(a)(1) provides that no person may operate a facility for the trading or processing of SB swaps, unless the facility is registered as an SB SEF or as a national securities exchange.¹⁶⁶ Section 3(a)(77) of the Exchange Act defines “security-based swap execution facility” as a trading system or platform in which multiple participants have the ability to execute or trade SB swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that (A) facilitates the execution of SB swaps between persons; and (B) is not a national securities exchange. Thus, the

¹⁶² *Id.* at 78c-3(h). See section II.E.(iii) *infra* for a discussion of the mandatory trade execution requirement set forth in section 3C(h) of the Exchange Act.

¹⁶³ See *supra* note 34.

¹⁶⁴ See *supra* note 36.

¹⁶⁵ See Pub. L. No. 111-203, section 763(c) (adding section 3D of the Exchange Act).

¹⁶⁶ *Id.*

Commission has proposed to interpret these two provisions, taken together, to require registration as a SB SEF or a national securities exchange for any entity that meets the definition of SB SEF in section 3(a)(77) of the Exchange Act.¹⁶⁷

To facilitate the start of organized trading of SB swaps, the Commission proposed rule 801(c) of proposed Regulation SB SEF, which would provide a method for the Commission to grant temporary registration to an applicant to become a registered SB SEF.¹⁶⁸ For any application for registration as a SB SEF filed with the Commission on or before July 31, 2014, for which the applicant indicates that it would like to be considered for temporary registration, the Commission proposed to grant such temporary registration as long as certain requirements were met. The Commission believes a temporary (or similar) registration process for prospective SB SEFs would serve as a useful tool during the initial implementation period to allow an applicant to operate as a SB SEF for a period of time while the Commission reviews its SB SEF registration application.

In the SB SEF Proposing Release, the Commission stated that when considering whether to grant a request for temporary registration, the Commission would review the information provided by the applicant that the Commission believes to be relevant, including, but not limited to: whether the applicant's trading system satisfies the definition of a "security-based swap execution facility" in section 3(a)(77) of the Exchange Act and any Commission rules, interpretations or guidelines regarding such definition; any access requirements or limitations imposed by the SB SEF; the ownership and voting structure of the applicant; and any certifications made by the applicant, including with respect to its capacity to function as a SB

¹⁶⁷ See SB SEF Proposing Release at 10959 n.62.

¹⁶⁸ See proposed rule 801(c) of proposed Regulation SB SEF, SB SEF Proposing Release at 11054.

SEF and its compliance with the Exchange Act and the rules and regulations thereunder.¹⁶⁹

Temporary registration would expire on the earlier of: (1) the date that the Commission grants or denies the applicant's registration as a SB SEF; or (2) the date that the Commission rescinds the applicant's temporary registration.

As discussed further below, the Commission has exempted entities that meet the definition of "security-based swap execution facility" from having to comply with the registration requirements set forth in section 3D(a)(1) of the Exchange Act until the compliance date set forth in the final rules pertaining to the registration of SB SEFs. The Commission expects to set forth in any future release adopting final SB SEF rules the timing for compliance with the registration requirements (including any temporary registration requirements), the core principles and the rules thereunder.

(ii) Proposed Regulation MC

Proposed Regulation MC would apply governance requirements and ownership and voting limitations to SB SEFs as a means to mitigate conflicts of interest for SB SEFs.¹⁷⁰ The Commission may, taking into account comments received, consider taking final action on the conflicts of interest proposals relating to SB SEFs that are set forth in proposed Regulation MC as part of any final rules the Commission may adopt that relate to the regulation and registration of SB SEFs. The Commission preliminarily believes the proposed rules for SB SEFs contained in Proposed Regulation MC¹⁷¹ align in scope with proposed Rule 820 implementing Core

¹⁶⁹ SB SEF Proposing Release at 10999.

¹⁷⁰ See Proposed Regulation MC, *supra* note 27. Proposed Regulation MC also would apply governance requirements and ownership and voting limitations on national securities exchanges that post or make available for trading SB swaps.

¹⁷¹ Proposed Regulation MC at 65890-12, 65931-2.

Principle 11, as set forth in proposed Regulation SB SEF,¹⁷² because both proposals include rules that are designed to minimize and resolve conflicts of interest with respect to SB SEFs.

(iii) Statutory Sequencing of the SB Swap Mandatory Trade Execution Requirement

Section 3C(h) of the Exchange Act requires that transactions in SB swaps that are subject to the clearing requirement of section 3C(a)(1) of the Exchange Act must be executed on an exchange or on a SB SEF registered with the Commission (or a SB SEF exempt from registration), unless no exchange or SB SEF makes the SB swap available to trade (referred to as the “mandatory trade execution requirement”) or the SB swap transaction is subject to the clearing exception in section 3C(g) of the Exchange Act.¹⁷³ The Commission believes this section provides a certain sequencing of the SB swap mandatory trade execution requirement, as it states that only a SB swap that has been determined by the Commission to be required to be cleared, and that has been made available to trade on an exchange or registered SB SEF, must be executed on an exchange or registered SB SEF.¹⁷⁴

As discussed in section II.C above, the Commission anticipates that SB swap transactions that the Commission determines are subject to mandatory clearing would not be required to be cleared until the later of: (1) the compliance date of certain of the final rules to be adopted pursuant to the Clearing Agency Standards Proposing Release; (2) the compliance date of the final rules adopted pursuant to the End-User Exception Proposing Release; and (3) the Commission determining whether to propose amendments to the existing net capital and customer protection requirements applicable to broker-dealers with regard to SB swap clearing

¹⁷² SB SEF Proposing Release at 11064.

¹⁷³ 15 U.S.C. 78c-3(h).

¹⁷⁴ See *id.*

through such broker-dealers and whether to address portfolio margining with swaps. The Commission expects there would be no mandatory exchange or SB SEF trading of SB swap transactions (thus allowing such SB swap transactions to continue to trade OTC) before compliance is required with any final rules adopted pursuant to the Clearing Agency Standards Proposing Release and the End-User Exception Proposing Release and before the Commission considers appropriate steps to address potential issues relating to the existing broker-dealer net capital and customer protection requirements and portfolio margining with swaps, as SB swaps would not be required to be cleared until the Commission has determined that SB swaps are required to be cleared and the clearing requirement has become operative.

The Dodd-Frank Act additionally provides that SB swaps that are subject to mandatory clearing but that have not been made available to trade by an exchange or SB SEF would not be subject to the mandatory trade execution requirement.¹⁷⁵ In the SB SEF Proposing Release, the Commission proposed to interpret the phrase “made available to trade” to mean something more than the decision to simply trade an SB swap on a SB SEF or an exchange, and that SB swaps subject to mandatory clearing would not be subject to mandatory exchange or SB SEF trading simply because they are listed on a SB SEF or exchange.¹⁷⁶ The Commission further proposed that the determination as to when a SB swap would be considered to be “made available to trade” on an exchange or a SB SEF be made pursuant to objective measures established by the Commission, rather than by one or a group of SB SEFs.¹⁷⁷ The Commission further noted that it did not, at that time, have sufficient data to propose standards pursuant to which a determination

¹⁷⁵ Exchange Act section 3C(h)(2), 15 U.S.C. 78c-3(h)(2).

¹⁷⁶ SB SEF Proposing Release at 10969.

¹⁷⁷ Id.

of whether an SB swap is “made available to trade” should be made, and requested that commenters provide suggestions as to those objective standards that would be appropriate.¹⁷⁸

The Commission is reviewing comments received on its proposal relating to the determination of when a SB swap should be “made available to trade”. If the Commission adopts its interpretation of “made available to trade” as proposed, the Commission anticipates that it would ultimately adopt standards for determining when a SB swap has been “made available to trade.” Thus, if the Commission adopts the proposed interpretation, the Commission expects that there would be no mandatory exchange or SB SEF trading of SB swaps (and thus such SB swaps may continue to trade OTC) before: (1) any such standards have been finalized; (2) a SB swap has been determined to be “made available to trade” pursuant to such standards; and (3) such “made available to trade” determination has become effective.

As discussed above, the specific compliance dates for the core principles applicable to SB SEFs as set forth in the Exchange Act, and any final rules relating to SB SEFs that are adopted by the Commission, including registration rules, will be addressed in any release adopting such final rules. The Commission understands that some entities that intend to seek to register with the Commission as an SB SEF or to be exempt from such registration would do so as soon as possible, which likely would be, as discussed above, before the mandatory trade execution requirement becomes operational.¹⁷⁹

Based upon Commission staff conversations with industry participants, the Commission believes that some entities that meet the definition of an SB SEF may seek to register with the

¹⁷⁸ Id.

¹⁷⁹ See, e.g., letter from Tradeweb Markets LLC (Apr. 4, 2011), File No. S7-06-11, at 1; letter from MarketAxess Corporation (Apr. 4, 2011), File No. S7-06-11, at 1.

Commission (or be exempt from such registration) before the mandatory trade execution requirement becomes operational.

(iv) Expiration of Exemptions and Exceptions Granted Pursuant to the Effective Date Order and the Exchange Act Exemptive Order

The compliance dates of certain of the rules pertaining to SB SEFs will result in the expiration of certain of the temporary exemptions and exceptions granted pursuant to the Effective Date Order and the Exchange Act Exemptive Order. Specifically, the following temporary exemptions granted pursuant to the Effective Date Order will expire upon the earliest compliance date set forth in any of the final rules pertaining to the registration of SB SEFs:

- The exemption from compliance with section 3D(a)(1) of the Exchange Act's prohibition against any person operating a facility for the trading or processing of SB swaps unless the facility is registered as a SB SEF or as a national securities exchange;¹⁸⁰ and
- The exemption from compliance with section 3D(c) of the Exchange Act's requirement that a national securities exchange (to the extent that it also operates a SB SEF and uses the same electronic trade execution system for listing and executing trades of SB swaps on or through the exchange and the facility) identify whether electronic trading of SB swaps is taking place on or through the national securities exchange or the SB SEF.¹⁸¹

Also upon the earliest compliance date set forth in the any of the final rules pertaining to the registration of SB SEFs, the temporary exceptions from the following Exchange Act requirements will expire:

- The temporary exemption from Exchange Act sections 5 and 6;¹⁸²

¹⁸⁰ Effective Date Order at 36306.

¹⁸¹ Id. at 36306.

¹⁸² Exchange Act Exemptive Order at 39939.

- The exemption applicable to any person other than a clearing agency acting as a central counterparty in SB swaps from the requirements to register as a national securities exchange under sections 5 and 6 of the Exchange Act and the rules and regulations thereunder solely in connection with the person's activities involving SB swaps;¹⁸³
- The exemption applicable to broker-dealers from section 5 of the Exchange Act solely in connection with the broker's or dealer's activities involving SB swaps that it effects or reports on an exchange that is exempted from registration pursuant to the Exchange Act Exemptive Order's temporary exemption from Exchange Act sections 5 and 6;¹⁸⁴
- The exemption applicable to credit default swap central counterparties from the requirements of sections 5 and 6 of the Exchange Act and the rules and regulations thereunder solely in connection with their calculation of mark-to-market prices for opened positions in cleared credit default swaps;¹⁸⁵
- The exemption applicable to any member of a credit default swap central counterparty from the requirements of section 5 of the Exchange Act solely to the extent such member uses any transactions in cleared credit default swaps to effect any transaction in cleared credit default swaps, or to report any such transaction, in connection with the credit default swap central counterparty's clearance and risk management process for cleared credit default swaps.¹⁸⁶

¹⁸³ Id.

¹⁸⁴ Id.

¹⁸⁵ Id. at 39939-40.

¹⁸⁶ Id. at 39940.

The Commission granted the foregoing exemptions in the Exchange Act Exemptive Order because certain persons, particularly those that would meet the statutory definition of “security-based swap execution facility,” may be engaging in activities that would subject them to the restrictions and requirements of Sections 5 and 6 of the Exchange Act as of the Effective Date. In setting the compliance dates for the final rules pertaining to the registration and regulation of SB SEFs, the Commission intends to consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to take further action with regard to any of the above-described temporary exemptions.

(v) Request for Comment

- Pursuant to the sequencing described herein, rules implementing the regulation and registration of SB SEFs would be sequenced later in the process than other rules implementing SB swap provisions of the Dodd-Frank Act. Do commenters believe this sequencing is appropriate or should any final rules governing SB SEFs be considered at an earlier point in time? Why or why not? How would this sequencing affect the goals of Title VII’s reforms of the SB swap market?
- Should an SB SEF be required to comply with all duties, core principles and other requirements upon receiving approval of its registration with the Commission or should compliance with some of these requirements be delayed until a later point in time? Why or why not? If so, for which requirements and until what point in time should compliance be delayed? What factors, if any, should be considered in establishing the compliance dates for any SB SEF requirements that should be subject to delayed or phased-in compliance, and why should such factors be considered? How would such a delay or phasing in affect the goals of Title VII’s reforms of the SB swap market?

Would there be potential advantages and disadvantages of such a delay or phasing in? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?

- In the SB SEF Proposing Release, the Commission proposed a rule that would permit applicants to apply for temporary registration as a SB SEF.¹⁸⁷ The Commission believes temporary registration for SB SEFs could serve as a useful tool during the initial implementation period and should provide the Commission sufficient time to review an application more thoroughly when considering an application for registration that is not limited in duration.¹⁸⁸ Should the Commission consider granting an exemption from section 3D of the Exchange Act or extending the current exemption from section 3D in the Effective Date Order for any entity that submits an application for temporary SB SEF registration to permit it to operate as a SB SEF pending submission of an application for permanent SB SEF registration, or pending Commission approval or disapproval of its permanent application? If so, should the Commission condition such extension or granting of an exemption on the prospective SB SEF complying with certain conditions such as, for example, meeting the Commission's interpretation of the definition of SB SEF, satisfying any requirements relating to fair access, and providing the Commission with access to its books and records? Why or why not? If so, which conditions should the Commission impose on the SB SEF's operations prior to the Commission taking action on its application for registration, and why?

¹⁸⁷ See SB SEF Proposing Release at 10999-11000; see also section II.E.(i) *supra*.

¹⁸⁸ See SB SEF Proposing Release at 11000.

- If the Commission were to permit entities to submit applications for temporary SB SEF registration prior to their permanent SB SEF applications, how soon after an entity submitted its application for temporary SB SEF registration should it be required to submit its application for permanent SB SEF registration? For example, would 360 days be sufficient? Should a shorter or longer time period be applied? If so, what is an appropriate time period and why?
- In the SB SEF Proposing Release, the Commission proposed an initial implementation phase for the registration of SB SEFs, which phase would begin on the date of Regulation SB SEF's effectiveness and end on July 31, 2014.¹⁸⁹ Based upon the sequencing of the compliance dates of the final rules described herein that would result in the registration and registration of SB SEFs later in the implementation process, is this time period initially proposed to implement the registration of SB SEFs appropriate? Why or why not? If not, what would be a more appropriate time period?
- In determining when to require SB SEFs to register with the Commission, should the Commission take into account the CFTC's timing for its parallel requirement and/or the timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- Should the Commission consider a delayed implementation schedule for any conflicts of interest rules that it may adopt for SB SEFs? Why or why not? How would such a delayed implementation schedule affect the goals of Title VII's reforms of the SB swap

¹⁸⁹ See *id.* at 10998.

market? Would there be potential advantages and disadvantages of doing so? If so, what would they be? If there are potential disadvantages, what steps could be taken to mitigate them?

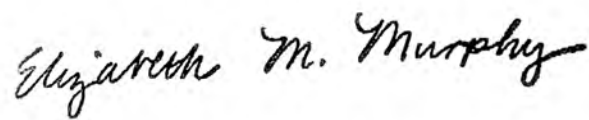
- Are there other rules or sets of rules with which compliance should be required, or which must be effective, before SB swaps subject to the mandatory trade execution requirement are required to be traded? If so, which ones, and why?
- Should the Commission phase in compliance with the mandatory trade execution requirement by type of market participant? For example, should the Commission phase in this requirement by market participant type in the manner proposed by the CFTC in its Clearing and Trade Execution Implementation Proposal?¹⁹⁰ Why or why not? What would the advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?
- In determining when to require compliance with the mandatory trade execution requirement, should the Commission take into account the CFTC's timing for its parallel requirement and/or the timing of other jurisdictions? Why or why not? If so, what is the most appropriate manner of sequencing in relation to those potentially differing timelines? What would the advantages and disadvantages of doing so be? If there are potential disadvantages, what steps could be taken to mitigate them?

¹⁹⁰ See supra note 53 and accompanying text for a discussion of the CFTC's proposals to phase in compliance with the swap clearing, trading, trade documentation, and margining requirements arising under Subtitle A of Title VII of the Dodd-Frank Act by category of market participant. See also supra note 59 and accompanying text noting that, in the CFTC Clearing and Trade Execution Implementation Proposal, the CFTC stated that before the mandatory clearing of swaps begins, the product and entity definitions, the end-user exception from mandatory clearing, and the rules pertaining to the segregation of customer collateral must be adopted and that before swap market participants could be required to comply with a trade execution requirement, the CFTC must adopt final rules related to swap execution facilities and designated contract markets.

III. Solicitation of Comments

The Commission intends to monitor closely the imposition of the new regulatory regime upon SB swaps and SB swap market participants to determine to what extent, if any, additional regulatory action may be necessary. The Commission is soliciting comment on all aspects of this Statement and the guidance it provides regarding compliance dates for the rules to be adopted under Subtitle B of Title VII. Comments received will be addressed in the relevant final rulemakings to which they pertain.

By the Commission.



Elizabeth M. Murphy
Secretary

Date: June 11, 2012

*Commissioner Aguilar
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67179 / June 11, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14912

In the Matter of

RONNY J. HALPERIN, ESQ.,

Respondent.

ORDER INSTITUTING ADMINISTRATIVE
PROCEEDINGS PURSUANT TO RULE
102(e) OF THE COMMISSION'S RULES
OF PRACTICE, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted against Ronny J. Halperin, Esq. ("Respondent" or "Halperin") 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 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 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.

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1. Halperin, age 63, resides in Aventura, Florida. He is an attorney licensed to practice law in the State of Florida and is the sole member of law firm Ronny J. Halperin PA. From January 14, 2009 until April 16, 2009, Halperin was CEO of HydroGenetics, Inc., a Florida corporation with its principal place of business in Fort Lauderdale, Florida. Halperin also served as a HydroGenetics director (until he resigned in late 2011). HydroGenetics, which has common stock registered pursuant to Section 12(g) of the Exchange Act, purportedly researches and develops fuel cell systems for internal combustion gas engines.

2. Recycle Tech is a Colorado company. From February 16, 2010 through June 2010 its principal place of business was Miami, Florida. Its common stock is quoted on the OTC Link (formerly, "Pink Sheets") operated by OTC Markets Group Inc. under the symbol "RCYT." From no later than February 2010 to June 2010, Recycle Tech purported to be a development and engineering firm specializing in "green building."

3. On May 4, 2012, a final judgment was entered by consent against Halperin, permanently enjoining him from violating Sections 5(a) and (c) of the Securities Act of 1933 and aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder in the action entitled Securities and Exchange Commission v. Recycle Tech, Inc., et al., Civil Action Number 12-cv-21656-JAL, in the United States District Court for the Southern District of Florida. Halperin was also ordered to pay disgorgement of \$235,060, prejudgment interest of \$15,000, and a \$75,000 civil money penalty.

4. The Commission's complaint alleged, among other things, that Halperin violated the registration and antifraud provisions of the securities laws in connection with Recycle Tech's stock distribution and unregistered offering of securities. The complaint also alleged that Recycle Tech, along with other defendants, orchestrated, coordinated, and funded a "pump-and-dump" scheme involving the sale of unregistered shares of Recycle Tech stock. Halperin assisted with the execution of their scheme.

IV.

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

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

Halperin is suspended from appearing or practicing before the Commission as an attorney for a period of five years.

By the Commission.

Elizabeth M. Murphy
Secretary

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By **Jill M. Peterson**
Assistant Secretary

*Commissioner Paredes
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67187 / June 12, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-12111

In the Matter of

FEDERATED INVESTMENT
MANAGEMENT COMPANY,
FEDERATED SECURITIES
CORP. and FEDERATED
SHAREHOLDER SERVICES
COMPANY,

Respondents.

ORDER MODIFYING
DISTRIBUTION PLAN AND
DIRECTING DISBURSEMENT

On December 4, 2009, the Commission issued a Notice of Proposed Plan of Distribution and Opportunity for Comment ("Notice") in connection with this proceeding (Exchange Act Release No. 61118) pursuant to Rule 1103 of the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1103. No comments were received by the Commission in response to the Notice and on January 28, 2010, the Commission approved the proposed plan of distribution ("Plan") (Exchange Act Release No. 61437).

The Plan provides that a Fair Fund consisting of \$72 million in disgorgement and a civil penalty, plus any accrued interest, be transferred to Deutsche Bank to be distributed by the Fund Administrator to injured investors according to the methodology set forth in the Plan. Pursuant to the Plan, and following the issuance of Orders Directing Disbursement, the Independent Distribution Consultant ("IDC") and the Fund Administrator, in two tranches, distributed \$77,153,245.32 to injured investors.¹ There is a significant amount remaining in the Fair Fund after the distribution of those amounts, which is considered the Residual pursuant to the Plan. Paragraph 9.18 of the Plan provides that any Residual shall be distributed to the Federated Funds, based on the proportionate excess profits by market timers accounted for by each Federated Fund.

¹ See Exchange Act Release Nos. 62542 (July 21, 2010) and 62836 (September 2, 2010).

A substantial portion of the Residual is comprised of approximately \$3.8 million in Fair Fund monies that the Fund Administrator had originally distributed to a broker-dealer for application among the beneficial holders of non-disclosed accounts. The broker-dealer returned the \$3.8 million to the Fund Administrator due to the broker-dealer's inability, at that time, to obtain the necessary shareholder data to distribute the monies. However, the broker-dealer has since provided the Fund Administrator with the necessary information. In addition, a substantial portion of the Residual is comprised of amounts that were distributed but which were not claimed (i.e., checks that were not presented for payment within the time period prescribed by the Plan). Consistent with the Plan's primary objective to distribute funds to affected investors at the time of the misconduct and with the concurrence of the IDC and Federated, the Plan is modified in the following respects:

- A. Additional Steps: The IDC and the Fund Administrator will take the following additional steps ("Additional Steps") relating to the distribution: (1) reissue and mail all checks in the amount of \$250 to \$499 to investors who failed to present those checks for payment within the time prescribed by the Plan and whose check was not otherwise previously reissued; (2) identify and issue checks to the beneficial accountholders of non-disclosed accounts consisting of approximately \$3.8 million in Fair Fund monies that the Fund Administrator had originally distributed to an intermediary; and (3) reissue and mail all checks to investors who contacted Federated, BFDS, or the staff after March 4, 2011, the last date that checks were honored, to request that their checks be reissued.
- B. Stale Dates for Reissued Checks: Checks reissued as a result of the Additional Steps shall be void 60 days after issuance. The IDC may, in his discretion, reissue a check which was issued pursuant to the Additional Steps, but only if the request for reissuance is made before the stale date of the original reissued check (i.e., within 60 days after original reissuance). Any check so reissued will be void no later than 30 days after the stale date of the original reissued check. Except as provided in this paragraph, the IDC will not reissue any other checks.
- C. Remaining Uncashed Checks to be Returned to Residual: Any checks issued pursuant to the Additional Steps which remain uncashed after their stale date or which are returned as undeliverable, shall be cancelled and returned to the Fair Fund as Residual to be distributed as part of the Second Residual, described in paragraph G, below.
- D. Costs of Additional Steps: Federated will pay, but shall be reimbursed from the Fair Fund, for the fees and expenses of the IDC and Fund Administrator that are attributable to the Additional Steps which are found not to be unreasonable by the Commission staff. Such reimbursable costs, however, are not to exceed \$600,000 ("Total Reimbursable Amount"). Fees and expenses of the IDC and Fund Administrator which are not attributable to the Additional Steps, as determined by the Commission staff, shall be borne by Federated in accordance with the Order Instituting Administrative and Cease-and-Desist Proceedings,

Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b)(4) and 17A(c)(3) of the Securities Exchange Act of 1934, Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) and 9(f) of the Investment Company Act of 1940, dated November 28, 2005, and shall not be reimbursed from the Fair Fund.

Accordingly, fees and expenses attributable to the Additional Steps but which exceed the Total Reimbursable Amount shall not be reimbursed.

- E. Amount to be Reserved From the Residual: The amount of \$5,511,081.65 will be reserved from the Fair Fund ("Reserved Amount") to pay: (1) any check issuances or re-issuances that result from the Additional Steps; (2) the Total Reimbursable Amount of the Additional Steps as described above; and (3) estimated tax liabilities of the Fair Fund.
- F. First Residual Distribution: The current balance of the Fair Fund less the Reserved Amount shall be considered the Residual and shall be distributed to the affected Federated Funds in accordance with the Plan. The First Residual distribution may be made while the Additional Steps are being taken. Upon certification that a validated payment file has been received by Commission staff and the distribution information has also been received by the affected Federated Funds, the Secretary shall issue an Order to Disburse the First Residual pursuant to the Plan.
- G. Second Residual Distribution: After the stale date for all checks issued or reissued as a result of the Additional Steps, any funds from the Reserved Amount remaining in the Fair Fund shall be considered Residual. Upon certification that a validated payment file has been received by Commission staff and the distribution information has also been received by the affected Federated Funds, the Secretary shall issue an Order to Disburse the Second Residual pursuant to the Plan.

Accordingly, it is ORDERED that:

A. Pursuant to Rule 1104 of the Fair Fund Rules, 17 C.F.R. § 201.1104, the Distribution Plan is modified as described above, and approved with such modification;

B. The Commission staff shall transfer \$16,932.03 of the Fair Fund to Deutsche Bank and the Fund Administrator shall include such monies in its distributions to the affected Federated Funds, as provided for in the Distribution Plan and in paragraph C., below;

C. The Fund Administrator shall disburse the First Residual as described above in Paragraph F. to the affected Federated Funds, in the amount stated in the validated payment file of \$14,575,932.22, as provided for in the Distribution Plan as hereby modified.

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. 67188 / June 12, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-12896

In the Matter of

**FOUNDING PARTNERS
CAPITAL MANAGEMENT
COMPANY AND
WILLIAM GUNLICKS,**

Respondents.

**ORDER DISCHARGING FUND
ADMINISTRATOR AND
TERMINATING DISGORGEMENT
FUND**

On December 3, 2007, the Commission issued a Corrected Order Instituting Administrative and Cease-And-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 8A of the Securities Act of 1933 and Section 203(e) of the Investment Advisers Act of 1940 ("Order") against Founding Partners Capital Management Company ("Founding Partners") and William Gunlicks (Securities Act Release No. 8866). Among other things, the Order, to which Founding Partners and Gunlicks consented without admitting or denying the Commission's findings, ordered Founding Partners to pay disgorgement of \$169,180 and prejudgment interest of \$13,064.

On March 3, 2008, the Commission issued a Notice of Proposed Plan of Distribution and Opportunity for Comment (Exchange Act Rel. No. 57423). The Commission received no comments and on May 9, 2008 issued an Order Approving Distribution Plan and Appointing Fund Administrator (Exchange Act Rel. No. 57807). The distribution plan provided that the Fund Administrator would develop a list of payees and amounts and then seek an order directing disbursement for the distribution based on this payee list. On December 3, 2009, the Commission issued an Order Directing Disbursement of Disgorgement Fund (Exchange Act Rel. No. 61109).

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The Fund Administrator submitted a Final Accounting pursuant to Rule 1105(f) of the Commission's Rules on Fair Fund and Disgorgement Plans, which was approved by the Commission. Pursuant to the Administrator's Final Accounting, all liabilities have been satisfied and \$1,989.17 in residual funds will be transmitted to the U.S. Treasury.

Accordingly, IT IS ORDERED that:

- A. the Disgorgement Fund is terminated;
- B. the Fund Administrator is discharged; and
- C. the \$1,989.17 remaining in the Disgorgement Fund shall be transferred to the U.S. Treasury.

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. 67190 / June 12, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14913

In the Matter of

JAMES FLEISHMAN,

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 Fleishman ("Fleishman" 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, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and 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. Fleishman was a sales manager at Primary Global Research LLC ("PGR") from at least 2008 through December 2010. Fleishman held Series 7 and 63 licenses that were registered with a broker-dealer affiliate of PGR during the relevant time period. Fleishman, age 42, is currently incarcerated in Colorado.

2. On May 7, 2012, a final judgment was entered by consent against Fleishman, permanently enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in the civil action entitled SEC v. Longoria et al., Civil Action No. 11-CV-0753 (S.D.N.Y.).

3. The Commission's complaint alleged that, in connection with the purchase or sale of securities, Fleishman knew, recklessly disregarded, or should have known, that material nonpublic information he received from consultants to PGR was disclosed or misappropriated in breach of a fiduciary duty, or similar relationship of trust and confidence. The complaint further alleges that Fleishman facilitated the transfer of the material nonpublic information to hedge fund clients of PGR and/or passed the information directly to PGR clients himself, and that certain hedge fund clients of PGR traded based on the material nonpublic information.

4. On September 20, 2011, Fleishman was convicted of one count of conspiracy to commit securities fraud and one count of conspiracy to commit wire fraud in violation of Title 18 United States Code, Sections 371 and 1349, before the United States District Court for the Southern District of New York, in United States v. James Fleishman, 11-cr-00032 (JSR).

5. The counts of the indictment on which Fleishman was convicted alleged, inter alia, that Fleishman, and others, participated in a scheme to defraud public companies of material nonpublic information. The indictment alleged that Fleishman did so by obtaining material nonpublic information and transmitting it directly to clients of PGR, and by facilitating meetings, phone calls, and other communications between employees of public companies and PGR clients knowing that material nonpublic information would be divulged. The indictment alleged that Fleishman understood that the material nonpublic information would be used for purposes of executing and causing others to execute trades in the securities of public companies.

IV.

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

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


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 67192 / June 13, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14914

In the Matter of

**ROK Entertainment Group, Inc.,
RussOil Corp.,
Tricell, Inc.,
Tunex International, Inc. (n/k/a Aone
Dental International Group, Inc.), and
Wireless Age Communications, 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 ROK Entertainment Group, Inc., RussOil Corp., Tricell, Inc., Tunex International, Inc. (n/k/a Aone Dental International Group, Inc.), and Wireless Age Communications, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. ROK Entertainment Group, Inc. (CIK No. 863139) is a void Delaware corporation located in Wolverhampton, United Kingdom with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ROK Entertainment Group 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, 2008, which reported a net loss of over \$20 million for the prior three months. As of June 11, 2012, the company's stock (symbol "ROKE") was quoted on OTC Link (previously,

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"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. RussOil Corp. (CIK No. 1369092) is a revoked Nevada corporation located in Moscow, Russia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). RussOil is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2008, which reported a net loss of over \$458,000 for the prior three months. As of June 11, 2012, the company's stock (symbol "RUSO") was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

3. Tricell, Inc. (CIK No. 1178156) is a revoked Nevada corporation located in Cheshire, United Kingdom with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tricell 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, 2006, which reported a net loss of over \$22 million for the prior three months. As of June 11, 2012, the company's stock (symbol "TCLL") 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. Tunex International, Inc. (n/k/a Aone Dental International Group, Inc.) (CIK No. 806129) is a Utah corporation located in Hong Kong with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Tunex International 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, 2006, which reported a net loss of over \$19,000 for the prior nine months. As of June 11, 2012, the company's stock (symbol "AODG") was quoted on OTC Link, had four market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

5. Wireless Age Communications, Inc. (CIK No. 1130131) is a Nevada corporation located in King City, Ontario, Canada with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Wireless Age Communications is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended September 30, 2008. As of June 11, 2012, the company's stock (symbol "WLSA") 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

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 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 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


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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

June 13, 2012

In the Matter of

**ROK Entertainment Group, Inc.,
RussOil Corp.,
Tricell, Inc.,
Tunex International, Inc. (n/k/a Aone Dental
International Group, Inc.), and
Wireless Age Communications, 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 ROK Entertainment Group, 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 RussOil Corp. because it has not filed any periodic 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 Tricell, 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 Tunex International, Inc. (n/k/a Aone Dental International Group, Inc.) because it has not filed any periodic reports since the period ended December 31, 2006.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Wireless Age Communications, 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. EDT on June 13, 2012, through 11:59 p.m. EDT on June 26, 2012.

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. 67197 / June 13, 2012**

**ADMINISTRATIVE PROCEEDING
File No. 3-14915**

In the Matter of

STEVEN H. BETHKE,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 17A 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 17A of the Securities Exchange Act of 1934 ("Exchange Act") against Stephen H. Bethke ("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 17A 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. Bethke was the principal of First National Trust Company, a transfer agent not registered with the Commission. Bethke, 53 years old, is a resident of Houston, Texas.

2. On June 5, 2012, a final judgment was entered by consent against Bethke, 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. Steven H. Bethke, Civil Action Number 4:12-cv-01638, in the United States District Court for the Southern District of Texas.

3. The Commission's complaint alleged that, while acting as a transfer agent to Bederra Corporation ("Bederra"), Bethke misappropriated Bederra stock certificates and used them to issue over one billion shares of Bederra common stock without authorization from Bederra. Bethke sold the shares, which were unregistered, for his own account, in exchange for payments of approximately \$355,250. Bethke also fabricated officers' certificates and company resolutions in connection with the sale of the shares.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 17A(c)(4)(C) of the Exchange Act that Respondent Bethke be, and hereby is, barred from association with any transfer agent, broker, dealer, investment adviser, or municipal securities dealer.

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

By the Commission.

Elizabeth M. Murphy
Secretary

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. 67199 / June 14, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14916

In the Matter of

**Stream Communications Network &
Media, 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 Stream Communications Network & Media, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENT

1. Stream Communications Network & Media, Inc. (CIK No. 1125670) is a British Columbia corporation located in Warsaw, Poland with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Stream Communications Network & Media is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 20-F for the period ended December 31, 2008, which reported a net loss of over \$5.5 million for the prior twelve months. As of June 11, 2012, the company's stock (symbol "SCNWF") 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).

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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 failed to heed delinquency letters sent to it by the Division of Corporation Finance requesting compliance with its periodic filing obligations or, through its failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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, 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)].

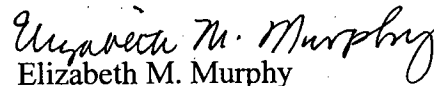
If the Respondent fails to file the directed Answer, or fail to appear at a hearing after being duly notified, the Respondent, and any successor under Exchange Act Rules 12b-2 or 12g-3, and any new corporate name of the Respondent, may be deemed in default and the proceedings may be determined against it upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f), and 310 of the Commission's Rules of Practice [17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f), and 201.310].

This Order shall be served forthwith upon 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
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

June 14, 2012

In the Matter of

Stream Communications Network & Media, 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 Stream Communications Network & Media, Inc. because it has not filed any periodic reports since the period ended December 31, 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 company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the security of the above-listed company is suspended for the period from 9:30 a.m. EDT on June 14, 2012, through 11:59 p.m. EDT on June 27, 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. 67200 / June 14, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14917

In the Matter of

LUC D. NGUYEN, ESQ.,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(3)(i) of the Commission's Rules of Practice¹ against Luc D. Nguyen, Esq. ("Respondent" or "Nguyen").

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

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.

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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 Section 15(b) of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. ("Nguyen"), age 41, is a Utah resident living in Draper, Utah. Nguyen is a member of the Utah State Bar. Nguyen provided advice to individuals and entities regarding compliance with the federal securities laws. Nguyen has never held any securities licenses and is not registered with the Commission in any capacity.

2. On January 6, 2011, the Commission filed a complaint against Nguyen in SEC v. Morris et al. (Civil Action No. 2:11CV00021). On June 1, 2012, the court entered an order permanently enjoining Nguyen, by consent, from future violations of Sections 17(a), 5(a) and 5(c) of the Securities Act of 1933, Sections 10(b) and 15(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

3. The Commission's complaint alleged, among other things, that Nguyen knowingly made material misrepresentations to investors regarding an investment opportunity he recommended, including telling investors that their principal would be safe and essentially risk-free. Nguyen also told investors he had performed extensive due diligence on the investment including meeting personally with the attorneys representing the supposed trading companies involved in the investment. In fact, Nguyen performed no due diligence regarding the investment opportunity. Nguyen's representations regarding the lack of risk investors faced were also false. In truth, investors faced real risk of losing their principal as the investment operated as a classic Ponzi scheme. In addition, the Commission's complaint alleged that Nguyen acted as an unregistered broker-dealer in violation of Section 15(a) of the Exchange Act.

IV.

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

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

barred from association with any broker, dealer, investment adviser, municipal securities dealer, 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.

It is also hereby ORDERED pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice, effective immediately, that:

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

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

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67205 / June 14, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14919

In the Matter of

GARRETT D. BAUER,

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 Garrett D. Bauer ("Bauer" 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, Respondent consents to the Commission's jurisdiction over him and the subject matter of these proceedings and 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. Bauer, age 44, is a resident of New York, New York. From June 2009 to August 16, 2010, Bauer was a trader at Lighthouse Financial Group, LLC, which was a registered broker-dealer. On August 16, 2010, Lighthouse Financial Group, LLC was deregistered. From September 2008 to December 2009, Bauer traded at Jag Trading, LLC and from April 2001 to September 2008 he was a trader at RBC Professional Trader Group, LLC (which changed its name to G-2 Trading, LLC in October 2009), both of which are registered broker-dealers. From October 1991 to January 1994, Bauer was employed at Weiss Peck & Greer, which was a registered broker-dealer. Bauer is not currently associated with a broker-dealer. At the time the insider trading scheme described below was active, Bauer was associated with broker-dealers. Bauer has held a Series 7 securities license.

2. On May 1, 2012, a final judgment was entered by consent against Bauer, permanently enjoining him from future violations of Sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder, in the civil action entitled Securities and Exchange Commission v. Garrett D. Bauer, et al., Civil Action Number 2:11-cv-01936, in the United States District Court for the District of New Jersey. Bauer was ordered to pay \$30,812,796 in disgorgement of ill-gotten gains representing profits gained as a result of the fraudulent conduct alleged in the Commission's complaint, which is partially satisfied and offset, on a dollar-for-dollar basis, by a Final Order of Forfeiture entered in a criminal matter brought in the District of New Jersey under Criminal Action No. 11-842 (KSH) for the following assets: i) \$23,200 in cash; ii) \$20,960,741 from bank and brokerage accounts; and iii) the net proceeds from the sale of two pieces of real property that were seized at the direction of the United States Attorney's Office for the District of New Jersey. In addition, Bauer was ordered to pay \$859,135 in prejudgment interest.

3. The Commission's complaint alleged that Bauer engaged in a long-standing serial insider trading scheme along with two others: Matthew H. Kluger ("Kluger"), a lawyer who over the course of several years repeatedly accessed material nonpublic information about pending mergers and acquisitions from the computer system of his former employer, Wilson Sonsini Goodrich & Rosati ("Wilson Sonsini") and Kenneth T. Robinson ("Robinson"), identified in the complaint only as the "middle man", who was Kluger's friend and who passed along the information to Bauer (and later traded on it himself in two instances). From at least April 2006 through February 2011, based on nonpublic information that Kluger obtained from Wilson Sonsini, Bauer traded in advance of at least nine pending mergers and acquisitions involving companies that were advised by Wilson Sonsini, and realized over \$30 million in ill-gotten gains.

4. On December 8, 2011, Bauer pled guilty to conspiracy to commit securities fraud [18 U.S.C. § 371], securities fraud [15 U.S.C. § 78j(b) and 78ff(a) and 17 C.F.R. § 240.10b-5], conspiracy to commit money laundering [18 U.S.C. § 1956(h)], and obstruction of justice [18 U.S.C. § 1512(c)(2)] before the United States District Court for the District of New Jersey, in United States v. Garrett D. Bauer, No. 2:11-cr-00842.

5. In pleading guilty, Bauer admitted that, among other things, between 1994 to 2011 he engaged in numerous instances of buying and selling securities based on inside information that Kluger had obtained from his employment at various law firms, knowing that Kluger had misappropriated that information from his law firms. Bauer also admitted that he would typically purchase shares in his trading accounts for himself, Kluger, and Robinson, and then would withdraw cash from ATMs and give Robinson his proceeds and Kluger's proceeds with the understanding that Robinson would give Kluger his share. Bauer also admitted that he made these payments in cash in an effort to conceal and disguise the nature, location, source, ownership or control of proceeds from the insider trading scheme. Bauer admitted that in undertaking these actions, he acted knowingly, willfully, and with the intent to defraud.

IV.

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

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

*Commissioner Walter
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67204 / June 14, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14918

_____ :
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In the Matter of :
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MATTHEW H. KLUGER, :
: :
: :
Respondent. :
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_____ :

**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 H. Kluger ("Respondent" or "Kluger") 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 . . . 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.

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 admits the Commission's jurisdiction over him and the subject matter of these proceedings, and the findings contained in paragraph 2 of Section III below, and 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. Kluger, age 51, is and has been an attorney licensed to practice in the State of New York and the District of Columbia. From December 5, 2005 until approximately February 2011, Kluger was a mergers and acquisitions lawyer in Wilson Sonsini Goodrich & Rosati's ("Wilson Sonsini") Washington, DC office. Immediately prior to his association with Wilson Sonsini, from approximately 2004 to 2005, Kluger was Associate General Counsel at Asbury Automotive Group. From 2001 to 2004, Kluger worked as an attorney, including at a law firm located in New Jersey. From 1998 to 2001, Kluger was an associate at Skadden, Arps, Meagher & Flom, LLP. From 1994 to 1998, Kluger was a summer associate and an associate at Cravath, Swaine & Moore, LLP.
2. On May 2, 2012, a final judgment was entered by consent against Kluger, permanently enjoining him from future violations of Sections 10(b) 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. Matthew H. Kluger, et al., Civil Action Number 2:11-cv-01936, in the United States District Court for the District of New Jersey. Kluger was ordered to pay \$502,500, representing profits gained as a result of the conduct alleged in the complaint, which was partially satisfied and offset, on a dollar-for-dollar basis, by \$87,500 in cash that was seized by the Federal Bureau of Investigation at the direction of the U.S. Attorney's Office in the District of New Jersey on or about March 18, 2011, upon Kluger's agreement that he shall not contest, directly or indirectly, the seizure of those funds, or any amount thereof, in any civil or criminal proceeding. In addition, Kluger was ordered to pay \$14,010 in prejudgment interest.
3. The Commission's complaint alleged that Kluger engaged in a long-standing serial insider trading scheme along with two others: Kenneth T. Robinson ("Robinson"), who was identified only as the "middle man", and Garrett D. Bauer ("Bauer"). The complaint alleged that over the course of several years, Kluger repeatedly accessed material nonpublic information about pending mergers and acquisitions from the computer system of his former employer, Wilson Sonsini, and passed that information to his friend, Robinson, who served as the middle man, and further passed along the information to Bauer to place trades for the benefit of Kluger and Robinson. Robinson also traded for himself and Kluger in two instances. From at least

April 2006 through February 2011, based on nonpublic information that Kluger obtained from Wilson Sonsini, Bauer and/or Robinson traded in advance of at least eleven pending mergers and acquisitions involving companies that were advised by Wilson Sonsini, and the trio realized over \$32 million in ill-gotten gains.

4. On December 14, 2011, Kluger pled guilty to conspiracy to commit securities fraud [18 U.S.C. § 371], securities fraud [15 U.S.C. § 78j(b) and 78ff(a) and 17 C.F.R. § 240.10b-5], conspiracy to commit money laundering [18 U.S.C. § 1956(h)], and obstruction of justice [18 U.S.C. § 1512(c)(2)] before the United States District Court for the District of New Jersey, in United States v. Matthew H. Kluger, No. 2:11-cr-00858.

5. In pleading guilty, Kluger admitted that, among other things, between 1994 and 2011 he engaged in a scheme in which there were numerous instances of buying and selling securities based on inside information that he had obtained from his employment at various law firms. Kluger also admitted that he knew that Bauer was purchasing securities for Robinson, and himself, based on the inside information that Kluger had stolen from the law firms and passed on to Robinson, and that Kluger would receive his portion of the profits from Robinson. Kluger further admitted that he received these payments in cash in an effort to conceal and disguise the nature, location, source, ownership or control of proceeds from the insider trading scheme. Kluger admitted that in undertaking these actions, he acted knowingly, willfully, and with the intent to defraud.

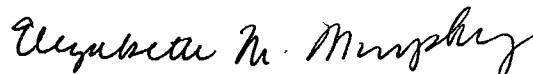
IV.

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

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

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

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Aguilar
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67206 / June 15, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14720

In the Matter of

Alchemy Ventures, Inc., KM
Capital Management, LLC,
Zanshin Enterprises, LLC,
Mark H. Rogers, Steven D.
Hotovec, Joshua A. Klein,
Yisroel M. Wachs, Frank K.
McDonald, and Douglas G.
Frederick,

Respondents.

ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS AND
CEASE-AND-DESIST ORDERS PURSUANT
TO SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934 AS
TO ALCHEMY VENTURES, INC.,
MARK H. ROGERS, AND
STEVEN D. HOTOVEC

I.

In these proceedings, instituted on January 26, 2012 pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), respondents Alchemy Ventures, Inc. ("Alchemy"), Mark H. Rogers ("Rogers"), and Steven D. Hotovec ("Hotovec") (collectively "Respondents") have submitted Offers of Settlement ("Offers") which the Securities and Exchange Commission ("Commission") has determined to accept.

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Making Findings and Imposing Remedial Sanctions and Cease-and-Desist Orders Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 as to Alchemy Ventures, Inc., Mark H. Rogers, and Steven D. Hotovec ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

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

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Summary

1. These proceedings arise from trading access that Alchemy extended to an individual who subsequently used that trading access to profit from an account intrusion and market manipulation scheme. On 22 occasions from September to December 2009, the individual made profitable trades through Alchemy contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts of innocent and unknowing account holders at multiple U.S. broker-dealers. The individual generated ill-gotten gains of \$149,288 from the scheme through Alchemy.

2. By effecting securities transactions for the individual, Alchemy acted as an unregistered broker in willful² violation of Section 15(a) of the Exchange Act. Rogers and Hotovec willfully aided and abetted and caused Alchemy's violation of Section 15(a).

Respondents

3. Alchemy Ventures, Inc. is a California corporation with its principal place of business in San Mateo, California. Alchemy has never been registered with the Commission in any capacity. Alchemy's wholly-owned subsidiary Alchemy Alternatives, Inc. is a registered broker-dealer. From September to December 2009 (the "relevant period"), approximately 250 individuals traded as many as 300 million shares per month on U.S. exchanges through an omnibus account held in Alchemy's name at a registered broker-dealer.

4. During the relevant period, Mark H. Rogers was President of, and associated with, Alchemy. In that capacity, Rogers caused Alchemy to extend market access to traders through Alchemy. Also during the relevant period, Rogers was President of Alchemy Alternatives, Inc. and held Series 7, 24 and 63 licenses. Rogers, age 52, is a resident of San Carlos, California.

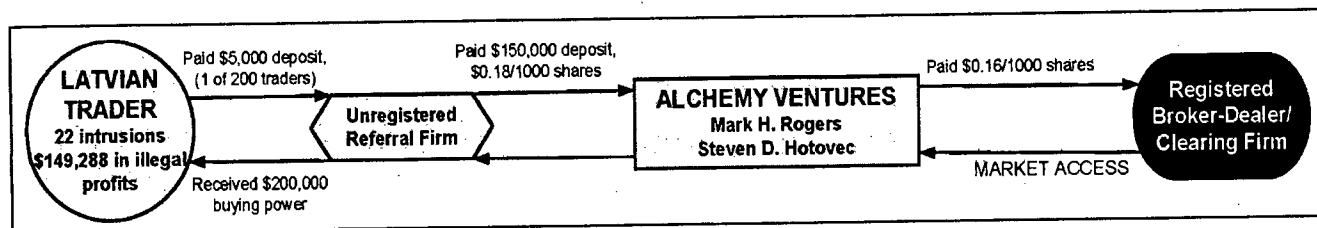
5. During the relevant period, Steven D. Hotovec was Vice President of, and associated with, Alchemy. In that capacity, Hotovec caused Alchemy to extend market access to traders through Alchemy. Also during the relevant period, Hotovec was an officer of Alchemy Alternatives, Inc. and held Series 7, 24 and 63 licenses. Hotovec, age 46, is a resident of Redwood City, California.

Sponsored Market Access

6. Sponsored market access is a form of trading access whereby a broker-dealer permits customers to enter orders into the public market without the orders first passing through the broker-dealer's trading systems.

7. The following chart illustrates the relationships through which Alchemy extended market access to an individual identified as a citizen of Latvia ("the Latvian trader") who conducted an account intrusion and market manipulation scheme.

² A willful violation of the securities laws means merely "that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)).



8. During the relevant period, Alchemy received sponsored market access from a registered broker-dealer and passed the sponsored market access on to traders through a Canadian entity that solicited traders through its website and referred them to Alchemy.

9. In connection with extending sponsored market access to traders through the Canadian entity, Alchemy participated in the order-taking and order-routing process, extended credit to the traders in connection with securities transactions, and handled customer funds and securities.

10. During the relevant period, Alchemy, at the direction of Rogers and Hotovec, maintained an agreement with the Canadian entity. Under the agreement, approximately 200 traders who had been referred by the Canadian entity were trading through Alchemy's omnibus account via sponsored market access during the relevant period.

11. Under the agreement, Alchemy charged the Canadian entity a commission of \$0.18 per thousand shares traded, which exceeded the commission of \$0.16 per thousand shares traded that Alchemy paid the registered broker-dealer. Rogers and Hotovec were responsible for setting the commission rate and directed Alchemy to charge transaction-based compensation for extending the market access.

12. Under the agreement, Alchemy and the Canadian entity divided the trading profits generated by traders referred by the Canadian entity.

13. Rogers and Hotovec initially required the Canadian entity to maintain a risk deposit of \$150,000 with Alchemy. Under the agreement, the Canadian entity was responsible for 100% of any trading losses that its traders incurred through Alchemy's account.

14. During the relevant period, Rogers and Hotovec directed Alchemy to maintain documentation tracking the Canadian entity's deposit balance against all commissions, fees, and profits or losses for all trading activity through Alchemy's account by traders referred by the Canadian entity.

15. In September 2009, the Canadian entity notified Alchemy that the Latvian trader had requested market access. Alchemy provided the Latvian trader with sponsored access trading software and instructed the software provider to assign the Latvian trader a user ID and password so that he could use the software to trade online through Alchemy's account. In so doing, Alchemy, at the direction of Rogers and Hotovec, provided order-taking and order-routing services and controlled an electronic trading system for the Latvian trader to trade in the public market.

16. Rogers and Hotovec were ultimately responsible for authorizing traders referred by the Canadian entity to trade through Alchemy's account, for determining whether to terminate a trader's access, and for controlling the trading parameters in the trading software, including the amount of credit each trader received.

17. The Latvian trader wired \$5,000 of his own money to the Canadian entity as a risk deposit. Alchemy then used the trading software to extend the Latvian trader \$200,000 in "buying power" through Alchemy's account, which was a portion of the trading credit that Alchemy received from the registered broker-dealer. Although Alchemy extended credit to the Latvian trader to purchase securities, Alchemy's capital was not ultimately at risk because it was entitled to recoup losses from the Canadian entity and the trading software allowed Alchemy to see the Latvian trader's trading in real time and automatically cut off his trading access if he or other traders referred by the Canadian entity incurred losses greater than the Canadian entity's deposit balance.

Account Intrusions

18. On 22 occasions between September and December 2009, the Latvian trader made profitable trades through Alchemy's account contemporaneous with unauthorized trading in the same securities in hijacked online brokerage accounts at multiple U.S. broker-dealers.

19. On each occasion, the Latvian trader first established a long or short position in a security through Alchemy's account. Then the Latvian trader surreptitiously gained access to an online brokerage account and made large unauthorized trades in the same security to manipulate the stock price in his favor. Finally, during or shortly after the manipulative trading in the intruded account, the Latvian trader closed out his position through Alchemy at the artificial market price to generate a profit.

20. The Latvian trader generated ill-gotten gains of \$149,288 from the scheme through the electronic trading system provided by Alchemy. The Latvian trader engaged in similar manipulative trading through other unregistered firms and generated total profits of more than \$850,000 from 159 account intrusions between June 2009 and August 2010.

21. As a result of providing electronic order-taking and order-routing services that the Latvian trader used to conduct an illegal market manipulation scheme, Alchemy received \$28,502.59 in commissions and other profits during the relevant period.

22. By extending market access to traders through the Canadian entity in the manner described above, including through participating in the order-taking and order-routing process, extending credit in connection with securities transactions, handling customer funds and securities, and allocating trades conducted by the traders against the Canadian entity's risk deposit, Alchemy engaged in the business of effecting transactions in securities for the account of others.

23. As described above, Rogers and Hotovec each was aware of his role in furthering improper or illegal activity by Alchemy and provided substantial assistance to Alchemy in connection with conduct that constituted a violation of the federal securities laws.

Violations

24. As a result of the conduct described above, Alchemy willfully violated Section 15(a) of the Exchange Act, which prohibits certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

25. As a result of the conduct described above, Rogers and Hotovec willfully aided and abetted and caused Alchemy's violation of Section 15(a) of the Exchange Act, which prohibits

certain persons and entities, while acting as brokers, from effecting transactions in securities when such person or entity is not registered with the Commission as a broker.

IV.

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

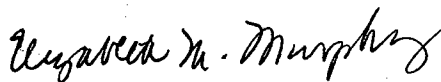
Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

- A. Respondents Alchemy, Rogers, and Hotovec shall cease and desist from committing or causing any violations and any future violations of Section 15(a) of the Exchange Act.
- B. Respondents Alchemy, Rogers, and Hotovec are censured.
- C. Respondent Alchemy shall, within 30 days of the entry of this Order, pay disgorgement of \$28,502.59 and prejudgment interest of \$2,514.59 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Alchemy Ventures, Inc. as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and check, money order, or wire transfer confirmation shall be sent to Jina L. Choi, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, 28th Floor, San Francisco, CA 94104.
- D. Respondent Alchemy shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$75,000 to the United States Treasury. If timely payment is not made, interest shall accrue pursuant to 31 U.S.C. Section 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Alchemy Ventures, Inc. as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and check, money order, or wire transfer confirmation shall be sent to Jina L. Choi, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, 28th Floor, San Francisco, CA 94104.
- E. Respondent Rogers shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$35,000 to the United States Treasury. If timely payment is not made, interest shall accrue pursuant to 31 U.S.C. Section 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Mark H. Rogers as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and check, money order, or wire transfer confirmation shall be sent to Jina L. Choi,

Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 44
Montgomery Street, 28th Floor, San Francisco, CA 94104.

F. Respondent Hotovec shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$35,000 to the United States Treasury. If timely payment is not made, interest shall accrue pursuant to 31 U.S.C. Section 3717. Such payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., NE, Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Steven D. Hotovec as a Respondent in these proceedings and the file number of these proceedings, a copy of which cover letter and check, money order, or wire transfer confirmation shall be sent to Jina L. Choi, Market Abuse Unit, Division of Enforcement, Securities and Exchange Commission, 44 Montgomery Street, 28th Floor, San Francisco, CA 94104.

By the Commission.



Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 67217 / June 19, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14920

In the Matter of

Fourthstage Technologies, Inc.,
Freesoftwareclub.com,
FTM Media, Inc.,
Full Moon Universe, Inc., and
Future Educational 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 Fourthstage Technologies, Inc., Freesoftwareclub.com, FTM Media, Inc., Full Moon Universe, Inc., and Future Educational Systems, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Fourthstage Technologies, Inc. (CIK No. 68619) is a forfeited Delaware corporation located in Phoenix, Arizona with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Fourthstage 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, 2001, which reported a net loss of over \$3.2 million for the prior six months. On December 31, 2001, Fourthstage Technologies filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Arizona, and the case was terminated on June 21, 2007.

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2. Freesoftwareclub.com (CIK No. 1082736) is a void Delaware corporation located in Berkeley, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Freesoftwareclub.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2001, which reported a net loss of over \$136,000 for the prior nine months.

3. FTM Media, Inc. (CIK No. 1004991) 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). FTM Media is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended December 31, 2000, which reported a net loss of over \$7 million for the prior nine months. On February 8, 2001, FTM Media filed a Chapter 7 petition in the U.S. Bankruptcy Court for the District of Arizona, and the case was terminated on November 5, 2008.

4. Full Moon Universe, Inc. (CIK No. 43052) is an inactive Washington corporation located in Hollywood, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Full Moon Universe is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2001.

5. Future Educational Systems, Inc. (CIK No. 1162455) is a permanently revoked Nevada corporation located in Los Angeles, California with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Future Educational Systems is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2002, which reported a net loss of over \$123,000 for the prior three months.

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 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 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


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67218 / June 19, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3389 / June 19, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14921

In the Matter of

LAURENCE M. BROWN, CPA,

Respondent.

ORDER OF SUSPENSION PURSUANT
TO RULE 102(e)(2) OF THE
COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission deems it appropriate to issue an order of forthwith suspension of Laurence M. Brown ("Brown") pursuant to Rule 102(e)(2) of the Commission's Rules of Practice, 17 C.F.R. § 201.102(e)(2).¹

II.

The Commission finds that:

1. Brown, age 64, is and has been a certified public accountant licensed to practice in the State of New York. From at least January 1, 2008 until June 30, 2010, Brown was a principal, and managing and general partner of Marshall Granger & Company LLP, an accounting firm located in Armonk, New York.

2. On January 25, 2012, a judgment of conviction was entered against Brown in *United States v. Brown*, No. 10-Cr. 991 (MGC), in the United States District Court for the Southern District of New York, finding him guilty of one count of securities fraud in violation of 15 U.S.C. § 78j(b), two counts of wire fraud in violation of 18 U.S.C. § 1342, and one count of

¹ Rule 102(e)(2) provides in pertinent part: "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."

15 U.S.C. § 78j(b), two counts of wire fraud in violation of 18 U.S.C. § 1342, and one count of money laundering in violation of 18 U.S.C. § 1957.

3. As a result of this conviction, Brown was sentenced to 60 months imprisonment in a federal penitentiary and ordered to pay restitution in the amount of \$2,096,394.

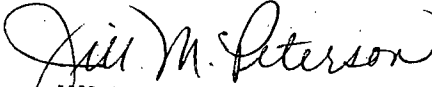
III.

In view of the foregoing, the Commission finds that Brown has been convicted of a felony within the meaning of Rule 102(e)(2) of the Commission's Rules of Practice.

Accordingly, it is ORDERED that Laurence M. 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


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67219 / June 19, 2012

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3390 / June 19, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14922

In the Matter of

RONALD J. MANGINI, CPA,

Respondent.

ORDER INSTITUTING PUBLIC
ADMINISTRATIVE PROCEEDINGS AND
IMPOSING TEMPORARY SUSPENSION
PURSUANT TO RULE 102(e)(3) OF THE
COMMISSION'S RULES OF PRACTICE

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Rule 102(e)(3) of the Commission's Rules of Practice, 17 C.F.R. § 201.102(e)(3),¹ against Ronald J. Mangini ("Respondent" or "Mangini").

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

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

II.

The Commission finds that:

A. RESPONDENT

1. Mangini, age 63, is and has been a certified public accountant licensed to practice in the State of New York. From at least January 1, 2008 until June 30, 2010, Mangini was a principal, and managing and general partner of Marshall Granger & Company LLP ("Marshall Granger"), an accounting firm located in Armonk, New York.

B. CIVIL INJUNCTION

2. On March 21, 2012, the United States District Court for the Southern District of New York entered a final judgment against Mangini, permanently enjoining him from future violations, direct or indirect, of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Securities and Exchange Commission v. Brown, et al., Civil Action Number 10 Civ. 5564 (MGC). Under the final judgment, Mangini is liable to pay disgorgement in the amount of \$484,000, plus prejudgment interest thereon in the amount of \$28,625, and a civil penalty in the amount of \$484,000.

3. The Commission's complaint alleged, among other things, that, from at least April 2008 through June 2010, Mangini, together with a co-defendant, offered and sold what purported to be the common stock and promissory notes of Infinity Reserves-Tennessee, Inc. ("IRT"). The IRT stock and notes were fictitious. IRT was solely owned by a Marshall Granger client and, at the time, its principal asset, a natural gas pipeline in Tennessee, had been inoperative for over a decade. To perpetuate the scheme, without the knowledge or authorization of the Marshall Granger client who owned IRT, Mangini falsely held himself out to be an officer of, and the stock and notes to be bona fide interests in, IRT. In reality, the offering was a sham and a Ponzi scheme. Mangini, together with his co-defendant, fraudulently obtained more than \$2.1 million from at least thirteen investors, including Marshall Granger clients, selling the sham IRT securities.

III.

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

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

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

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

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

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229 and 240

[RELEASE NOS. 33-9330; 34-67220; File No. S7-13-11]

RIN 3235-AK95

LISTING STANDARDS FOR COMPENSATION COMMITTEES

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting a new rule and amendments to our proxy disclosure rules to implement Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which added Section 10C to the Securities Exchange Act of 1934. Section 10C requires the Commission to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. In accordance with the statute, new Rule 10C-1 directs the national securities exchanges to establish listing standards that, among other things, require each member of a listed issuer's compensation committee to be a member of the board of directors and to be "independent," as defined in the listing standards of the national securities exchanges adopted in accordance with the final rule. In addition, pursuant to Section 10C(c)(2), we are adopting amendments to our proxy disclosure rules concerning issuers' use of compensation consultants and related conflicts of interest.

DATES: Effective Date: [insert date 30 days after publication in the Federal Register].

Compliance Dates: Each national securities exchange and national securities association must provide to the Commission, no later than [insert date 90 days after publication in the Federal Register], proposed rule change submissions that comply with the requirements of Exchange Act

Rule 10C-1. Further, each national securities exchange and national securities association must have final rules or rule amendments that comply with Rule 10C-1 approved by the Commission no later than [insert date 1 year after publication in the Federal Register]. Issuers must comply with the disclosure changes in Item 407 of Regulation S-K in any proxy or information statement for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting) at which directors will be elected occurring on or after January 1, 2013.

FOR FURTHER INFORMATION CONTACT: N. Sean Harrison, Special Counsel, Office of Rulemaking, at (202) 551-3430, or Heather Maples, Senior Special Counsel, Office of Chief Counsel, at (202) 551-3520, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are adopting new Rule 10C-1 under the Securities Exchange Act of 1934¹ and amendments to Item 407² of Regulation S-K.³

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¹ 15 U.S.C. 78a *et seq.*

² 17 CFR 229.407.

³ 17 CFR 229.10 *et seq.*

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VI. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS

I. BACKGROUND AND SUMMARY

On March 30, 2011, we proposed a new rule and rule amendments⁴ to implement Section 10C of the Securities Exchange Act of 1934 (the "Exchange Act"),⁵ as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act").⁶ Section 10C requires the Commission to direct the national securities exchanges⁷ (the "exchanges") and national securities associations⁸ to prohibit the listing of any equity security of an issuer, with certain exceptions, that does not comply with Section 10C's compensation committee and compensation adviser requirements.⁹

⁴ See Release No. 33-9199 (Mar. 30, 2011) [76 FR 18966] (the "Proposing Release").

⁵ 15 U.S.C. 78j-3.

⁶ Pub. L. No. 111-203, 124 Stat. 1900 (2010).

⁷ A "national securities exchange" is an exchange registered as such under Section 6 of the Exchange Act [15 U.S.C. 78f]. There are currently sixteen national securities exchanges registered under Section 6(a) of the Exchange Act: NYSE Amex (formerly the American Stock Exchange), BATS Exchange, BATS Y-Exchange, BOX Options Exchange, C2 Options Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, EDGA Exchange, EDGX Exchange, International Securities Exchange, NASDAQ OMX BX (formerly the Boston Stock Exchange), The NASDAQ Stock Market, National Stock Exchange, New York Stock Exchange, NYSE Arca and NASDAQ OMX PHLX (formerly Philadelphia Stock Exchange). Certain exchanges are registered with the Commission through a notice filing under Section 6(g) of the Exchange Act for the purpose of trading security futures. See Section II.B.1, below, for a discussion of these types of exchanges.

⁸ A "national securities association" is an association of brokers and dealers registered as such under Section 15A of the Exchange Act [15 U.S.C. 78o-3]. The Financial Industry Regulatory Authority ("FINRA") is the only national securities association registered with the Commission under Section 15A of the Exchange Act. FINRA does not list equity securities; therefore, we refer only to national securities exchanges in this release.

In addition, Section 15A(k) of the Exchange Act [15 U.S.C. 78o-3(k)] provides that a futures association registered under Section 17 of the Commodity Exchange Act [7 U.S.C. 21] shall be registered as a national securities association for the limited purpose of regulating the activities of members who are registered as broker-dealers in security futures products pursuant to Section 15(b)(11) of the Exchange Act [15 U.S.C. 78o(b)(11)]. See Section II.B.1, below, for a discussion regarding security futures products.

⁹ See Exchange Act Sections 10C(a) and (f).

Specifically, Section 10C(a)(1) of the Exchange Act requires the Commission to adopt rules directing the exchanges to establish listing standards that require each member of a listed issuer's compensation committee to be a member of the board of directors and to be "independent."¹⁰ The term "independent" is not defined in Section 10C. Instead, Section 10C(a)(3) provides that "independence" is to be defined by the exchanges after taking into consideration "relevant factors," which are required to include (1) a director's source of compensation, including any consulting, advisory or other compensatory fee paid by the issuer to such director, and (2) whether a director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer. Section 10C(a)(4) of the Exchange Act requires our rules to permit the exchanges to exempt particular relationships from the independence requirements, as each exchange determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

In addition to the independence requirements set forth in Section 10C(a), Section 10C(f) of the Exchange Act requires the Commission to adopt rules directing the exchanges to establish listing standards that provide for the following requirements relating to compensation committees and compensation consultants, independent legal counsel and other advisers (collectively, "compensation advisers"), as set forth in paragraphs (b)-(e) of Section 10C:

- Each compensation committee must have the authority, in its sole discretion, to retain or obtain the advice of compensation advisers;¹¹

¹⁰ Five categories of issuers are excluded from this requirement: controlled companies, limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act of 1940 (the "Investment Company Act"), and foreign private issuers that disclose in their annual reports the reasons why they do not have an independent compensation committee.

¹¹ Exchange Act Sections 10C(c)(1)(A) and 10C(d)(1).

- Before selecting any compensation adviser, the compensation committee must take into consideration specific factors identified by the Commission that affect the independence of compensation advisers;¹²
- The compensation committee must be directly responsible for the appointment, compensation and oversight of the work of compensation advisers;¹³ and
- Each listed issuer must provide appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to compensation advisers.¹⁴

Finally, Section 10C(c)(2) requires each issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting), in accordance with Commission regulations, whether the issuer's compensation committee retained or obtained the advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed.

We proposed new Exchange Act Rule 10C-1 to implement the compensation committee listing requirements of Sections 10C(a)-(g)¹⁵ of the Exchange Act. We proposed rule amendments to Item 407 of Regulation S-K to require the disclosures mandated by Section 10C(c)(2), which are to be provided in any proxy or information statement relating to an annual meeting of shareholders at which directors are to be elected (or special meeting in lieu of the

¹² Exchange Act Section 10C(b).

¹³ Exchange Act Sections 10C(c)(1)(B) and 10C(d)(2).

¹⁴ Exchange Act Section 10C(e).

¹⁵ Section 10C(g) of the Exchange Act exempts controlled companies from the requirements of Section 10C.

annual meeting). In connection with these amendments, we also proposed to revise the current disclosure requirements with respect to the retention of compensation consultants.

The comment period for the Proposing Release closed on May 19, 2011.¹⁶ We received 58 comment letters from 56 different commentators, including pension funds, corporations, compensation consulting firms, professional associations, trade unions, institutional investors, investment advisory firms, law firms, academics, individual investors and other interested parties. Commentators generally supported the proposed implementation of the new requirements. Some commentators urged us to adopt additional requirements not mandated by the Act. Other commentators opposed some aspects of the proposed rule and rule amendments and suggested modifications to the proposals.

We have reviewed and considered all of the comments that we received on the proposals. The final rules reflect a number of changes made in response to these comments. We discuss our revisions with respect to the proposed rule and rule amendments in more detail throughout this release.

II. DISCUSSION OF THE FINAL RULES

A. Exchange Listing Standards

1. Applicability of Listing Standards

We proposed to direct the exchanges to adopt listing standards that would apply Section 10C's independence requirements to members of a listed issuer's compensation committee as well as any committee of the board that performs functions typically performed by a compensation committee. We are adopting this aspect of the rule substantially as proposed, but with one change reflecting comments we received.

¹⁶ We extended the original comment period deadline from April 29, 2011 to May 19, 2011. See Listing Standards for Compensation Committees, Release No. 33-9203 (Apr. 29, 2011)[76 FR 25273].

a. Proposed Rule

In enacting Section 10C of the Exchange Act, Congress intended to require that “board committees that set compensation policy will consist only of directors who are independent.”¹⁷ In addition, Congress sought to provide “shareholders in a public company” with “additional disclosures involving compensation practices.”¹⁸ Although Section 10C includes numerous provisions applicable to the “compensation committees” of listed issuers, it does not require a listed issuer to have a compensation committee or a committee that performs functions typically assigned to a compensation committee. Moreover, Section 10C does not provide that, in the absence of a compensation committee, the entire board of directors will be considered to be the compensation committee, nor does it include provisions that have the effect of requiring a compensation committee as a practical matter.

Neither the Act nor the Exchange Act defines the term “compensation committee.”¹⁹ Our rules do not currently require that a listed issuer establish a compensation committee. Current exchange listing standards, however, generally require listed issuers either to have a compensation committee or to have independent directors determine, recommend or oversee specified executive compensation matters.²⁰ For example, the New York Stock Exchange

¹⁷ See H.R. Rep. No. 111-517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E “Accountability and Executive Compensation,” at 872-873 (Conf. Rep.) (June 29, 2010).

¹⁸ Id.

¹⁹ By contrast, Section 3(a)(58) of the Exchange Act defines an “audit committee” as “a committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer; and . . . if no such committee exists with respect to an issuer, the entire board of directors of the issuer.”

²⁰ There are some exchanges registered under Section 6(a) of the Exchange Act that have not adopted listing standards that require executive compensation determinations for listed issuers to be made or recommended by an independent compensation committee or independent directors. However, these exchanges, which include the BOX Options Exchange, International Securities Exchange, EDGA Exchange, EDGX Exchange, BATS Y-Exchange, and C2 Options Exchange, currently either trade securities only pursuant to unlisted trading privileges or trade only standardized options. In addition, the listing standards of certain exchanges that are registered with the Commission for the purpose of trading security futures do not address executive compensation matters. See Section II.B.1, below, for a discussion of these types of exchanges.

("NYSE") requires a listed issuer to have a compensation committee composed solely of independent directors and to assign various executive compensation-related tasks to that committee.²¹ On the other hand, the NASDAQ Stock Market ("Nasdaq") does not mandate that a listed issuer have a compensation committee, but requires that executive compensation be determined or recommended to the board for determination either by a compensation committee composed solely of independent directors or by a majority of the board's independent directors in a vote in which only independent directors participate.²² Some of the other exchanges have standards comparable to the NYSE's and require their listed issuers to have independent compensation committees.²³ Other exchanges have standards comparable to Nasdaq's and, in the absence of a compensation committee, require executive compensation determinations to be made or recommended by a majority of independent directors on the listed issuer's board.²⁴

Proposed Rule 10C-1(b) would direct the exchanges to adopt listing standards that would apply to a listed issuer's compensation committee or, in the absence of such a committee, any other board committee that performs functions typically performed by a compensation committee, including oversight of executive compensation. Proposed Rule 10C-1(b), however,

²¹ See NYSE Listed Company Manual Section 303A.05. Section 303A.05 permits a listed issuer's board to allocate the responsibilities of the compensation committee to another committee, provided that the committee is composed entirely of independent directors and has a committee charter. The NYSE exempts certain issuers from this requirement, including controlled companies, limited partnerships, companies in bankruptcy, and closed-end and open-end management investment companies registered under the Investment Company Act. See NYSE Listed Company Manual Section 303A.00.

²² See Nasdaq Rule 5605(d). Based on data supplied by Nasdaq, we understand that fewer than 2% of its listed issuers utilize the alternative of having independent board members, and not a committee, oversee compensation. See also Nasdaq IM 5605-6 (stating that the Nasdaq rule "is intended to provide flexibility for a [c]ompany to choose an appropriate board structure and to reduce resource burdens, while ensuring [i]ndependent [d]irector control of compensation decisions."). Nasdaq exempts certain issuers from this requirement, including asset-backed issuers and other passive issuers, cooperatives, limited partnerships, management investment companies registered under the Investment Company Act, and controlled companies. See Nasdaq Rules 5615(a) and 5615(c)(2).

²³ See NYSE Arca Rule 5.3(k)(4); National Stock Exchange Rule 15.5(d)(5); and NASDAQ OMX PHLX Rule 867.05.

²⁴ See NASDAQ OMX BX Rule 4350(c)(3); NYSE Amex Company Guide Section 805; Chicago Board Options Exchange Rule 31.10; Chicago Stock Exchange Article 22, Rules 19(d) and 21; and BATS Exchange Rule 14.10(c)(4).

would not require the independence listing requirements to apply to members of the board who oversee executive compensation in the absence of a board committee.²⁵

b. Comments on the Proposed Rule

Comments on this proposal were generally favorable. Many commentators supported the functional approach of the proposed rule, which would require compensation committee independence listing standards to apply to any board committee charged with oversight of executive compensation, regardless of its formal title.²⁶ In response to our request for comment on whether we should direct the exchanges to apply the proposed rule's requirements to directors who oversee executive compensation matters in the absence of a formal committee structure, several commentators recommended that we do so,²⁷ and two of these commentators suggested that such a requirement would help ensure that companies could not rely on technicalities or loopholes to avoid independent director oversight of executive compensation.²⁸ Another commentator, however, argued that the final rule should not apply to independent directors who determine, or recommend to the board, executive compensation matters in the absence of a formal committee structure.²⁹ This commentator believed that broadening the scope of the rule to apply to a group of directors who determine executive compensation in lieu of a formal committee is not clearly mandated by Section 10C and would burden listed issuers that do not

²⁵ As noted, to the extent no board committee is authorized to oversee executive compensation, under applicable listing standards, board determinations with respect to executive compensation matters may be made by the full board with only independent directors participating. In such situations, under state corporate law, we understand that action by the independent directors would generally be considered action by the full board, not action by a committee.

²⁶ See, e.g., letters from Chris Barnard ("Barnard"), the Chartered Financial Analyst Institute ("CFA") and Railpen Investments ("Railpen").

²⁷ See, e.g., letters from Barnard, Better Markets Inc. ("Better Markets"), CFA, Georg Merkl ("Merkl"), National Association of Corporate Directors ("NACD") and Railpen.

²⁸ See letters from NACD and Railpen.

²⁹ See letter from the American Bar Association, Business Law Section ("ABA").

have a board committee overseeing executive compensation, without necessarily improving their oversight of executive compensation.³⁰

In the Proposing Release, we requested comment on whether the exchanges should be prohibited from listing issuers that do not have compensation committees. Several commentators supported the concept of mandatory compensation committees for listed issuers, on the basis that executive compensation deserves special, ongoing attention by a dedicated working group of the board; a committee structure may promote increased board expertise on compensation; and having a formal committee would help promote accountability to shareholders.³¹ Several other commentators opposed such requirements, arguing that the exchanges should be allowed broad discretion on how listed issuers determine compensation matters.³²

c. Final Rule

After considering the comments, we are adopting Rule 10C-1(b) substantially as proposed. Under the final rule, the exchanges will be directed to adopt listing standards that apply to any committee of the board that performs functions typically performed by a compensation committee, including oversight of executive compensation, whether or not such committee also performs other functions or is formally designated as a compensation committee.³³ In addition, the listing standards adopted by the exchanges must also apply the

³⁰ This commentator also noted that, “[a]s a practical matter, we understand that most listed companies that are accelerated filers under the Exchange Act, and many listed companies that are smaller reporting companies, already have compensation committees or committees performing the functions of compensation committees.” *Id.*

³¹ See letters from the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”), the Council of Institutional Investors (“CII”), Merkl and the Ohio Public Employees’ Retirement System (“OPERS”).

³² See letters from ABA, CFA and NACD.

³³ For example, if a listed issuer has a “corporate governance committee” or a “human resources committee,” the responsibilities of which include, among other matters, oversight of executive compensation, such committee will be subject to the compensation committee listing requirements of the applicable exchange.

director independence requirements of Rule 10C-1(b)(1), the requirements relating to consideration of a compensation adviser's independence in Rule 10C-1(b)(4), and the requirements relating to responsibility for the appointment, compensation and oversight of compensation advisers in Rules 10C-1(b)(2)(ii) and (iii) to the members of a listed issuer's board of directors who, in the absence of a board committee, oversee executive compensation matters on behalf of the board of directors. We believe this approach is an appropriate way to implement Section 10C. The listing standards are intended to benefit investors by requiring that the independent directors of a listed issuer oversee executive compensation matters, consider independence criteria before retaining compensation advisers and have responsibility for the appointment, compensation and oversight of these advisers. We believe it would benefit investors to implement Section 10C in a manner that does not allow listed issuers to avoid these listing standards by simply not having a compensation committee or another board committee oversee executive compensation matters.

We have determined not to require the exchanges to apply the listing standards relating to the compensation committee's authority to retain compensation advisers, Rule 10C-1(b)(2)(i), or required funding for payment of such advisers to directors who oversee executive compensation matters outside of the structure of a formal board committee, Rule 10C-1(b)(3). As noted above, we understand that action by independent directors acting outside of a formal committee structure would generally be considered action by the full board of directors. As a result, we believe it is unnecessary to apply these requirements to directors acting outside of a formal committee structure, as they retain all the powers of the board of directors in making executive compensation determinations.

We are implementing this change by defining the term “compensation committee” so that it includes, for all purposes other than the requirements relating to the authority to retain compensation advisers in Rule 10C-1(b)(2)(i) and required funding for payment of such advisers in Rule 10C-1(b)(3), the members of the board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of a formal committee. For ease of reference throughout this release, in our discussion of the final rules we are adopting, references to an issuer’s “compensation committee” include any committee of the board that performs functions typically performed by a compensation committee, including oversight of executive compensation, whether or not formally designated as a “compensation committee,” as well as, to the extent applicable, those members of a listed issuer’s board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of such a committee.

The final rule will not require a listed issuer to have a compensation committee or a committee that performs functions typically assigned to a compensation committee. We believe this aspect of the final rule is consistent with the requirements of Section 10C, which does not direct us to require such a committee. Moreover, in light of our determination to apply the requirements for director independence, consideration of adviser independence, and responsibility for the appointment, compensation and oversight of compensation advisers to those members of a listed issuer’s board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of a formal committee, there will be little difference between the requirements applicable to listed issuers that do not have compensation committees as compared to those applicable to issuers that do have compensation committees.

2. Independence Requirements

Proposed Rule 10C-1(b)(1) would require each member of a listed issuer's compensation committee to be a member of the board of directors and to be independent. We proposed to require that the exchanges develop a definition of independence applicable to compensation committee members after considering relevant factors, including, but not limited to, the two factors enumerated in Section 10C(a)(3). We are adopting these requirements as proposed, except that, as discussed above, this aspect of the final rule will also apply to those members of a listed issuer's board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of a board committee.

a. Proposed Rule

Most exchanges that list equity securities already require directors on compensation committees or directors determining or recommending executive compensation matters to be "independent" under their general independence standards. Although independence requirements and standards vary somewhat among the different exchanges, listing standards generally prescribe certain bright-line independence tests (including restrictions on compensation, employment and familial or other relationships with the listed issuer or the executive officers of the listed issuer that could interfere with the exercise of independent judgment) that directors must meet in order to be considered independent.³⁴ For example, both NYSE and Nasdaq rules preclude a finding of independence if the director is or recently was employed by the listed issuer, the director's immediate family member is or recently was employed as an executive officer of the listed issuer, or the director or director's family member

³⁴ See NYSE Listed Company Manual Section 303A.02(b); Nasdaq Rule 5605(a)(2).

received compensation from the listed issuer in excess of specified limits.³⁵ In addition, under both NYSE and Nasdaq rules, directors may be disqualified based on their or their family members' relationships with a listed issuer's auditor, affiliation with entities that have material business relationships with the listed issuer, or employment at a company whose compensation committee includes any of the listed issuer's executive officers.³⁶ We note, however, that with the exception of audit committee membership requirements, stock ownership alone will not automatically preclude a director from being considered independent under either NYSE or Nasdaq listing standards.³⁷ The NYSE and Nasdaq also require their listed issuers' boards to affirmatively determine that each independent director either, in NYSE's case, has no material relationship with the issuer³⁸ or, in Nasdaq's case, has no relationship which, in the opinion of the issuer's board of directors, would interfere with the director's exercise of independent judgment in carrying out his or her responsibilities.³⁹ The other exchanges have similar requirements.⁴⁰

In addition to meeting exchange listing standards, there are other reasons for members of the compensation committee to be independent. For example, in order for a securities transaction between an issuer and one of its officers or directors to be exempt from short-swing profit liability under Section 16(b) of the Exchange Act, the transaction must be approved by the full board of directors or by a committee of the board that is composed solely of two or more

³⁵ See id.

³⁶ See id.

³⁷ See Commentary to NYSE Listed Company Manual Section 303A.02(a); Nasdaq Rule 5605; Nasdaq IM-5605.

³⁸ See NYSE Rule 303A.02(a).

³⁹ See Nasdaq Rule 4200(a)(15).

⁴⁰ See, e.g., NYSE Arca Rule 5.3(k)(1) and NYSE AMEX Company Guide Section 803.A.02.

“Non-Employee Directors,” as defined in Exchange Act Rule 16b-3(b)(3).⁴¹ We understand that many issuers use their independent compensation committees to avail themselves of this exemption.⁴² Similarly, if an issuer wishes to preserve the tax deductibility of the amounts of certain awards paid to executive officers, among other things, the performance goals of such awards must be determined by a compensation committee composed of two or more “outside directors,” as defined in Section 162(m) of the Internal Revenue Code.⁴³ The definitions of “Non-Employee Director” and “outside director” are similar to the exchanges’ definitions of independent director.

The proposed rule would direct the exchanges to develop a definition of independence applicable to compensation committee members after considering relevant factors, including, but not limited to, a director’s source of compensation, including any consulting, advisory or other compensatory fee paid by the issuer to such director, and whether a director is affiliated with the

⁴¹ As defined in Exchange Act Rule 16b-3(b)(3)(i) [17 CFR 240.16b-3(b)(3)(i)], a “Non-Employee Director” is a director who is not currently an officer (as defined in Rule 16a-1(f)) of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by the issuer or a parent or subsidiary of the issuer; does not receive compensation, either directly or indirectly, from the issuer or a parent or subsidiary of the issuer for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed the dollar amount for which disclosure would be required pursuant to Item 404(a) of Regulation S-K; and does not possess an interest in any other transaction for which disclosure would be required pursuant to Item 404(a) of Regulation S-K. In addition, Rule 16b-3(b)(3)(ii) provides that a Non-Employee Director of a closed-end investment company is a director who is not an “interested person” of the issuer, as that term is defined in Section 2(a)(19) of the Investment Company Act [15 U.S.C. 80a-2(a)(19)].

⁴² See letter from Sullivan & Cromwell LLP to Facilitating Shareholder Director Nominations, Release No. 34-60089, available at <http://www.sec.gov/comments/s7-10-09/s71009-430.pdf> (“In our experience, many compensation committee charters require their members to meet the requirements of Rule 16b-3 and Section 162(m).”); Ira G. Bogner & Michael Krasnovsky, “Exchange Rules Impact Compensation Committee Composition,” *The Metropolitan Corporate Counsel*, Apr. 2004, at 17 (“Most compensation committees of public companies include at least two directors that are ‘outside directors’ under Section 162(m) of the Internal Revenue Code... and ‘non-employee directors’ under Rule 16b-3 of the Securities Exchange Act....”).

⁴³ A director is an “outside director” if the director (A) is not a current employee of the publicly held corporation; (B) is not a former employee of the publicly held corporation who receives compensation for prior services (other than benefits under a tax-qualified retirement plan) during the taxable year; (C) has not been an officer of the publicly held corporation; and (D) does not receive remuneration from the publicly held corporation, either directly or indirectly, in any capacity other than as a director. For this purpose, remuneration includes any payment in exchange for goods or services. Section 162(m) of the Internal Revenue Code of 1986, as amended. Treas. Reg. Section 1.162-27(e)(3).

issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer. We did not propose to specify any additional factors that the exchanges must consider in determining independence requirements for members of compensation committees.

In proposing Rule 10C-1(b)(1), we considered the similarities and differences between Section 952 of the Act and Section 301 of the Sarbanes-Oxley Act of 2002.⁴⁴ Section 301 of the Sarbanes-Oxley Act added Section 10A(m)(1) to the Exchange Act,⁴⁵ which required the Commission to direct the exchanges to prescribe independence requirements for audit committee members. Although the independence factors in Section 10C(a)(1) are similar to those in Section 10A(m)(1) – and indeed, Section 952 of the Act essentially provides the compensation committee counterpart to the audit committee requirements of Section 301 of the Sarbanes-Oxley Act – one significant difference is that Section 10C(a) requires only that the exchanges “consider relevant factors” (emphasis added), which include the source of compensation and any affiliate relationship, in developing independence standards for compensation committee members, whereas Section 10A(m) expressly states that certain relationships preclude independence: an audit committee member “may not, other than in his or her capacity as a member of the audit committee...[a]ccept any consulting, advisory, or other compensatory fee from the issuer; or [b]e an affiliated person of the issuer or any subsidiary thereof” (emphasis added).⁴⁶

As a result, we interpret Section 10C as providing the exchanges more discretion to determine the standards of independence that compensation committee members are required to

⁴⁴ Pub. L. 107-204, 116 Stat. 745 (2002).

⁴⁵ 15 U.S.C. 78j-1(m)(1).

⁴⁶ See Section 10A(m) of the Exchange Act. Exchange Act Rule 10A-3 states that in order to be considered “independent,” an audit committee member “may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee . . . [a]ccept directly or indirectly any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof” For non-investment company issuers, the audit committee member also cannot be an affiliated person of the issuer or its subsidiaries. For investment company issuers, the audit committee member cannot be an “interested person” of the issuer as defined in Section 2(a)(19) of the Investment Company Act.

meet than they are provided under Section 10A with respect to audit committee members.

Section 10A(m) prescribes minimum criteria for the independence of audit committee members.

In contrast, Section 10C gives the exchanges the flexibility to establish their own minimum independence criteria for compensation committee members after considering relevant factors, including the two enumerated in Section 10C(a)(3). Accordingly, the proposed rule would allow each exchange to establish its own independence definition, subject to Commission review and approval pursuant to Section 19(b) of the Exchange Act, provided the exchange considers relevant factors in establishing its own standards, including those specified in Section 10C(a)(3).

b. Comments on the Proposed Rule

Comments on this proposal were generally favorable. Many commentators supported permitting the exchanges to establish their own independence criteria for compensation committee members, provided they consider the statutorily-required factors.⁴⁷ One commentator claimed that this approach would utilize the relative strengths and experiences of the exchanges by avoiding a “one size fits all” approach and could be more conducive to responding quickly to changes in corporate governance.⁴⁸ Another commentator noted that the proposal permitted each exchange to develop more finely tuned listing rules that reflect the particular characteristics of each exchange’s listed companies.⁴⁹

⁴⁷ See, e.g., letters from ABA, Barnard, Sanjai Bhagat, et al. (“Bhagat”), the Center on Executive Compensation (“CEC”), CFA, Davis Polk & Wardwell LLP (“Davis Polk”), MarkWest Energy Partners, L.P. (“MarkWest”), NYSE Euronext (“NYSE”), Pfizer Inc. (“Pfizer”) and Sullivan & Cromwell LLP (“S&C”).

⁴⁸ See letter from MarkWest.

⁴⁹ See letter from ABA (noting that “the average board size of an S&P 100 company (which are primarily listed on the NYSE) is approximately 50% larger than the average board size of a Silicon Valley 150 company (which are primarily listed on Nasdaq” and that “[i]nvestors in these disparate categories of companies have meaningfully different expectations and interests in the governance context”).

Allowing the exchanges the latitude to establish their own independence criteria concerned some commentators, however.⁵⁰ These commentators cautioned against permitting the exchanges to establish their own independence criteria and argued in support of a uniform definition of independence across all exchanges.⁵¹ One of these commentators claimed that uniform requirements would serve as a deterrent to engaging in a “race to the bottom.”⁵² Another commentator recommended that the exchanges’ independence criteria should preclude a finding of independence if a director fails to meet the definitions of an “outside” director under Section 162(m) of the Internal Revenue Code or a “non-employee” director under Exchange Act Rule 16b-3(b)(3); is a party to a related party transaction that must be disclosed pursuant to Item 404 of Regulation S-K; or has an immediate family member who is employed by the company.⁵³

Some commentators urged us to require the exchanges to consider additional factors in developing a definition of independence.⁵⁴ Several commentators advocated that we should require the exchanges to include business or personal relationships between a compensation committee member and executive officers of the issuer as factors for consideration,⁵⁵ as well as board interlocks.⁵⁶ Another commentator believed that mandatory factors for consideration should include linkages between a director’s family members and the company or its affiliates

⁵⁰ See, e.g., letters from the American Federation of State, County and Municipal Employees (“AFSCME”), California Public Employees’ Retirement System (“CalPERS”), the Colorado Public Employees’ Retirement Association (“COPERA”), OPERS and USS.

⁵¹ See letters from CalPERS, Railpen and USS.

⁵² See letter from USS.

⁵³ See letter from AFL-CIO.

⁵⁴ See, e.g., letters from AFSCME, Better Markets, CFA, CII, the State Board of Administration of Florida (“FLSBA”) and UAW Retiree Medical Benefits Trust (“UAW”).

⁵⁵ See, e.g., letters from AFL-CIO, AFSCME, CFA, CII, FLSBA and UAW.

⁵⁶ See, e.g., letters from AFSCME, CII, FLSBA and UAW.

and a director's relationships with other directors.⁵⁷ One commentator believed that, in setting independence standards for compensation committee members, the exchanges should be required to consider all factors relevant to assessing the independence of a board member, including personal, family and business relationships, and all other factors that might compromise a board member's judgment on matters relating to executive compensation.⁵⁸

Three commentators, including the NYSE, stated that we should not specify additional mandatory factors that the exchanges must consider in developing a definition of independence applicable to compensation committee members.⁵⁹ In particular, the NYSE expressed concern that if the final rule specifies additional mandatory factors for consideration, such factors would be understood by the exchanges and by many boards of directors as the Commission's determination that such relationships compromise director independence, which would thereby effectively preempt the review of compensation committee independence standards that the exchanges would be required to undertake under the rule.⁶⁰

In the Proposing Release, we noted the concern of several commentators⁶¹ that our rules implementing Section 10C not prohibit directors affiliated with significant investors (such as private equity funds and venture capital firms) from serving on compensation committees. We requested comment on whether a director affiliated with a shareholder with a significant

⁵⁷ See letter from CII.

⁵⁸ See letter from Better Markets.

⁵⁹ See letters from ABA, NYSE and the Society of Corporate Secretaries and Governance Professionals ("SCSGP").

⁶⁰ See letter from NYSE.

⁶¹ To facilitate public input on the Act, the Commission has provided a series of e-mail links, organized by topic, on its website at <http://www.sec.gov/spotlight/regreformcomments.shtml>. The public comments we received on Section 952 of the Act before we issued the Proposing Release are available on our website at <http://www.sec.gov/comments/df-title-ix/executive-compensation/executive-compensation.shtml>. Several of those commentators suggested that stock ownership alone should not automatically disqualify a board member from serving as an independent director on the compensation committee. See, e.g., letters from ABA, Brian Foley & Company, Inc., Compensia, Davis Polk and Frederic W. Cook & Co., Inc. ("Frederic Cook").

ownership interest who is otherwise independent would be sufficiently independent for the purpose of serving on the compensation committee. Many commentators advocated that a significant shareholder's stock ownership alone should not preclude directors affiliated with the significant shareholder from serving on an issuer's compensation committee.⁶² A number of these commentators noted that equity ownership by directors serves to align the directors' interests with those of the shareholders with respect to compensation matters.⁶³ According to one commentator, private equity funds typically have a strong institutional belief in the importance of appropriately structured and reasonable compensation arrangements, and the directors elected by such funds are highly incentivized to rigorously oversee compensation arrangements because the funds' income, success and reputations are dependent on creating value for shareholders.⁶⁴ This commentator also noted that, while private equity funds may seek to create shareholder value by strengthening or replacing the management team of a portfolio company, such funds rarely appoint partners or employees of their affiliated private equity firms to serve as executives of portfolio companies.⁶⁵

One commentator did not believe that directors affiliated with large shareholders should be permitted to serve on compensation committees, noting that situations could arise where the director's obligation to act in the best interest of all shareholders would conflict with the director's or large shareholder's own interest.⁶⁶ Two additional commentators noted that private equity and venture capital firms may engage in significant transactions with an issuer, and urged

⁶² See, e.g., letters from ABA, AFSCME, Bhagat, CEC, Davis Polk, Debevoise, Robert J. Jackson ("Jackson"), the Private Equity Growth Capital Council ("PEGCC") and SCSGP.

⁶³ See, e.g., letters from CEC and Davis Polk.

⁶⁴ See letter from PEGCC.

⁶⁵ See *id.*

⁶⁶ See letter from Barnard.

that all ties to the company be considered in evaluating the independence of directors affiliated with significant shareowners.⁶⁷

Our proposed rule would require the exchanges to consider current relationships between the issuer and the compensation committee member, and we requested comment on whether relationships prior to a director's appointment to the compensation committee or, for directors already serving as compensation committee members when the new listing standards take effect, prior to the effective date of the new listing standards, should also be considered. Only two commentators expressed support for establishing any such "look-back" period.⁶⁸ One commentator, although not supporting a look-back period, believed that the decision of whether to require one should be determined not by the Commission but by the exchanges.⁶⁹ Other commentators argued that a look-back period was not necessary because the two largest exchanges (NYSE and Nasdaq) currently impose look-back requirements on listed issuers in their standards regarding director independence.⁷⁰

c. Final Rule

After consideration of the comments, we are adopting the requirements as proposed, except that we are also extending them to apply to those members of a listed issuer's board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of a board committee. Under the final rule, the exchanges will be directed to establish listing standards requiring each member of a listed issuer's compensation committee to be a member of the board of directors and to be independent. The final rule does not require that

⁶⁷ See letters from AFSCME and UAW.

⁶⁸ See letters from Better Markets and CFA.

⁶⁹ See letter from Davis Polk.

⁷⁰ See letters from ABA and CEC.

exchanges establish a uniform definition of independence. We believe this approach is consistent with the mandate in Section 10C(a)(3). Further, given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of Rule 10C-1(b)(1). Although this provides the exchanges with flexibility to develop the appropriate independence requirements, as discussed below, the independence requirements developed by the exchanges will be subject to review and final Commission approval pursuant to Section 19(b) of the Exchange Act.

In developing their own definitions of independence applicable to compensation committee members, the exchanges will be required to consider relevant factors, including, but not limited to:

- a director's source of compensation, including any consulting, advisory or compensatory fee paid by the issuer; and
- whether a director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

The final rule does not specify any additional factors that the exchanges must consider in determining independence requirements for compensation committee members, nor does the final rule prescribe any standards or relationships that will automatically preclude a finding of independence. Because the rule's relevant factors cover the same matters as the prohibitions in Section 10A(m)'s definition of audit committee independence, we expect the exchanges to consider whether those prohibitions should also apply to compensation committee members. However, consistent with Section 10C, the exchanges are not required to adopt those

prohibitions in their requirements and will have flexibility to consider other factors in developing their requirements.

As noted above and in the Proposing Release, Section 10C of the Exchange Act does not require that the exchanges prohibit all affiliates from serving on a compensation committee. In establishing their independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees, such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve. However, in response to concerns noted by some commentators that significant shareholders may have other relationships with listed companies that would result in such shareholders' interests not being aligned with those of other shareholders, we emphasize that it is important for exchanges to consider other ties between a listed issuer and a director, in addition to share ownership, that might impair the director's judgment as a member of the compensation committee. For example, the exchanges might conclude that personal or business relationships between members of the compensation committee and the listed issuer's executive officers should be addressed in the definition of independence.⁷¹

Although each exchange must consider affiliate relationships in establishing a definition of compensation committee independence, there is no requirement to adopt listing standards precluding compensation committee membership based on any specific relationships. Accordingly, we do not believe it is necessary to separately define the term "affiliate" for purposes of Rule 10C-1. In addition, the final rule does not impose any required look-back

⁷¹ As the NYSE Listed Company Manual observes, "the concern is independence from management." See Commentary to NYSE Rule 303A.02(a). See also the Commentary to NYSE Rule 303A.02(a), which discusses the wide range of circumstances that could signal conflicts of interest or that might bear on the materiality of the relationship between the director and the issuer.

periods that must be incorporated in exchange listing standards relating to the independence of compensation committee members. We agree with commentators that the determination of whether to impose a look-back period in evaluating compensation committee member independence should be left to the exchanges and note that the exchanges already incorporate various look-back periods in their general criteria for director independence. In this respect, the final rule is similar to Exchange Act Rule 10A-3, which did not impose a mandatory look-back period for evaluating audit committee member independence in light of look-back periods already required by the exchanges for evaluating director independence generally.

Consistent with the proposal, the exchanges' definitions of independence for compensation committee members will be implemented through proposed rule changes that the exchanges will be required to file pursuant to Section 19(b) of the Exchange Act, which are subject to the Commission's review and approval.⁷² Consistent with the proposal, Rule 10C-1(a)(4) will require that each proposed rule change submission include, in addition to any other information required under Section 19(b) of the Exchange Act and the rules thereunder: a review of whether and how the proposed listing standards satisfy the requirements of the final rule; a discussion of the exchange's consideration of factors relevant to compensation committee independence; and the definition of independence applicable to compensation committee members that the exchange proposes to adopt or retain in light of such review.⁷³ The

⁷² The standard of review for approving proposed exchange listing standards is found in Section 19(b)(2)(C) of the Exchange Act, which provides that "[t]he Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations issued under this title that are applicable to such organization." Under Section 6(b) of the Exchange Act, the rules of an exchange must be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest."

⁷³ A submission would be required even if an exchange believes that its existing rules satisfy the requirements of Rule 10C-1. In such a circumstance, the exchange's rule submission would explain how the exchange's existing

Commission will then consider, prior to final approval, whether the exchanges considered the relevant factors outlined in Section 10C(a) and whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Exchange Act.

3. Authority to Retain Compensation Advisers; Responsibilities; and Funding

Section 10C(c)(1) of the Exchange Act provides that the compensation committee of a listed issuer may, in its sole discretion, retain or obtain the advice of a "compensation consultant,"⁷⁴ and Section 10C(d) extends this authority to "independent legal counsel and other advisers."⁷⁵ Both sections also provide that the compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of compensation advisers. Sections 10C(c)(1)(C) and 10C(d)(3) provide that the compensation committee's authority to retain, and responsibility for overseeing the work of, compensation advisers may not be construed to require the compensation committee to implement or act consistently with the advice or recommendations of a compensation adviser or to affect the ability or obligation of the compensation committee to exercise its own judgment in fulfillment of its duties. To ensure that the listed issuer's compensation committee has the necessary funds to pay for such advisers, Section 10C(e) provides that a listed issuer shall provide "appropriate funding," as determined by the compensation committee, for payment of "reasonable compensation" to compensation advisers.⁷⁶

We proposed Rules 10C-1(b)(2) and (3) to implement these statutory requirements. We are adopting these requirements substantially as proposed.

rules satisfy the requirements of Rule 10C-1, and the submission would be subject to the Commission's review and approval.

⁷⁴ See Exchange Act Section 10C(c)(1).

⁷⁵ See Exchange Act Section 10C(d)(1).

⁷⁶ See Exchange Act Section 10C(e).

a. Proposed Rule

Proposed Rule 10C-1(b)(2) would implement Sections 10C(c)(1) and (d) by repeating the provisions set forth in those sections regarding the compensation committee's authority to retain or obtain a compensation adviser, its direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser, and the related rules of construction. In addition, proposed Rule 10C-1(b)(3) would implement Section 10C(e) by repeating the provisions set forth in that section regarding the requirement to provide appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to compensation advisers.

In the Proposing Release, we noted that while the statute provides that compensation committees of listed issuers shall have the express authority to hire "independent legal counsel," the statute does not require that they do so. Similar to our interpretation⁷⁷ of Section 10A(m) of the Exchange Act, which gave the audit committee authority to engage "independent legal counsel,"⁷⁸ we do not construe the requirements related to independent legal counsel and other advisers as set forth in Section 10C(d)(1) of the Exchange Act as requiring a compensation committee to retain independent legal counsel or as precluding a compensation committee from retaining non-independent legal counsel or obtaining advice from in-house counsel or outside counsel retained by the issuer or management.

b. Comments on the Proposed Rule

⁷⁷ See Standards Relating to Listed Company Audit Committees, Release No. 33-8220 (Apr. 9, 2003) [68 FR 18788], n. 114 ("As proposed, the requirement does not preclude access to or advice from the company's internal counsel or regular outside counsel. It also does not require an audit committee to retain independent counsel.").

⁷⁸ See Exchange Act Section 10A(m)(5) ("Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.").

Many commentators expressed general support for the proposed requirements.⁷⁹ While several commentators suggested that compensation committees should use, or be permitted to use, only independent compensation advisers,⁸⁰ other commentators agreed with the interpretive position expressed in the Proposing Release that the statute does not require a compensation committee to retain independent legal counsel or preclude the compensation committee from retaining non-independent legal counsel or obtaining advice from in-house counsel or counsel retained by the issuer or management.⁸¹ One commentator noted that the proposed rule should not be interpreted to “apply to or interfere with a compensation committee’s dealings with legal counsel from whom it may obtain advice, but which was not retained or selected by the committee, such as in-house and company counsel. Thus, the proposed language...should be clear that the requirement that independent legal counsel and other advisers be subject to the direct oversight of the compensation committee applies only to such counsel and advisors who are specifically and separately retained by the compensation committee.”⁸² This commentator thought it would be helpful to include the Commission’s interpretation of the statute in the text of the rule,⁸³ although one commentator viewed such clarification as unnecessary.⁸⁴ One commentator asked that we clarify whether the interpretive view expressed in the Proposing

⁷⁹ See, e.g., letters from Barnard, CalSTRS, Davis Polk, Pfizer and SCSGP.

⁸⁰ See letters from AFL-CIO, Better Markets, CalPERS, CFA Institute, CII, FLSBA and Railpen.

⁸¹ See, e.g., letters from ABA, CEC (noting that “the compensation committee is in the best position to determine whether a particular advisor would be an appropriate advisor following a review of all factors and subject to appropriate disclosure”) and Merkl.

⁸² See letter from ABA.

⁸³ See *id.*

⁸⁴ See letter from Merkl.

Release would apply equally to compensation consultants – i.e., whether a compensation committee could obtain advice from compensation consultants retained by management.⁸⁵

We asked for comment on whether we should define what constitutes an “independent legal counsel.” One commentator stated, without explanation, that it would not be necessary for us to define what constitutes an “independent legal counsel.”⁸⁶ Another commentator believed that we should provide more guidance for issuers to determine whether legal counsel is “independent,” so that listed issuers would have greater assurance that they are in compliance with Exchange Act Section 10C(d)(1).⁸⁷

c. Final Rule

We are adopting the rule substantially as proposed, with modifications to clarify that the scope of the requirements is limited to only those compensation advisers retained by the compensation committee and to apply the requirement that the compensation committee be directly responsible for the appointment, compensation and oversight of the work of any compensation adviser retained by the compensation committee to those members of a listed issuer’s board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of a board committee. Under the final rules, the exchanges will be directed to adopt listing standards that provide that:

- the compensation committee may, in its sole discretion, retain or obtain the advice of a compensation adviser;
- the compensation committee, which for this purpose includes those members of a listed issuer’s board of directors who oversee executive compensation matters on

⁸⁵ See letter from Carl Struby.

⁸⁶ See letter from Merkl.

⁸⁷ See letter from Robert M. Fields (Apr. 6, 2011)(“Fields”).

behalf of the board of directors in the absence of a board committee, shall be directly responsible for the appointment, compensation and oversight of the work of any compensation adviser retained by the compensation committee; and

- each listed issuer must provide for appropriate funding for payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.

Consistent with Sections 10C(c)(1)(c) and 10C(d)(3), the final rule may not be construed to require the compensation committee to implement or act consistently with the advice or recommendations of any adviser to the compensation committee or to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

Consistent with our interpretation of Section 10C, the final rule does not require compensation committees to retain or obtain advice only from independent advisers. A listed issuer's compensation committee may receive advice from non-independent counsel, such as in-house counsel or outside counsel retained by management, or from a non-independent compensation consultant or other adviser, including those engaged by management. The final rule does not require a compensation committee to be directly responsible for the appointment, compensation or oversight of compensation advisers that are not retained by the compensation committee, such as compensation consultants or legal counsel retained by management. Rather, the direct responsibility to oversee compensation advisers applies only to those advisers retained by a compensation committee, and the obligation of the issuer to provide for appropriate funding applies only to those advisers so retained. Finally, in light of the provisions of our final rule and the fact that commentators did not urge us to define "independent legal counsel," we do not

believe such a definition is needed.⁸⁸ We note that the final rule requires the payment of reasonable compensation not only to independent legal counsel but also to “any other adviser” to the compensation committee, which includes any compensation advisers retained by the compensation committee, such as attorneys and consultants, whether or not they are independent.

4. Compensation Adviser Independence Factors

Section 10C(b) of the Exchange Act provides that the compensation committee of a listed issuer may select a compensation adviser only after taking into consideration the five independence factors specified in Section 10C(b) as well as any other factors identified by the Commission. In accordance with Section 10C(b), these factors would apply to the selection of compensation consultants, legal counsel and other advisers to the committee. The statute does not require a compensation adviser to be independent, only that the compensation committee of a listed issuer consider the enumerated independence factors before selecting a compensation adviser. Section 10C(b)(2) specifies that the independence factors identified by the Commission must be competitively neutral⁸⁹ and include, at minimum:

- The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser;

⁸⁸ Similarly, Exchange Act Rule 10A-3 provides that audit committees must have the authority to engage “independent counsel” and that listed issuers must provide for appropriate funding of such advisers. Independent counsel is not further defined in Rule 10A-3, and we do not believe that there has been any uncertainty arising from the absence of such a definition.

⁸⁹ Although there is no relevant legislative history, we assume this requirement is intended to address the concern expressed by the multi-service compensation consulting firms that the disclosure requirements the Commission adopted in 2009 are not competitively neutral because they do not address potential conflicts of interest presented by boutique consulting firms that are dependent on the revenues of a small number of clients. See letter from Towers Perrin, commenting on Proxy Disclosure and Solicitation Enhancements, Release No. 33-9052 (July 10, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-90.pdf>. The list of independence factors in Section 10C(b)(2), which addresses both multi-service firm “other services” conflicts and boutique firm “revenue concentration” conflicts, is consistent with this assumption.

- The amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; and
- Any stock of the issuer owned by the compensation consultant, legal counsel or other adviser.

We proposed to direct the exchanges to adopt listing standards requiring the compensation committee of a listed issuer to consider the five factors enumerated in Section 10C(b) of the Exchange Act prior to selecting a compensation adviser. We are adopting the rule substantially as proposed, but with some changes in response to comments.

a. Proposed Rule

Proposed Rule 10C-1(b)(4) would direct the exchanges to adopt listing standards that require the compensation committee of a listed issuer to take into account the five factors identified in Section 10C(b)(2), in addition to any other factors identified by the relevant exchange, before selecting a compensation adviser. Under the proposed rule, the exchanges would have the ability to add other independence factors that must be considered by compensation committees. In the Proposing Release, we stated that we did not propose any additional factors because we believed that the factors set forth in Section 10C(b) are “generally comprehensive,” although we solicited comment as to whether there are any additional

independence factors that should be taken into consideration by a listed issuer's compensation committee.⁹⁰

As noted above and in the Proposing Release, Section 10C does not require compensation advisers to be independent – only that the compensation committee consider factors that may bear upon independence. As a result, we did not believe that it would be appropriate to establish bright-line or numerical thresholds that would affect whether or when the factors listed in Section 10C, or any additional factors, must be considered by a compensation committee. For example, we did not believe that our rules should provide that a compensation committee must consider stock owned by an adviser only if ownership exceeds a specified minimum percentage of the issuer's stock, or that a committee must consider the amount of revenues that the issuer's business represents for an adviser only if the percentage exceeds a certain percentage of the adviser's revenues. Accordingly, proposed Rule 10C-1(b)(4) would require the listing standards developed by the exchanges to include the independence factors set forth in the statute and incorporated into the rule without any materiality or bright-line thresholds or cutoffs.⁹¹

b. Comments on the Proposed Rule

Comments on this proposal were mixed. A number of commentators supported directing the exchanges to adopt listing standards that require the compensation committee to take into account the five factors enumerated in Section 10C, in addition to any other factors identified by the exchanges.⁹² One multi-service compensation consulting firm believed that the five factors listed in Section 10C(b)(2) were, in total, competitively neutral, but that, on an individual basis,

⁹⁰ See Proposing Release, 76 FR at 18972.

⁹¹ As noted above, the exchanges would have the ability to add other independence factors that must be considered by compensation committees, and these additional factors could include materiality or bright-line thresholds or cutoffs.

⁹² See, e.g., letters from ABA, Pfizer, SCSGP and USS.

some of the factors were not competitively neutral.⁹³ This commentator suggested that we should provide an instruction to the final rules to emphasize that the factors should be considered in their totality and that no one factor should be viewed as a determinative factor of independence. Another commentator argued that the full effects of any independence factor on competition in the rapidly evolving advisory industry are not entirely knowable, and that the Commission should generally recommend factors that, when applied equally across the full spectrum of existing firms, help in achieving the goal of adviser independence.⁹⁴

Several commentators argued that some or all of the five factors identified in Section 10C(b)(2) and included in the proposed rule were not competitively neutral.⁹⁵ Multi-service consulting firms argued that the consideration of other services provided to the issuer by the person that employs the compensation consultant was not competitively neutral as this factor would affect only multi-service firms. For their part, smaller consulting firms argued that the consideration of the amount of fees received from the issuer as a percentage of a firm's total revenues was not competitively neutral because the likelihood of revenue concentration would be greater in smaller firms.⁹⁶ Three commentators argued that our existing compensation consultant fee disclosure requirements disproportionately affect multi-service consulting firms, and suggested that we could improve the competitive neutrality of our rules by requiring competitively neutral disclosure of fees paid to all compensation consultants or advisers.⁹⁷

⁹³ See letter from Aon Hewitt ("AON").

⁹⁴ See letter from Hodak Value Advisors.

⁹⁵ See, e.g., letters from Frederic Cook, Longnecker & Associates ("Longnecker"), Mercer, Steven Hall & Partners ("Steven Hall") and Towers Watson ("Towers").

⁹⁶ See letters from Frederic Cook and Longnecker.

⁹⁷ See letters from AON, Mercer and Towers.

Many commentators urged us to add more independence factors to the list of factors that could affect the independence of a compensation adviser.⁹⁸ Several commentators argued that we should include a comparison of the amount of fees received for providing executive compensation consulting services to the amount of fees received for providing non-executive compensation consulting services.⁹⁹ Other commentators expressed support for requiring compensation committees to consider any business or personal relationship between an executive officer of the issuer and an adviser or the person employing the compensation adviser.¹⁰⁰ Some commentators, however, opposed adding new factors to the list of factors identified in the proposed rule,¹⁰¹ although one of these commentators acknowledged that it would advise any compensation committee evaluating the independence of a potential adviser to consider the business and personal relationships between the issuer's executive officers and the adviser or adviser's firm.¹⁰²

In the Proposing Release, we requested comment on the application of the independence factors to different categories of advisers. Several commentators requested that we stipulate that a compensation committee conferring with or soliciting advice from the issuer's in-house or outside legal counsel would not be required to consider the independence factors with respect to

⁹⁸ See, e.g., letters from ABA, AFL-CIO, AFSCME and USS.

⁹⁹ See letters from AFL-CIO, AFSCME, Frederic Cook and UAW. See also letter from Steven Hall (noting that the "requirement that a compensation committee consider the company's fees paid to a firm as a percentage of the firm's overall fees seems to overlook the more significant issue of the amount of fees the consulting firm receives for services to the compensation committee as a percentage of the total fees the firm receives including fees for other services to the company").

¹⁰⁰ See, e.g., letters from ABA (supporting consideration of relationships between adviser's employer and issuer's executive officers), Better Markets, Merkl (supporting consideration of relationships between either adviser or adviser's employer and issuer's executive officers), and USS (supporting consideration of relationships between adviser and issuer's executive officers). One commentator supported requiring consideration of business or personal relationships between an issuer's executive officers and the compensation adviser, but not the adviser's employer. See letter from Towers.

¹⁰¹ See, e.g., letters from AON, Meridian Compensation Partners ("Meridian"), SCSGP and Steven Hall.

¹⁰² See letter from Steven Hall.

such counsels.¹⁰³ These commentators believed that a compensation committee should be required to consider the independence factors only when the committee itself selects a compensation adviser, but not when it receives advice from, but does not select, an adviser.¹⁰⁴ Moreover, two of these commentators questioned the usefulness of the independence assessment as it relates to in-house legal counsel, outside legal counsel to an issuer or a compensation adviser retained by management, as they are not held out, or considered by the compensation committee, to be independent.¹⁰⁵

On the other hand, a number of commentators argued that the compensation adviser independence requirements should apply to any legal counsel that provides advice to the compensation committee.¹⁰⁶ One of these commentators argued that the language of Section 10C(b)(1) is unambiguous and that the final rules should clarify that exchange listing standards must require compensation committees to consider the independence factors whenever a committee receives advice from legal counsel, regardless of whether or not the committee selected counsel.¹⁰⁷

We also requested comment on whether we should include materiality, numerical or other thresholds that would limit the circumstances in which a compensation committee is required to consider the independence factors. Several commentators opposed including such materiality, numerical or other bright-line thresholds in the rule.¹⁰⁸ These commentators expressed concern that such thresholds may not be competitively neutral and could reduce the

¹⁰³ See letters from ABA, Davis Polk, McGuire Woods and S&C.

¹⁰⁴ See letters from ABA and McGuire Woods.

¹⁰⁵ See letters from ABA and S&C.

¹⁰⁶ See, e.g., letters from Better Markets, Robert M. Fields (Apr. 29, 2011), Richard Thalheimer and Towers.

¹⁰⁷ See letter from Towers.

¹⁰⁸ See letters from Longnecker, McGuireWoods, Meridian, SCSGP and Towers.

flexibility compensation committees have to select advisers best-suited to the issuer. A number of commentators supported a materiality threshold with respect to the stock ownership factor. One commentator suggested that consideration of this factor should be required only if an individual beneficially owns in excess of 5% of an outstanding class of an issuer's equity securities.¹⁰⁹ Another commentator suggested a threshold of \$50,000 in fair market value or 5,000 shares of a listed issuer's stock, below which an adviser's stock ownership would not be deemed to affect his or her independence.¹¹⁰ Other commentators suggested that compensation committees should be required to consider only stock owned by the lead adviser and not stock owned by other employees on the adviser's team.¹¹¹

Comments were mixed as to whether the final rule should clarify the phrases "provision of other services" or "business or personal relationships," as used in proposed Rule 10C-1(b)(4). Some commentators thought no further clarification of the phrase "provision of other services" was necessary,¹¹² and another commented that it "is better to have a general principle than to have exhaustive detailed rules that may leave loopholes for services that may impair the independence of an advisory firm."¹¹³ Two commentators suggested defining the phrase to expressly exclude certain services.¹¹⁴ For example, one commentator suggested excluding advice related to broad-based, non-discriminatory plans or surveys.¹¹⁵

¹⁰⁹ See letter from Steven Hall.

¹¹⁰ See letter from ABA.

¹¹¹ See letters from AON and Mercer.

¹¹² See letters from AON and Towers.

¹¹³ See letter from Merkl.

¹¹⁴ See letters from Hodak and Mercer.

¹¹⁵ See letter from Mercer.

Some commentators urged that we further define the phrase “business or personal relationship.”¹¹⁶ One commentator suggested that we should define “business relationship” to expressly exclude any non-commercial relationship between an adviser and a member of the issuer’s compensation committee, provided that such relationship does not result in significant monetary or economic gain to either party, and that we should define “personal relationship” to include only familial relationships.¹¹⁷ Another commentator argued that business or personal relationships that are more casual in nature may not be relevant to adviser independence and suggested limiting consideration of such relationships to those that would “more likely than not” have a “material adverse effect” on an individual’s independence.¹¹⁸ Two commentators thought it would be helpful if we provided examples of the types of relationships to be considered, in order to guide compensation committees as they consider the breadth of possible relationships that might impair adviser independence.¹¹⁹ Another commentator thought it was unnecessary for us to further define the phrase because the “myriad possible definitions and considerations are unlikely to be fully encompassed by such a definition.”¹²⁰

A few commentators also urged that we clarify the scope of individuals whose relationships would need to be considered in the context of evaluating adviser independence. One commentator recommended limiting the required consideration to the individual adviser who renders services to the compensation committee,¹²¹ and another commentator similarly recommended limiting the required consideration to the lead consultant, counsel or adviser to the

¹¹⁶ See, e.g., letters from AON and Meridian.

¹¹⁷ See letter from Meridian.

¹¹⁸ See letter from AON.

¹¹⁹ See letters from Merkl and Towers.

¹²⁰ See letter from Mercer.

¹²¹ See letter from Meridian.

committee, but not to other members of the adviser's team serving the compensation committee.¹²²

We requested comment on whether we should require disclosure of a compensation committee's process for selecting advisers. Many commentators criticized this idea, citing concerns about extending already lengthy proxy statement discussions of executive compensation and expressing doubt that additional disclosure of the process for selecting advisers would provide any useful information to investors.¹²³ However, some commentators thought such disclosure could be useful in providing transparency as to whether compensation committees were following the required process for selecting advisers.¹²⁴

c. Final Rule

After considering the comments, we are adopting the requirements substantially as proposed, but with some revisions. As discussed above, this aspect of the final rule will also apply to those members of a listed issuer's board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of a board committee. We have also decided to include one additional independence factor that compensation committees must consider before selecting a compensation adviser. Under the final rule, the exchanges will be directed to adopt listing standards that require a compensation committee to take into account the five factors enumerated in Section 10C(b)(2), as well as any business or personal relationships between the executive officers of the issuer and the compensation adviser or the person employing the adviser. This would include, for example, situations where the chief executive officer of an issuer and the compensation adviser have a familial relationship or where

¹²² See letter from Mercer (noting that the more junior members of the team rarely interact directly with the compensation committee).

¹²³ See, e.g., letters from CFA Institute and Frederic Cook.

¹²⁴ See, e.g., letter from Better Markets.

the chief executive officer and the compensation adviser (or the adviser's employer) are business partners. We agree with commentators who stated that business and personal relationships between an executive officer and a compensation adviser or a person employing the compensation adviser may potentially pose a significant conflict of interest that should be considered by the compensation committee before selecting a compensation adviser.¹²⁵

As was proposed, the final rule does not expand the stock ownership factor to require consideration of stock owned by the person employing a compensation adviser. As we noted in the Proposing Release, we interpret "any stock of the issuer owned by the compensation consultant, legal counsel, or other adviser" to include shares owned by the individuals providing services to the compensation committee and their immediate family members.

Other than the additional factor described above, the final rules will not require the listing standards to mandate consideration of independence factors beyond those set forth in Section 10C(b)(2). We believe that these six factors, when taken together, are competitively neutral, as they will require compensation committees to consider a variety of factors that may bear upon the likelihood that a compensation adviser can provide independent advice to the compensation committee, but will not prohibit committees from choosing any particular adviser or type of adviser. We agree with the commentator who suggested that the factors should be considered in their totality and that no one factor should be viewed as a determinative factor of independence.¹²⁶ We do not believe it is necessary, however, to provide an instruction to this effect, as the final rule directs the exchanges to require consideration of all of the specified factors. In response to concerns echoed by a number of commentators, we emphasize that neither the Act nor our final rule requires a compensation adviser to be independent, only that the

¹²⁵ See, e.g., letters from ABA, Better Markets, Merkl and USS.

¹²⁶ See letter from AON.

compensation committee consider the enumerated independence factors before selecting a compensation adviser. Compensation committees may select any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors outlined in the final rule.¹²⁷

In response to comments,¹²⁸ we are including an instruction to the final rule to provide that a compensation committee need not consider the six independence factors before consulting with or obtaining advice from in-house counsel. Commentators noted that it is routine for in-house counsel to consult with, and provide advice to, the compensation committee on a variety of issues, such as, for example, the terms of an existing benefit plan or how a proposed employment contract would interrelate with other company agreements.¹²⁹ We agree with these commentators that, as in-house legal counsel are company employees, they are not held out to be independent. In addition, we do not believe compensation committees consider that in-house counsel serve in the same role or perform a similar function as a compensation consultant or outside legal counsel.

This instruction will not affect the obligation of a compensation committee to consider the independence of outside legal counsel or compensation consultants or other advisers retained by management or by the issuer. We believe that information gathered from an independence assessment of these categories of advisers will be useful to the compensation committee as it considers any advice that may be provided by these advisers. In addition, excluding outside legal counsel or compensation consultants retained by management or by the issuer from the required independence assessment may not be competitively neutral, since, as some

¹²⁷ The listing standards do not, of course, override any duties imposed on directors by applicable state law relating to the selection of compensation advisers.

¹²⁸ See letters from ABA, Davis Polk and S&C.

¹²⁹ See letters from Davis Polk and S&C.

commentators pointed out, they often perform the same types of services as the law firms and compensation consultants selected by the compensation committee.¹³⁰ Accordingly, we are including an instruction to the final rule that provides that a listed issuer's compensation committee is required to conduct the independence assessment outlined in Rule 10C-1(b)(4) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house legal counsel.

The final rule, like our proposal, does not include any materiality, numerical or other thresholds that would narrow the circumstances in which a compensation committee is required to consider the independence factors specified in the rule. We are concerned that adding materiality or other bright-line thresholds may not be competitively neutral. The absence of any such thresholds means that all facts and circumstances relevant to the six factors will be presented to the compensation committee for its consideration of the independence of a compensation adviser, and not just those factors that meet a prescribed threshold. For similar reasons, the final rule does not further define the phrases "provision of other services" or "business or personal relationship."

Consistent with the proposed rule, the final rule does not require listed issuers to describe the compensation committee's process for selecting compensation advisers pursuant to the new listing standards. We are sensitive to the concerns of commentators that adding such disclosure would increase the length of proxy statement disclosures on executive compensation without necessarily providing additional material information to investors.

5. Opportunity to Cure Defects

¹³⁰ See letters from Jackson and Towers.

Section 10C(f)(2) of the Exchange Act specifies that our rules must provide for appropriate procedures for an issuer to have a reasonable opportunity to cure any defects that would be the basis for a prohibition of the listing of an issuer's securities as a result of its failure to meet the requirements set forth in Section 10C, before imposition of such prohibition.¹³¹ To implement this requirement, we proposed Rule 10C-1(a)(3), which would require the exchanges to establish such procedures if their existing procedures are not adequate. We are adopting the rule as proposed.

a. Proposed Rule

Proposed Rule 10C-1(a)(3) would provide that the exchange listing standards required by Rule 10C-1 must allow issuers a reasonable opportunity to cure violations of the compensation committee listing requirements. The proposed rule did not set forth specific procedures for curing violations of compensation committee listing requirements, but specified that the listing standards may provide that if a member of a compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the issuer to the applicable exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual shareholders' meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent. Proposed Rule 10C-1(a)(3) was patterned after similar provisions contained in Exchange Act Rule 10A-3(a)(3).¹³²

b. Comments on the Proposed Rule

Commentators generally supported proposed Rule 10C-1(a)(3). Two commentators favored requiring the exchanges to provide issuers the same opportunity to cure non-compliance

¹³¹ See Exchange Act Section 10C(f)(2).

¹³² 17 CFR 240.10A-3(a)(3).

with the compensation committee listing requirements as they have with respect to audit committee requirements.¹³³ In response to our request for comment on whether we should direct the exchanges to adopt specific procedures for curing non-compliance, several commentators were opposed to requiring the exchanges to establish any such specific procedures.¹³⁴ One commentator, however, urged us to direct the exchanges to establish more limited procedures for curing defects.¹³⁵

We also requested comment as to whether listed issuers that have just completed initial public offerings should be given additional time to comply with the compensation committee independence requirements, as is permitted by Exchange Act Rule 10A-3(b)(1)(iv)(A) with respect to audit committee independence requirements. Several commentators supported providing newly listed issuers with additional time to comply with the compensation committee listing requirements.¹³⁶ The NYSE argued that the exchanges should have the flexibility to permit an issuer applying for listing in connection with an initial public offering to have additional time to comply with compensation committee requirements.¹³⁷ The NYSE also requested that we clarify that the authority the exchanges would have under Rule 10C-1(a)(3) to provide issuers an opportunity to cure defects is not limited to situations where a previously independent compensation committee member loses his or her independent status for reasons outside his or her control.¹³⁸

c. Final Rule

¹³³ See letters from Debevoise and CalPERS.

¹³⁴ See, e.g., letters from Davis Polk and Merkl.

¹³⁵ See letter from Better Markets.

¹³⁶ See, e.g., letters from ABA, Davis Polk, Merkl and NYSE.

¹³⁷ See letter from NYSE.

¹³⁸ See *id.*

After consideration of the comments, we are adopting Rule 10C-1(a)(3) as proposed. Similar to Exchange Act Rule 10A-3(a)(3), the final rule requires the exchanges to provide appropriate procedures for listed issuers to have a reasonable opportunity to cure any noncompliance with the compensation committee listing requirements that could result in the delisting of an issuer's securities. The exchanges' rules may also provide that if a member of a listed issuer's compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, with notice by the issuer to the applicable exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual shareholders' meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent. The exchanges' authority to provide issuers an opportunity to cure defects is not limited to situations where a previously independent compensation committee member loses his or her independent status for reasons outside his or her control.

As we noted in the Proposing Release, we believe that existing listing standards and delisting procedures of most of the exchanges satisfy the requirement for there to be reasonable procedures for an issuer to have an opportunity to cure any defects on an ongoing basis. Most exchanges have already adopted procedures to provide issuers with notice and opportunity for a hearing, an opportunity for an appeal and an opportunity to cure defects before their securities are delisted.¹³⁹ Nonetheless, we expect that the rules of each exchange would provide for

¹³⁹ See, e.g., NYSE Listed Company Manual Section 801-805; Nasdaq Equity Rules 5800 Series; NYSE AMEX Company Guide Section 1009 and Part 12; Chicago Board Options Exchange Rule 31.94; Chicago Stock Exchange Article 22, Rules 4, 17A, and 22; Nasdaq OMX BX Rule 4800 series; Nasdaq OMX PHLX Rule 811. Neither NYSE Arca nor the National Stock Exchange has a rule that specifically requires listed companies to be given an opportunity to submit a plan to regain compliance with corporate governance listing standards other than audit committee requirements; issuers listed on these exchanges, however, are provided notice, an opportunity for a hearing, and an opportunity for an appeal prior to delisting. See NYSE Arca Rule 5.5(m); National Stock Exchange Rule 15.7 and Chapter X.

definite procedures and time periods for compliance with the final rule requirements to the extent they do not already do so.

We have not made any modifications to Rule 10C-1(a)(3) with respect to newly listed issuers. As discussed in more detail in Section II.B.2 of this release, in accordance with Exchange Act Section 10C(f)(3), our final rule will authorize the exchanges to exempt categories of issuers from the requirements of Section 10C. We believe this authority will allow the exchanges to craft appropriate limited exceptions from the required compensation committee listing standards for newly listed and other categories of listed issuers, subject to Commission review and approval pursuant to Section 19(b) of the Exchange Act.

B. Implementation of Listing Requirements

1. Exchanges and Securities Affected

We proposed to apply the requirements of Section 10C only to exchanges that list equity securities. In addition, the proposed rule would require that the exchanges adopt listing standards in compliance with the rule only with respect to issuers with listed equity securities. Along with the exemptions contained in Section 10C, the proposed rule would also exempt security futures products and standardized options. We are adopting the rule as proposed.

a. Proposed Rule

Section 10C(a) provides that the Commission shall direct the exchanges to prohibit the listing of any “equity security” of an issuer (other than several types of exempted issuers) that does not comply with the compensation committee member independence requirements. In contrast, Section 10C(f)(1), which states generally the scope of the compensation committee and compensation adviser listing requirements, provides that the Commission shall direct the national

securities exchanges and national securities associations “to prohibit the listing of any security of an issuer that is not in compliance with the requirements of this section” (emphasis added).

The Senate-passed version of the bill did not distinguish between equity and non-equity securities, referencing only the prohibition against the listing of “any security” of an issuer not in compliance with the independence requirements.¹⁴⁰ The initial House-passed version would have required the Commission to adopt rules to direct the exchanges to prohibit the listing of “any class of equity security” of an issuer that is not in compliance with the compensation committee independence standards, as well as with any of the other provisions of that section, including the provisions relating to compensation advisers.¹⁴¹ According to a press release issued by the House Financial Services Committee, this language was added during deliberations by that committee to clarify that the compensation committee independence standards would apply only to “public companies, not to companies that have only an issue of publicly-registered debt.”¹⁴² Because the Senate-passed version of the bill (which did not specify “equity” securities) was used as the base for the conference draft, it appears that addition of “equity” securities in Section 10C(a) of the conference draft was deliberate. Unlike the House-passed bill, however, the final bill specifically references equity securities only in connection with compensation committee member independence requirements.

As we noted in the Proposing Release, the NYSE currently exempts issuers whose only listed securities are debt securities from the compensation committee listing requirements that apply to issuers listing equity securities.¹⁴³ In addition, Exchange Act Rule 3a12-11 exempts

¹⁴⁰ See H.R. 4173, 111th Cong. § 952 (as passed, with amendments, by the Senate on May 20, 2010).

¹⁴¹ See H.R. 4173, 111th Cong. § 2003 (as passed by the House of Representatives on Dec. 11, 2009).

¹⁴² See Press Release, Financial Services Committee Passes Executive Compensation Reform, July 28, 2009, available at: <http://democrats.financialservices.house.gov/press/PRArticle.aspx?NewsID=520>.

¹⁴³ See NYSE Listed Company Manual Section 303A.00.

listed debt securities from most of the requirements in our proxy and information statement rules.¹⁴⁴ Finally, most, if not all, issuers with only listed debt securities, other than foreign private issuers, are privately held.¹⁴⁵ In light of the legislative history and our and the exchanges' historical approach to issuers with only listed debt securities, we noted in the Proposing Release that we view the requirements of Section 10C as intended to apply only to issuers with listed equity securities.¹⁴⁶

Accordingly, we proposed to apply Rule 10C-1 only to exchanges that list equity securities, and to direct these exchanges to adopt listing standards implementing our rule only as to issuers that are seeking to list or have listed equity securities. We noted in the Proposing Release that proposed Rule 10C-1 would not currently apply to FINRA, the only existing national securities association registered under Section 15A(a) of the Exchange Act, as FINRA does not list any securities and does not have listing standards under its rules.¹⁴⁷ Nevertheless, as

¹⁴⁴ In adopting this rule, the Commission determined that debt holders would receive sufficient protection from the indenture, the Trust Indenture Act, the proxy rules' antifraud proscriptions, and the Exchange Act rules that facilitate the transmission of materials to beneficial owners. See Exemptive Relief and Simplification of Filing Requirements for Debt Securities To Be Listed on a National Securities Exchange, Release No. 34-34922 (Nov. 1, 1994) [59 FR 55342].

¹⁴⁵ Based on a review of information reported on Forms 10-K, 20-F and 40-F and current public quotation and trade data on issuers whose debt securities are listed on an exchange, such as the NYSE Listed and Traded Bonds and NYSE Amex Listed Bonds, we estimate that there are approximately 83 issuers that list only debt securities on an exchange. Of these 83 issuers, approximately 45 are wholly-owned subsidiaries that would be exempt from proposed Exchange Act Rule 10C-1 pursuant to Section 10C(g) of the Act. None of these 83 issuers has a class of equity securities registered under Section 12 of the Exchange Act.

¹⁴⁶ Although Section 10C is, in many respects, similar to the audit committee independence requirements contained in Section 10A(m), there are differences in some of the statutory language. In this regard, we note that the requirements included in Section 10A(m) of the Exchange Act, as set forth in Section 301 of the Sarbanes-Oxley Act, are applicable generally to "listed securities," and no reference is made to equity securities. Therefore, although Section 10A(m) applies to issuers whether they have listed debt or equity, we do not believe this should necessarily prescribe the scope of Section 10C.

¹⁴⁷ Similarly, we stated that we did not expect the National Futures Association, which is a national securities association registered under Section 15A(k) for the limited purpose of regulating the activities of members who are registered as broker-dealers in security futures products, see note 8, above, to develop listing standards regarding compensation committees in compliance with proposed Rule 10C-1. See Proposing Release, 76 FR at 18974, n. 73.

Section 10C specifically references national securities associations, proposed Rule 10C-1 would apply to any registered national securities association that lists equity securities in the future.¹⁴⁸

Under proposed Rule 10C-1(a), exchanges would be required, to the extent that their listing standards did not conform with Rule 10C-1, to issue or amend their listing rules, subject to Commission review, to comply with the new rule. As noted in the Proposing Release, an exchange that lists or trades security futures products (as defined in Exchange Act Section 3(a)(56))¹⁴⁹ may register as an exchange under Section 6(g) of the Exchange Act solely for the purpose of trading those products. As the Exchange Act definition of “equity security” includes security futures on equity securities,¹⁵⁰ exchanges whose only listed equity securities are security futures products¹⁵¹ would be required to comply with Rule 10C-1 absent an applicable exemption. Given that Section 10C(f) of the Exchange Act makes no distinction between exchanges registered pursuant to Section 6(a) – such as the NYSE and Nasdaq – and those

¹⁴⁸ The OTC Bulletin Board (OTCBB) and the OTC Markets Group (previously known as the Pink Sheets and Pink OTC Markets) will not be affected by Rule 10C-1, and therefore issuers whose securities are quoted on these interdealer quotation systems similarly will not be affected, unless their securities also are listed on a national securities exchange. The OTCBB is an “interdealer quotation system” for over-the-counter securities that is operated by FINRA. (Exchange Act Rule 15c2-11 defines the term “interdealer quotation system.” 17 CFR 240.15c2-11.) It does not, however, have a listing agreement or arrangement with the issuers whose securities are quoted on the system and are not considered listed, as that term is defined and used in Rule 10C-1. See Rules 10C-1(a)(2) and (c)(3). Although market makers may be required to review and maintain specified information about an issuer and to furnish that information to FINRA, the issuers whose securities are quoted on the OTCBB are not required to submit any information to the system. The OTC Markets Group is not a registered national securities exchange or association, nor is it operated by a registered national securities exchange or association, and thus is not covered by the terms of the final rule.

¹⁴⁹ Exchange Act Section 3(a)(56) defines the term “security futures product” to mean “a security future or any put, call, straddle, option, or privilege on any security future.” 15 U.S.C. 78c(a)(56).

¹⁵⁰ Section 3(a)(11) of the Exchange Act defines the term “equity security” as any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

¹⁵¹ Exchanges currently registered solely pursuant to Section 6(g) of the Exchange Act include the Board of Trade of the City of Chicago, Inc.; the CBOE Futures Exchange, LLC; the Chicago Mercantile Exchange, Inc.; One Chicago, LLC; the Island Futures Exchange, LLC; and NQLX LLC.

registered pursuant to Section 6(g), we did not propose a wholesale exemption from the requirements of Rule 10C-1 for those exchanges registered solely pursuant to Section 6(g).

However, as discussed below, we proposed to exempt security futures products from the scope of proposed Rule 10C-1. Accordingly, we noted in the Proposing Release that, to the extent the final rule exempted the listing of security futures products from the scope of Rule 10C-1, any exchange registered solely pursuant to Section 6(g) of the Exchange Act and that lists and trades only security futures products would not be required to file a rule change in order to comply with Rule 10C-1.

We proposed to exempt security futures products and standardized options from the requirements of Rule 10C-1. Although the Exchange Act defines “equity security” to include any security future on any stock or similar security, the Commodity Futures Modernization Act of 2000 (the “CFMA”)¹⁵² permits the exchanges to trade futures on individual securities and on narrow-based security indices (“security futures”)¹⁵³ without such securities being subject to the registration requirements of the Securities Act of 1933 (the “Securities Act”) and the Exchange Act so long as they are cleared by a clearing agency that is registered under Section 17A of the Exchange Act¹⁵⁴ or that is exempt from registration under Section 17A(b)(7)(A) of the Exchange Act. In December 2002, we adopted rules that provide comparable regulatory treatment for standardized options.¹⁵⁵

¹⁵² Pub. L. No. 106-554, 114 Stat. 2763 (2000).

¹⁵³ Exchange Act Section 3(a)(56) [15 U.S.C. 78c(a)(56)], and Commodities Exchange Act Section 1a(32) [7 U.S.C. 1a(32)] define “security futures product” as a security future or any put, call, straddle, option, or privilege on any security future.

¹⁵⁴ 15 U.S.C. 78q-1.

¹⁵⁵ See Release No. 33-8171 (Dec. 23, 2002) [68 FR 188]. In that release, we exempted standardized options issued by registered clearing agencies and traded on a registered national securities exchange or on a registered national securities association from all provisions of the Securities Act, other than the antifraud provision of Section 17, as well as the Exchange Act registration requirements. Standardized options are defined in Exchange Act Rule 9b-1(a)(4) [17 CFR 240.9b-1(a)(4)] as option contracts trading on a national securities exchange, an automated

The clearing agency for security futures products and standardized options is the issuer of these securities,¹⁵⁶ but its role as issuer is fundamentally different from an issuer of equity securities of an operating company. The purchasers of security futures products and standardized options do not, except in the most formal sense, make an investment decision based on the issuer. As a result, information about the clearing agency's business, its officers and directors and its financial statements is much less relevant to investors in these securities than information about the issuer of the underlying security. Similarly, the investment risk in these securities is determined by the market performance of the underlying security rather than the results of operations or performance of the clearing agency, which is a self-regulatory organization subject to regulatory oversight. Furthermore, unlike a conventional issuer, the clearing agency does not receive the proceeds from the sales of security futures products or standardized options.¹⁵⁷

In recognition of these fundamental differences, we provided exemptions for security futures products and standardized options from the audit committee listing requirements in Exchange Act Rule 10A-3.¹⁵⁸ Specifically, Rule 10A-3(c) exempts the listing of a security futures product cleared by a clearing agency that is registered pursuant to Section 17A of the Exchange Act or that is exempt from registration pursuant to Section 17A(b)(7)(A) and the

quotation system of a registered securities association, or a foreign securities exchange which relate to option classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.

¹⁵⁶ See Fair Administration and Governance of Self-Regulatory Organizations; Disclosure and Regulatory Reporting by Self-Regulatory Organizations; Recordkeeping Requirements for Self-Regulatory Organizations; Ownership and Voting Limitations for Members of Self-Regulatory Organizations; Ownership Reporting Requirements for Members of Self-Regulatory Organizations; Listing and Trading of Affiliated Securities by a Self-Regulatory Organization, Release No. 34-50699 (Nov. 18, 2004) [69 FR 71126], at n. 260 ("Standardized options and security futures products are issued and guaranteed by a clearing agency. Currently, all standardized options and security futures products are issued by the Options Clearing Corporation ('OCC').").

¹⁵⁷ However, the clearing agency may receive a clearing fee from its members.

¹⁵⁸ See Exchange Act Rules 10A-3(c)(4) and (5).

listing of a standardized option issued by a clearing agency that is registered pursuant to Section 17A of the Exchange Act. For the same reasons that we exempted these securities from Rule 10A-3, we proposed to exempt these securities from Rule 10C-1.

b. Comments on the Proposed Rule

Commentators generally agreed that Section 10C should apply only to issuers with listed equity securities.¹⁵⁹ Some commentators argued that the proposed rule should apply to all domestic exchanges and public companies without exception.¹⁶⁰ These commentators did not specifically comment on whether the statute is intended to apply only to issuers with listed equity securities. One commentator recommended that we exempt only exchanges that do not list equity securities and agreed that our proposed exemption for security futures products and standardized options is necessary or appropriate in the public interest and consistent with the protection of investors.¹⁶¹

c. Final Rule

After consideration of the comments, we are adopting the proposals without change. As adopted, the final rule will:

- Require all exchanges that list equity securities, to the extent that their listing standards do not already comply with the final rule, to issue or amend their listing rules to comply with the new rule;
- Provide that exchange listing standards required by the new rule need apply only to issuers with listed equity securities; and

¹⁵⁹ See, e.g., letters from Debevoise and PEGCC.

¹⁶⁰ See letters from CII and FLSBA.

¹⁶¹ See letter from Merkl.

- Exempt security futures products cleared by a clearing agency that is registered pursuant to Section 17A of the Exchange Act or that is exempt from registration pursuant to Section 17A(b)(7)(A) and standardized options that are issued by a clearing agency that is registered pursuant to Section 17A of the Exchange Act.

2. Exemptions

Section 10C of the Exchange Act has four different provisions relating to exemptions from some or all of the requirements of Section 10C:

- Section 10C(a)(1) provides that our rules shall direct the exchanges to prohibit the listing of any equity security of an issuer that is not in compliance with the compensation committee member independence requirements of Section 10C(a)(2), other than an issuer that is in one of five specified categories – controlled companies, limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act¹⁶² and foreign private issuers that disclose in their annual reports the reasons why they do not have an independent compensation committee;
- Section 10C(a)(4) provides that our rules shall authorize the exchanges to exempt a particular relationship from the independence requirements applicable to compensation committee members, as each exchange determines is appropriate, taking into consideration the size of the issuer and any other relevant factors;
- Section 10C(f)(3) provides that our rules shall authorize the exchanges to exempt any category of issuer from the requirements of Section 10C as the exchanges determine

¹⁶² 15 U.S.C. 80a-1 et seq.

is appropriate, and that, in making such determinations, the exchanges must take into account the potential impact of the requirements on smaller reporting issuers; and

- Section 10C(g) specifically exempts controlled companies, as defined in Section 10C(g), from all of the requirements of Section 10C.

We proposed Rule 10C-1(b)(1)(iii)(A) to exempt the five categories of issuers enumerated in Section 10C(a)(1); Rule 10C-1(b)(1)(iii)(B) to authorize the exchanges to exempt a particular relationship from the independence requirements applicable to compensation committee members, as each exchange determines is appropriate, taking into consideration the size of the issuer and other relevant factors; Rule 10C-1(b)(5)(i) to permit the exchanges to exempt any category of issuer from the requirements of Section 10C, as each exchange determines is appropriate, taking into consideration the potential impact of such requirements on smaller reporting issuers; and Rule 10C-1(b)(5)(ii) to exempt controlled companies from the requirements of Rule 10C-1. We are adopting the proposals with changes made in response to comments.

a. Proposed Rule

i. Issuers Not Subject to Compensation Committee Independence Requirements

As noted above, Exchange Act Section 10C(a)(1) provides that our rules shall direct the exchanges to prohibit the listing of any equity security of an issuer, other than an issuer that is in one of five specified categories, that is not in compliance with the compensation committee member independence requirements of Section 10C(a)(2). Accordingly, we proposed to exempt controlled companies, limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act and foreign

private issuers that provide annual disclosures to shareholders of the reasons why the foreign private issuer does not have an independent compensation committee from these requirements.

Under Section 10C(g)(2) of the Exchange Act, a “controlled company” is defined as an issuer that is listed on an exchange and that holds an election for the board of directors of the issuer in which more than 50% of the voting power is held by an individual, a group or another issuer. We proposed to incorporate this definition into Rule 10C-1(c)(2). Section 10C did not define the terms “limited partnerships” or “companies in bankruptcy proceedings.” As noted in the Proposing Release, we believe that a limited partnership is generally understood to mean a form of business ownership and association consisting of one or more general partners who are fully liable for the debts and obligations of the partnership and one or more limited partners whose liability is limited to the amount invested.¹⁶³ We also noted in the Proposing Release that the phrase “companies in bankruptcy proceedings” is used in several Commission rules without definition.¹⁶⁴ Accordingly, we did not further define either term in proposed Rule 10C-1(c).

Section 10C does not define the term “open-end management investment company.” As discussed in the Proposing Release, under the Investment Company Act, an open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer.¹⁶⁵ We proposed to define this term in proposed Rule 10C-1(c) by referencing Section 5(a)(1) of the Investment Company Act.

¹⁶³ See Unif. Ltd. P’ship Act §§ 102, 303 and 404 (2001).

¹⁶⁴ See, e.g., Section 55(a)(3)(A) of the Investment Company Act [15 U.S.C. 80a-54(a)(3)(A)]; Item 1107(k) of Regulation AB [17 CFR 229.1107(k)]; and Rule 457 under the Securities Act [17 CFR 230.457].

¹⁶⁵ See Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a-4 and 80a-5(a)(1)]. Open-end and closed-end management investment companies registered under the Investment Company Act are generally exempt from current exchange listing standards that require listed issuers to either have a compensation committee or to have independent directors determine, recommend, or oversee specified executive compensation matters. See, e.g.,

Under Section 10C(a)(1), a foreign private issuer that provides annual disclosure to shareholders of the reasons why the foreign private issuer does not have an independent compensation committee would be exempt from the compensation committee member independence requirements. Exchange Act Rule 3b-4 defines “foreign private issuer” as “any foreign issuer other than a foreign government, except for an issuer that has more than 50% of its outstanding voting securities held of record by U.S. residents and any of the following: a majority of its officers and directors are citizens or residents of the United States, more than 50% of its assets are located in the United States, or its business is principally administered in the United States.”¹⁶⁶ Since this definition applies to all Exchange Act rules, we did not believe it was necessary to include a cross-reference to Rule 3b-4 in our proposed rules.

In the Proposing Release, we noted that certain foreign private issuers have a two-tier board, with one tier designated as the management board and the other tier designated as the supervisory or non-management board. Similar to our approach to Rule 10A-3, proposed Rule 10C-1(b)(1)(iii) would clarify that in the case of foreign private issuers with two-tier boards of directors, the term “board of directors” means the supervisory or non-management board. Accordingly, to the extent the supervisory or non-management board forms a separate compensation committee, proposed Rule 10C-1 would apply to that committee, with the exception of the committee member independence requirements, assuming the foreign private issuer discloses why it does not have an independent compensation committee in its annual report.

ii. Exemption of Relationships and Other Categories of Issuers

NYSE Listed Company Manual Section 303A.00; Nasdaq Rule 5615(a)(5); NYSE Arca Rule 5.3; NYSE AMEX Company Guide Section 801.

¹⁶⁶ 17 CFR 240.3b-4(c).

As noted above, Section 10C(a)(4) of the Exchange Act provides that the Commission's rules shall permit an exchange to exempt a particular relationship from the compensation committee independence requirements, as such exchange deems appropriate, taking into consideration the size of the issuer and any other relevant factors. In addition, as noted above, Section 10C(f)(3) provides that our rules shall authorize an exchange to exempt a category of issuers from the requirements of Section 10C, as the exchange determines is appropriate, taking into account the potential impact of the Section 10C requirements on smaller reporting issuers. To implement these provisions, we proposed Rule 10C-1(b)(1)(iii)(B), which would authorize the exchanges to establish listing standards that exempt particular relationships between members of the compensation committee and listed issuers that might otherwise impair the member's independence, taking into consideration the size of an issuer and any other relevant factors, and Rule 10C-1(b)(5)(i), which would allow the exchanges to exempt categories of listed issuers from the requirements of Section 10C, as each exchange determines is appropriate. In determining the appropriateness of categorical issuer exemptions, the exchanges would be required, in accordance with the statute, to consider the potential impact of the requirements of Section 10C on smaller reporting issuers.¹⁶⁷

Other than the five categories of issuers in Section 10C(a)(1), we did not propose to exempt any relationship or any category of issuer from the compensation committee member independence requirements under Section 10C(a)(1). Instead of including specific exemptions,

¹⁶⁷ See Exchange Act Section 10C(f)(3)(B). Section 10C of the Exchange Act includes no express exemptions for smaller reporting companies. Some exchanges currently have limited exemptions from requirements to have a majority independent board or a three-member audit committee for smaller issuers – for example, NYSE Amex and the Chicago Stock Exchange permit smaller issuers to have a 50% independent board and a minimum of two members on the issuer's audit committee. See NYSE Amex Company Guide Section 801(h); Chicago Stock Exchange Article 22, Rules 19(a), 19(b)(1)(C)(iii), and 21(a). Section 10C(f)(3) expressly requires the exchanges to take into account the potential impact of the listing requirements on smaller reporting issuers when exercising the exemptive authority provided to them by our rules.

the proposed rule generally would leave the determination of whether to exempt particular relationships or categories of issuers to the discretion of the exchanges, subject to our review in the rule filing process. Because listed issuers frequently consult the exchanges regarding independence determinations and committee responsibilities, in the proposal we explained that we believed that the exchanges are in the best position to identify any relationships or categories of issuers that may merit exemption from the compensation committee listing requirements.

b. Comments on the Proposed Rule

Comments on the proposals were generally favorable. Commentators generally supported the proposed approach of deferring to the exchanges any decisions to exempt any categories of issuers or particular relationships that might compromise committee member independence.¹⁶⁸ One commentator expressed concern that the proposed definition of “controlled companies” would not exempt some listed issuers that are controlled companies under applicable listing standards, but do not actually hold director elections, such as some limited liability companies.¹⁶⁹ This commentator recommended that we revise the definition of “controlled companies” in proposed Rule 10C-1(c)(2) so that it would encompass companies that do not actually hold director elections but have more than 50% of the voting power for the election of directors held by an individual, a group or another company.

In the Proposing Release, we requested comment on whether we should exempt any types of issuers, such as registered management investment companies, foreign private issuers or smaller reporting companies,¹⁷⁰ from some or all of the requirements of Section 10C. The NYSE stated its view that the express exclusion of certain types of issuers in Section 10C(a)(1) should

¹⁶⁸ See, e.g., letters from NYSE and S&C.

¹⁶⁹ See letter from Vinson & Elkins LLP (“V&E”).

¹⁷⁰ See Exchange Act Rule 12b-2 for the definition of “smaller reporting company.”

not prevent an exchange from exempting other types of issuers, and urged us to clarify that the general exemptive authority exchanges would have under Rule 10C-1 is not limited to smaller reporting companies.¹⁷¹

Several commentators urged us to exempt all foreign private issuers from the requirements of Section 10C.¹⁷² Another commentator urged us to exempt smaller reporting companies from the requirements of Section 10C because smaller reporting companies may experience more difficulty than other issuers in finding independent directors who are willing to serve on their boards.¹⁷³ Other commentators, however, believed that we should not exempt foreign private issuers or smaller reporting companies from the requirements of Section 10C.¹⁷⁴ Several of these commentators supported uniform application of compensation committee independence requirements to all public companies.¹⁷⁵ One commentator believed that domestic companies should not face a stricter regime than foreign companies and suggested that foreign companies could be given a time frame within which they would be required to meet the listing standards that apply to domestic companies.¹⁷⁶

One commentator urged us to exempt all registered investment companies from the requirements of Section 10C.¹⁷⁷ This commentator noted that registered investment companies are subject to the requirements of the Investment Company Act, including, in particular, requirements concerning potential conflicts of interest related to investment adviser

¹⁷¹ See letter from NYSE.

¹⁷² See letters from ABA, Davis Polk and SAP AG.

¹⁷³ See letter from ABA.

¹⁷⁴ See letters from CalPERS, CII, FLSBA, the Local Authority Pension Fund Forum ("LAPFF"), Merkl, Railpen and USS.

¹⁷⁵ See letters from CII, FLSBA and USS.

¹⁷⁶ See letter from LAPFF.

¹⁷⁷ See letter from the Investment Company Institute ("ICI").

compensation. The commentator also noted that most registered investment companies are externally managed, do not have compensated executives and, therefore, do not need compensation committees to oversee executive compensation.

c. Final Rule

After consideration of the comments, we are adopting the rule with revisions in response to comments. Rule 10C-1(b)(1)(iii) will exempt from the compensation committee member independence listing standards required under Rule 10C-1(a) limited partnerships, companies in bankruptcy proceedings, registered open-end management investment companies and foreign private issuers that provide annual disclosures to shareholders of the reasons why the foreign private issuer does not have an independent compensation committee.

As we proposed, we are also exempting controlled companies from the requirements of Rule 10C-1. In light of Section 10C(g)'s general exemption for controlled companies, we have eliminated the specific exemption for controlled companies from the compensation committee member independence listing standards in final Rule 10C-1(b)(1)(iii). We believe this specific exemption from the compensation committee member independence listing standards for controlled companies is unnecessary in light of the broader exemption for controlled companies provided by final Rule 10C-1(b)(5)(ii).

In response to comments that our proposed definition of controlled company would not exempt listed issuers that would otherwise be controlled companies but for the fact that they do not hold director elections, we are modifying the definition of controlled company in the final rule. Under the final rule, a controlled company will be defined as a listed company in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company. We have removed from the definition the phrase "holds an election for the

board of directors.” The revised definition of “controlled company” will more closely follow the definition of the term currently used by the NYSE and Nasdaq.¹⁷⁸ Although the definition in the final rule is slightly broader than the definition of “controlled company” in Section 10C(g)(2), we believe this modification is consistent with the statutory intent to exempt from the requirements of Section 10C those companies that are in fact controlled by a shareholder or group of shareholders, regardless of whether director elections are actually held.

In addition to controlled companies, we are exempting smaller reporting companies, as defined in Exchange Act Rule 12b-2, from the requirements of Rule 10C-1.¹⁷⁹ As noted above, one commentator urged us to exempt smaller reporting companies from the requirements of Section 10C because smaller reporting companies may experience more difficulty than other issuers in finding independent directors who are willing to serve on their boards.¹⁸⁰ This commentator also noted that the compensation committees of smaller reporting companies often do not hire outside compensation consultants, both because their compensation programs tend to be “relatively simple” and also because smaller reporting companies “often cannot afford to hire outside experts.”¹⁸¹

We recognize that some commentators opposed such an exemption,¹⁸² but we believe, on balance, that an exemption is appropriate. In 2006, when we substantially revised our executive compensation disclosure rules, we adopted new scaled executive compensation disclosure

¹⁷⁸ See NYSE Listed Company Manual Section 303A.00 and Nasdaq Rule 5615(c).

¹⁷⁹ Approximately 1%, 25% and 53% of the operating companies listed on the NYSE, the Nasdaq Stock Market, and NYSE Amex, respectively, are smaller reporting companies. See Memorandum to File No. S7-13-11, dated May 8, 2012, concerning information on listed smaller reporting companies, which is available at <http://www.sec.gov/comments/s7-13-11/s71311-60.pdf>.

¹⁸⁰ See letter from ABA.

¹⁸¹ See *id.*

¹⁸² See letters from CalPERS, CII, FLSBA, Merkl and Railpen. These commentators did not provide specific reasons for their opposition, other than two commentators noting that the matters addressed in Section 10C are relevant to all public companies. See letters from CII and FLSBA.

requirements for smaller companies in recognition of the fact that the “executive compensation arrangements of small business issuers generally are so much less complex than those of other public companies that they do not warrant the more extensive disclosure requirements imposed on companies that are not small business issuers and related regulatory burdens that could be disproportionate for small business issuers.”¹⁸³ In light of those findings with respect to smaller reporting companies’ less complex executive compensation arrangements, we are not persuaded that the additional burdens of complying with Rule 10C-1 are warranted for smaller reporting companies.

We appreciate that these burdens for listed smaller reporting companies may not be significant given that such issuers are already subject to listing standards requiring directors on compensation committees or directors determining or recommending executive compensation matters to be “independent” under the exchanges’ general independence standards. We do believe, however, that exempting smaller reporting companies from the listing standards mandated by Rule 10C-1 can offer cost savings to these listed issuers to the extent that an exchange, in connection with the listing standards review required by Rule 10C-1, chooses to create a new independence standard for compensation committee members that is more rigorous than its existing standards – for example, a new standard could address personal or business relationships between members of the compensation committee and the listed issuer’s executive officers. Issuers subject to the exchange’s new standard may need to replace existing compensation committee members, and incur the associated costs, if the existing members do not qualify as independent under the new standard. In addition, although listed smaller reporting

¹⁸³ See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006) [71 FR 53158], at 53192 (“2006 Executive Compensation Release”). In 2007, we adopted a new eligibility standard for “smaller reporting companies” to replace the “small business issuer” definition then found in Item 10 of Regulation S-B. See Smaller Reporting Company Regulatory Relief and Simplification, Release No. 33-8876 (Dec. 19, 2007) [73 FR 934].

companies do not often engage outside compensation consultants, there would be cost savings to these listed issuers from not having to comply with the listing standards involving the compensation committee's engagement and oversight of compensation advisers. For example, the exchanges are required to adopt listing standards that require the compensation committee to consider the six independence factors listed in Rule 10C-1(b)(4) before selecting a compensation adviser. To comply with these listing standards, compensation committees will likely need to create procedures for collecting and analyzing information about potential compensation advisers before they can receive advice from such advisers, which would require the listed issuers to incur costs. We expect, however, that a portion of these cost savings would likely be offset by the costs that smaller reporting companies may incur to comply with the new requirement to disclose compensation consultants' conflicts of interest, which is described in Section II.C below. In light of these considerations, we do not believe it is necessary to require the exchanges to go through the process of proposing to exempt smaller reporting companies in the Section 19(b) rule filing process, since we have concluded that it is appropriate to provide this exemption in any event. Accordingly, we are exempting smaller reporting companies from the requirements of Rule 10C-1.¹⁸⁴

We are adopting Rules 10C-1(b)(1)(iii)(B) and 10C-1(b)(5)(i) substantially as proposed. Rule 10C-1(b)(1)(iii)(B) authorizes the exchanges to exempt a particular relationship from the compensation committee member independence requirements, as the exchanges deem appropriate, taking into consideration the size of the issuer and any other relevant factors. Rule 10C-1(b)(5)(i) authorizes the exchanges to exempt any category of issuers from the requirements

¹⁸⁴ When an issuer loses its smaller reporting company status, it will be required to comply with the listing standards applicable to non-smaller reporting companies. We anticipate that the exchanges will provide for a transition period for issuers that lose smaller reporting company status, similar to what they currently have for issuers that lose controlled company status. See, e.g., NYSE Listed Company Manual Section 303A.00; Nasdaq Rule 5615(c)(3).

of Section 10C,¹⁸⁵ as each exchange determines is appropriate, taking into consideration the potential impact of the requirements on smaller reporting issuers. In response to comment, we are clarifying that the final rule does not prohibit the exchanges from considering other relevant factors as well. The final rule will allow the exchanges flexibility to propose transactions or categories of issuers to exempt, subject to our review and approval under the Exchange Act Section 19(b) rule filing process. As we noted in the Proposing Release, we believe that relying on the exchanges in this manner to exercise the exemptive authority expressly granted to them under the final rules is consistent with the requirements of Section 10C and will result in more effective determinations as to the types of relationships and the types of issuers that merit an exemption.¹⁸⁶

As noted by one commentator, most registered investment companies do not have compensated employees or compensation committees.¹⁸⁷ Therefore, the requirements of Rule 10C-1, which does not itself require any issuer to have a compensation committee, will not affect most registered investment companies or impose any compliance obligations on them.¹⁸⁸ This commentator did not explain why, in the infrequent case where a registered investment company

¹⁸⁵ As noted in the Proposing Release, Rule 10C-1(b)(5)(i) does not provide the authority for the exchanges to exempt listed issuers from the disclosure requirements under Item 407 of Regulation S-K, which include Section 10C(c)(2)'s compensation consultant disclosure requirements.

¹⁸⁶ We note that the Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. (2012) (the "JOBS Act"), which was enacted on April 5, 2012, creates a new category of issuer, an "emerging growth company," under the Securities Act and the Exchange Act. See Section 2(a)(19) of the Securities Act [15 U.S.C. 77b(a)(19)]; Section 3(a)(80) of the Exchange Act [15 U.S.C. 78c(a)(80)]. An emerging growth company is defined as an issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year. Existing listing standards provide no accommodation for this category of issuer, and the JOBS Act does not require that exchanges do so. The rules we are adopting will permit the exchanges to consider, subject to the Commission's review and approval, whether any exemptions from the listing standards required by Rule 10C-1 are appropriate for emerging growth companies or any other category of issuer.

¹⁸⁷ See letter from ICI.

¹⁸⁸ We do not believe that any board committee or members of the board of a registered investment company or business development company would be a "compensation committee" under Rule 10C-1 solely as a result of carrying out the board's responsibilities under Rule 38a-1 under the Investment Company Act to approve the designation and compensation of the fund's chief compliance officer. Under Rule 38a-1, the approval of a majority of the board's independent directors is required. See 17 CFR 270.38a-1(a)(4).

has compensated executives and a compensation committee (which are not addressed by Investment Company Act requirements related to investment adviser compensation), the registered investment company should be exempt from the requirements that apply to all other listed issuers with compensation committees. We believe that the exchanges are in a better position to determine the appropriate treatment of registered investment companies that have compensated executives and compensation committees, if any.

C. Compensation Consultant Disclosure and Conflicts of Interest

Section 10C(c)(2) of the Exchange Act requires that, in any proxy or consent solicitation material for an annual meeting (or a special meeting in lieu of the annual meeting), each issuer must disclose, in accordance with regulations of the Commission, whether:

- the compensation committee has retained or obtained the advice of a compensation consultant; and
- the work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.

We proposed amendments to Item 407 of Regulation S-K to require issuers to include the disclosures required by Section 10C(c)(2) in any proxy or information statement for an annual meeting (or special meeting in lieu of an annual meeting) at which directors are to be elected. After consideration of the comments, we are adopting a modified version of the proposal.

1. Proposed Rule

Item 407 of Regulation S-K currently requires Exchange Act registrants that are subject to the proxy rules, other than registered investment companies, to provide certain disclosures concerning their compensation committees and the use of compensation consultants. Item 407(e)(3)(iii) generally requires registrants to disclose “any role of compensation consultants in

determining or recommending the amount or form of executive and director compensation,” including:

- identifying the consultants;
- stating whether such consultants were engaged directly by the compensation committee or any other person;
- describing the nature and scope of the consultants’ assignment, and the material elements of any instructions given to the consultants under the engagement; and
- disclosing the aggregate fees paid to a consultant for advice or recommendations on the amount or form of executive and director compensation and the aggregate fees for additional services if the consultant provided both and the fees for the additional services exceeded \$120,000 during the fiscal year.¹⁸⁹

The current item excludes from the disclosure requirement any role of compensation consultants limited to consulting on any broad-based plan that does not discriminate in scope, terms or operation in favor of executive officers or directors of the registrant and that is available generally to all salaried employees, or limited to providing information that either is not customized for a particular registrant or is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.¹⁹⁰

¹⁸⁹ See current Items 407(e)(3)(iii)(A) and (B) [17 CFR 229.407(e)(3)(iii)(A) and 229.407(e)(3)(iii)(B)]. Fee disclosure, however, is not required for compensation consultants that work with management if the compensation committee has retained a separate consultant. In promulgating these requirements, we recognized that, in this situation, the compensation committee may not be relying on the compensation consultant used by management, and therefore potential conflicts of interest are less of a concern. See Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 16, 2009) [74 FR 68334] (“Proxy Disclosure Enhancements Release”).

¹⁹⁰ See Item 407(e)(3)(iii). In adopting this exclusion, the Commission determined (based on comments it received on the rule proposal) that the provision of such work by a compensation consultant does not raise conflict of interest concerns that warrant disclosure of the consultant’s selection, terms of engagement or fees. See Proxy Disclosure Enhancements Release.

As we noted in the Proposing Release, the trigger for disclosure about compensation consultants under Section 10C(c)(2) is worded differently from the existing disclosure trigger under Item 407(e)(3)(iii). Under Section 10C(c)(2), an issuer must disclose whether the “compensation committee retained or obtained the advice of a compensation consultant.” By contrast, existing Item 407 requires disclosure, with limited exceptions, whenever a compensation consultant plays “any role” in determining or recommending the amount or form of executive or director compensation. Given the similarities between the disclosure required by Section 10C(c)(2) and the disclosure required by Item 407(e)(3)(iii), we proposed amendments to integrate Section 10C(c)(2)’s disclosure requirements with the existing disclosure rule. Specifically, as proposed, revised Item 407(e)(3)(iii) would include a disclosure trigger consistent with the statutory language and would, therefore, require issuers to disclose whether the compensation committee had “retained or obtained” the advice of a compensation consultant during the issuer’s last completed fiscal year. If so, the issuer would also be required to provide related disclosures describing the consultant’s assignment, any conflicts of interest raised by the consultant’s work, and how such conflicts were being addressed. In addition, our proposed rule would alter the existing consultant fee disclosure requirements to include the same disclosure trigger. We noted in the Proposing Release that we believed the practical effect of this change would be minimal, as it would be unusual for a consultant to play a role in determining or recommending the amount of executive compensation without the compensation committee also retaining or obtaining the consultant’s advice.

Our proposed integrated disclosure requirement would no longer provide an exception from the requirement to disclose the role of a compensation consultant where that role is limited to consulting on any broad-based plan that does not discriminate in scope, terms or operation in

favor of executive officers or directors of the registrant and that is available generally to all salaried employees, or limited to providing information that either is not customized for a particular issuer or is customized based on parameters that are not developed by the consultant and about which the consultant does not provide advice. As we explained in the Proposing Release, we believed this would be “consistent with the purposes of Section 10C(c)(2), which is to require disclosure about compensation consultants and any conflicts of interest they have in a competitively neutral fashion.”¹⁹¹ Under the proposed amendments, disclosure about the compensation consultant’s role and conflicts of interest would be required even if the consultant provided only advice on broad-based plans or non-customized benchmark data. We proposed, however, that the compensation consultant fee disclosure requirements currently included in Item 407(e)(3) would continue to include exceptions for cases where a consultant’s role is limited to providing these types of services.

In order to clarify certain terms contained in Section 10C(c)(2) and used in the proposed rules, we proposed to add an instruction to Item 407(e)(3) to clarify the meaning of the phrase “obtained the advice.” The proposed instruction would provide that a compensation committee or management will have “obtained the advice” of a compensation consultant if it “has requested or received advice from a compensation consultant, regardless of whether there is a formal engagement of the consultant or a client relationship between the compensation consultant and the compensation committee or management or any payment of fees to the consultant for its advice.” In addition, we proposed an instruction that identified the five independence factors that Section 10C requires a listed issuer’s compensation committee to consider before selecting a

¹⁹¹ See Proposing Release, 76 FR at 18980.

compensation adviser as among the factors that issuers should consider in determining whether there is a conflict of interest that may need to be disclosed.

Finally, under the proposed amendments, these disclosures would be required only in a proxy or information statement for an annual meeting (or special meeting in lieu of an annual meeting) at which directors are to be elected and would apply to issuers subject to our proxy rules, whether listed or not, and whether they are controlled companies or not.

2. Comments on the Proposed Rule

Comments on the proposed amendments were mixed, with the exception of our proposal to require the disclosures called for by Section 10C(c)(2) only in proxy or information statements for meetings at which directors are to be elected, which commentators generally supported.¹⁹²

Several commentators expressed general support for our proposal to require disclosure about compensation consultants' conflicts of interest.¹⁹³ Some of these commentators noted that timely disclosure of conflicts is needed to allow investors to adequately monitor compensation committee performance.¹⁹⁴ For this reason, another commentator noted that disclosure concerning compensation consultant conflicts of interest "is most appropriately required in the context of other corporate governance disclosures that are most relevant in the context of making voting decisions with respect to the election of directors."¹⁹⁵

Several commentators expressed general support for integrating the Section 10C(c)(2) disclosure requirements into the existing compensation consultant disclosure requirements contained in Item 407(e)(3)(iii) of Regulation S-K.¹⁹⁶ One of these commentators believed that a

¹⁹² See, e.g., letters from ABA, AON and Debevoise.

¹⁹³ See, e.g., letters from AFSCME, CII, FLSBA, Hermes, OPERS and UAW.

¹⁹⁴ See letters from CII and FLSBA.

¹⁹⁵ See, e.g., letter from ABA.

¹⁹⁶ See, e.g., letters from Davis Polk, Debevoise, Meridian, Pfizer and UAW.

combined rule with a single trigger for disclosure would benefit issuers and investors by simplifying the disclosure requirement and enhancing the clarity of the disclosure.¹⁹⁷ One commentator opposed integrating the disclosure requirements of Section 10C(c)(2) into Item 407(e)(3)(iii), and believed that a better approach would be to retain the existing disclosure trigger in Item 407(e)(3)(iii) and include a separate disclosure item within Item 407 to address conflict of interest disclosure requirements.¹⁹⁸ This commentator also criticized our proposed amendments because they would narrow the disclosure currently required by Item 407(e)(3)(iii) by excluding those compensation consultants that may have participated in executive compensation determinations but were not actually retained by the compensation committee.¹⁹⁹ Another commentator supported our proposal to integrate the disclosure requirements, but believed it was unnecessary to modify the wording of Item 407(e)(3)(iii) to include the “retain or obtain the advice” disclosure trigger included in the Act.²⁰⁰ This commentator noted that issuers and consulting firms had already made significant adjustments to their business practices in light of the existing Item 407(e)(3) requirements and that it would be costly and unnecessary to make additional adjustments if the wording of the existing rules is changed simply to mirror the language included in the Act.²⁰¹

A significant number of commentators expressed concern over the proposed instruction to clarify the phrase “obtained the advice.”²⁰² These commentators believed that the proposed instruction was too broad and could potentially cover director education programs, unsolicited

¹⁹⁷ See letter from Meridian.

¹⁹⁸ See letter from ABA.

¹⁹⁹ See *id.*

²⁰⁰ See letter from AON.

²⁰¹ See *id.*

²⁰² See, e.g., letters from AON, CEC, Davis Polk, Mercer, Meridian, Pearl Meyer & Partners (“Pearl Meyer”), McGuireWoods, NACD, Pfizer, SCSGP and Towers.

survey results and publications that contain executive compensation data, which they believed were not intended to be covered by Section 10C(c)(2).²⁰³ A number of these commentators recommended modifications to the instruction, including:

- excluding insubstantial or unsolicited interaction with a compensation committee;²⁰⁴
- clarifying that the phrase “obtained the advice” excludes materials prepared for management by a compensation consultant engaged by management, even if such materials are made available to the compensation committee;²⁰⁵ and
- clarifying that “advice” has not been obtained unless the compensation consultant provides a recommendation to the committee regarding the amount or form of executive compensation.²⁰⁶

A few commentators supported our proposal to require disclosure about the role of compensation consultants even where that role is limited to consulting on broad-based plans or providing non-customized benchmark information.²⁰⁷ Many more commentators, however, opposed eliminating the current disclosure exclusions under Item 407(e)(3) and recommended that we extend those disclosure exclusions to the new disclosure requirements.²⁰⁸ Some of these commentators noted that, when the disclosure exemptions in Item 407(e)(3)(iii) were adopted in December 2009, the Commission stated that consulting on broad-based plans or providing non-customized benchmark data did not raise conflict of interest concerns that would warrant

²⁰³ See, e.g., letters from Davis Polk, Meridian, NACD and Towers.

²⁰⁴ See, e.g., letters from Davis Polk and Meridian.

²⁰⁵ See letters from Davis Polk and Towers.

²⁰⁶ See letters from Pfizer and SCSGP.

²⁰⁷ See, e.g., letters from AFSCME and UAW.

²⁰⁸ See, e.g., letters from ABA, AON, CEC, Davis Polk, Debevoise, Meridian, SCSGP, Towers and U.S. Chamber of Commerce (Apr. 28, 2011) (“Chamber”).

disclosure of the consultant's selection, terms of engagement or fees.²⁰⁹ Another commentator believed that retaining the existing disclosure exclusions in Item 407(e)(3)(iii) would be consistent with the purposes of Section 10C(c)(2) because a consulting firm that provided only non-customized benchmark data to a compensation committee would not be providing "advice" to the compensation committee.²¹⁰

Commentators generally supported our proposal to identify the five factors in proposed Rule 10C-1(b)(4)(i) through (v) as among the factors that should be considered in determining whether a conflict of interest exists,²¹¹ though some commentators suggested additional factors that they believed should be considered.²¹² In the Proposing Release, we requested comment on whether we should include the appearance of a conflict of interest in our interpretation of what constitutes a "conflict of interest" that must be disclosed under the proposed amendments. A few commentators believed that we should require disclosure of the appearance of a conflict of interest or potential conflicts of interest.²¹³ One of these commentators argued that including potential conflicts is necessary because actual conflicts of interest can be difficult to identify with precision.²¹⁴ Other commentators believed that we should not require disclosure of either an appearance of a conflict of interest or a potential conflict of interest, for various reasons, such as: potential conflicts were not covered by the text of Section 10C(c)(2);²¹⁵ potential conflicts would

²⁰⁹ See, e.g., letter from ABA and Davis Polk.

²¹⁰ See letter from SCSGP.

²¹¹ See letters from AON and Towers.

²¹² See, e.g., letters from AFSCME (urging consideration of the ratio between fees paid for executive compensation and non-executive compensation consulting work, as well as equity ownership and incentive compensation arrangements of consultants) and Merkl (urging consideration of private and business relationships between the person employing the adviser and executive officers or members of the compensation committee, as well as stock ownership by the person that employs the adviser, if it is material).

²¹³ See letters from Better Markets, OPERS and Towers.

²¹⁴ See letter from Better Markets.

²¹⁵ See letters from ABA, AON and Mercer.

be difficult to define and would not provide investors with additional material information regarding the compensation consultant relationship,²¹⁶ and compensation committees are not reluctant or unable to conclude that a conflict of interest exists.²¹⁷

Many commentators requested that we clarify that the amendments to Item 407(e)(3)(iii) apply only to board committees that are charged with determining executive compensation, and not to any committee of the board, if separate, that oversees the compensation of non-employee directors.²¹⁸ Several of these commentators noted that in many instances, a committee other than the company's compensation committee, such as a governance committee, determines the compensation of the company's non-executive directors.²¹⁹

We requested comment on whether we should extend the Section 10C(c)(2) disclosure requirements to compensation advisers other than compensation consultants. Comments were mixed. A number of commentators believed we should require conflicts of interest disclosure for all types of advisers, including legal counsel.²²⁰ One commentator stated that extending the disclosure requirements to legal counsel would benefit the investing public in its consideration of compensation issues.²²¹ Another commentator noted that requiring such disclosure would allow investors to determine whether the compensation committee had the benefit of independent legal advice in making compensation determinations.²²² Other commentators felt that conflicted compensation advisers of any kind could not be relied upon to serve the best interests of the

²¹⁶ See letter from ABA.

²¹⁷ See letter from AON.

²¹⁸ See, e.g., letters from CEC, Chamber, Davis Polk, Pfizer and SCSGP.

²¹⁹ See letters from CEC and Chamber.

²²⁰ See, e.g., letters from Better Markets, CII, Fields, FLSBA, Jackson and Towers.

²²¹ See letter from Fields.

²²² See letter from Jackson.

issuer and its shareholders.²²³ Two commentators opposed extending the proposed disclosure requirements to legal counsel.²²⁴ One of these commentators believed that the specific statutory reference in Section 10C(c)(2) to “compensation consultants” reflects a deliberate policy choice by Congress to limit the additional required disclosures to compensation consultants alone.²²⁵

The proposed rule would apply to issuers that are required to comply with the proxy rules. One commentator supported our proposal to require controlled companies to provide disclosures relating to compensation consultants and conflicts of interest raised by the consultants’ work.²²⁶ Three commentators were opposed to this proposed requirement,²²⁷ and one of them questioned the value of requiring disclosure of a compensation consultant’s conflicts of interest in cases where the composition of the board of directors and compensation committee is subject to the direction of a control person or group.²²⁸ One commentator supported our proposal to require smaller reporting companies to provide disclosures relating to compensation consultant conflicts of interest, noting that “[w]e are not aware of any particular problems smaller reporting companies have had with the existing rules, and we do not believe the additional rules mandated by Dodd Frank will be any more burdensome on smaller reporting companies.”²²⁹

We received few comments on our proposal to extend the disclosure requirements to Exchange Act registrants that are not listed issuers. Two commentators supported our

²²³ See letters from CII and FLSBA.

²²⁴ See letters from ABA and McGuire Woods.

²²⁵ See letter from McGuire Woods.

²²⁶ See letter from AON.

²²⁷ See letters from ABA, Debevoise and Merkl.

²²⁸ See letter from Debevoise.

²²⁹ See letter from AON.

proposal.²³⁰ One commentator who opposed the proposal believed that extending the disclosure requirements of Section 10C(c)(2) to non-listed issuers is not required by Section 10C or for the protection of investors.²³¹

Several commentators agreed that we should not amend Forms 20-F or 40-F to require foreign private issuers that are not subject to our proxy rules to provide annual disclosure of the type required by Section 10C(c)(2).²³² Two of these commentators noted that imposing such requirements would be inconsistent with the current disclosure paradigm for compensation matters, which generally defers to a foreign private issuer's home country rules.²³³ One commentator, however, expressed the view that foreign private issuers should have to comply with the same compensation consultant disclosure requirements as domestic issuers.²³⁴

3. Final Rule

After consideration of the comments, we are adopting a modified version of the proposed amendments. The amendments we are adopting implement the disclosure requirements of Section 10C(c)(2) while preserving the existing disclosure requirements under Item 407(e)(3).

a. Disclosure Requirements

Rather than integrating the new disclosure requirements with the existing compensation consultant disclosure provisions, as proposed, we are retaining the existing disclosure trigger and requirements of Item 407(e)(3)(iii) and adding a new subparagraph to Item 407(e)(3) to require the disclosures mandated by Section 10C(c)(2)(B). With respect to Section 10C(c)(2)(A), which requires an issuer to disclose whether its compensation committee retained or obtained the

²³⁰ See letters from AON and Merkl.

²³¹ See letter from Debevoise.

²³² See letters from ABA, AON, Debevoise and SAP.

²³³ See letters from Debevoise and SAP.

²³⁴ See letter from Merkl.

advice of a compensation consultant, we believe existing Item 407(e)(3)(iii) implements this disclosure requirement, as it requires disclosure, with certain exceptions discussed more fully below, of any role compensation consultants played in determining or recommending the amount or form of executive and director compensation. As we noted in the Proposing Release, we believe it would be unusual for a compensation consultant to play “any role” in determining or recommending the amount of executive compensation without the compensation committee also retaining or obtaining the compensation consultant’s advice.

With respect to the disclosures mandated by Section 10C(c)(2)(B), we are persuaded by comments noting that our proposal to use the “retain or obtain the advice” disclosure trigger included in Section 10C could result in unnecessary, and potentially costly, adjustments by issuers and consulting firms that have adapted their business practices in light of the existing Item 407(e)(3)(iii) disclosure requirements. In addition, we note the comment pointing out that our proposal would eliminate the existing requirement to disclose the role of compensation consultants retained by management rather than the compensation committee. Consequently, we have concluded that this change to the existing requirement is not appropriate. In lieu of our proposal to integrate the Section 10C(c)(2) disclosure requirements with the existing disclosure rule, we have determined to adopt a new disclosure provision, new Item 407(e)(3)(iv), to implement Section 10C(c)(2).

Under Item 407(e)(3)(iii), registrants will continue to be required to disclose “any role of compensation consultants in determining or recommending the amount or form of executive and director compensation.” Specifically, registrants will continue to be required to:

- identify the consultants;

- state whether such consultants were engaged directly by the compensation committee or any other person;
- describe the nature and scope of the consultant's assignment and the material elements of any instructions given to the consultants under the engagement; and
- disclose the aggregate fees paid to a consultant for advice or recommendations on the amount or form of executive and director compensation and the aggregate fees for additional services if the consultant provided both and the fees for the additional services exceeded \$120,000 during the fiscal year.²³⁵

With respect to the new requirement in Item 407(e)(3)(iv) to disclose compensation consultant conflicts of interest, we have decided to use the "any role" disclosure trigger rather than the "obtained or retained the advice" trigger included in Section 10C. Hence, the new requirement will apply to any compensation consultant whose work must be disclosed pursuant to Item 407(e)(3)(iii), regardless of whether the compensation consultant was retained by management or the compensation committee or any other board committee. We believe that this approach is consistent with the meaning of the words "retained or obtained" (emphasis added) in Section 10C, as there will be little practical difference in the application of the two disclosure triggers as they relate to consultants advising on executive compensation matters. Based on the comments on this aspect of the proposal, we also believe that the existing disclosure trigger is well-understood by issuers. Because we are not changing the disclosure trigger, we no longer find it necessary to include an instruction to clarify when a compensation committee has

²³⁵ The rule will continue not to require fee disclosure for compensation consultants that work with management if the compensation committee has retained a separate compensation consultant. As we noted in the Proxy Disclosure Enhancements Release, in this situation, the compensation committee may not be relying on the compensation consultant retained by management and potential conflicts of interest are therefore less of a concern.

“obtained” advice. We are persuaded by commentators who expressed the view that the instruction, as proposed, was overly broad.

As is the case with our existing requirement to disclose the role of compensation consultants in determining or recommending the amount or form of executive and director compensation, issuers will be required to comply with the new disclosure requirement relating to compensation consultant conflicts of interest in a proxy or information statement for an annual meeting (or special meeting in lieu of an annual meeting) at which directors are to be elected. Although Section 10C(c)(2) is not explicitly limited to proxy statements for meetings at which directors will be elected, we believe this approach is appropriate in light of the approach in our rules to disclosure of compensation consultant matters generally.

This new subparagraph will apply to issuers subject to our proxy rules, including controlled companies, non-listed issuers and smaller reporting companies.²³⁶ Although Section 10C(c)(2) does not mandate this disclosure for issuers that will not be subject to the listing standards required by Rule 10C-1, we believe that investors are better served by requiring all issuers subject to our proxy rules to provide timely disclosure of compensation consultants’ conflicts of interests, which will enable investors to adequately monitor compensation committee performance and will help investors make better informed voting decisions with respect to the election of directors, including members of the compensation committee. Under the final amendments, issuers subject to our proxy rules will be required to disclose, with respect to any compensation consultant that is identified pursuant to Item 407(e)(3)(iii) as having played a role in determining or recommending the amount or form of executive and director compensation,

²³⁶ Foreign private issuers that are not subject to our proxy rules will not be required to provide this disclosure. Registered investment companies are subject to separate proxy disclosure requirements set forth in Item 22 of Schedule 14A, which do not include the compensation consultant disclosure requirement in Item 407(e)(3) of Regulation S-K. See Item 7(g) of Schedule 14A. As we proposed, registered investment companies will continue to provide disclosure under Item 22 and will not be subject to the amendments to Item 407(e) adopted in this release.

whether the work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed. As commentators generally supported our proposal to identify the independence factors that a compensation committee must consider before selecting a compensation adviser as among the factors that should be considered in determining whether a consultant conflict of interest exists, the final amendments will include an instruction to Item 407(e)(3) noting that, in deciding whether there is a conflict of interest that may need to be disclosed, issuers should, at a minimum, consider the six factors set forth in Rule 10C-1(b)(4)(i) through (vi).

We are sensitive to the additional burdens placed on issuers from the expansion of disclosure obligations under our rules. In light of those concerns, the final rule will not require disclosure of potential conflicts of interest or an appearance of a conflict of interest, nor will it require disclosure with respect to compensation advisers other than compensation consultants. These additional disclosures are not mandated by Section 10C, and we are not persuaded that the additional burdens of requiring this disclosure are justified by the potential benefit to investors.

b. Disclosure Exemptions

We proposed to eliminate the disclosure exemption in Item 407(e)(3) for compensation consulting services involving only broad-based, non-discriminatory plans and the provision of non-customized survey data. Several commentators opposed to the proposed elimination noted that, when the disclosure exemptions in Item 407(e)(3)(iii) were adopted in December 2009, we stated that consulting on broad-based plans or providing non-customized benchmark data did not raise conflict of interest concerns that would warrant disclosure of the consultant's selection, terms of engagement or fees.²³⁷ We continue to believe that compensation consulting work limited to these activities does not raise conflict of interest concerns. Accordingly, consulting on

²³⁷ See letters from ABA, Davis Polk and SCSGP.

broad-based plans and providing non-customized benchmark data will continue to be exempted from the compensation consultant disclosure requirements under Item 407(e)(3), including the new conflicts of interest disclosure required in our rules implementing Section 10C(c)(2).

c. Disclosure Regarding Director Compensation

Several commentators requested that we clarify that the proposed amendments to Item 407(e)(3)(iii) apply only to board committees that are charged with determining executive compensation and not to other committees that oversee the compensation of non-employee directors.²³⁸ We believe these comments were prompted by our proposal, described above, to replace the existing disclosure trigger in Item 407(e)(3)(iii) with our proposed trigger, which referenced compensation consultants retained by the compensation committee. As discussed above, we have determined to retain the existing disclosure trigger in Item 407(e)(3), which requires disclosure of the role played by compensation consultants in determining or recommending “executive and director compensation” (emphasis added).

Issuers are currently required to discuss in proxy and information statements the role played by compensation consultants in determining or recommending the amount or form of director compensation, including the nature and scope of their assignment and any material instructions or directions governing their performance under the engagement and to provide fee disclosure, all to the same extent that the disclosure is required regarding executive compensation. In light of the approach we are taking to the new disclosure requirement generally, which is to add the new requirement to the existing disclosure requirements using the existing triggers, we believe it is appropriate to apply the compensation consultant conflict of interest disclosure requirement to director compensation in the same manner as executive

²³⁸ See, e.g., letters from CEC, Chamber, Davis Polk, Pfizer and SCSGP.

compensation. We believe this will benefit investors by providing for more complete and consistent disclosures on how the board manages compensation-related conflicts of interest. Accordingly, to the extent consulting on director compensation raises a conflict of interest on the part of the compensation consultant, disclosure would be required in response to new Item 407(e)(3)(iv).

D. Transition and Timing

The Act did not establish a specific deadline by which the listing standards promulgated by the exchanges must be in effect. To facilitate timely implementation of the proposals, we proposed that each exchange must provide to the Commission, no later than 90 days after publication of our final rule in the Federal Register, proposed listing rules or rule amendments that comply with our final rule. Further, we proposed that each exchange would need to have final rule or rule amendments that comply with our final rule approved by the Commission no later than one year after publication of our final rule in the Federal Register.

Comments were mixed on these proposals. One commentator did not believe that the 90-day period would afford the exchanges enough time to draft the proposed rules or rule amendments or to work through related concerns or issues.²³⁹ The only comment letter we received from an exchange, however, indicated that the 90-day period would be adequate.²⁴⁰ The exchange recommended, however, that instead of obligating exchanges to have rules approved by the Commission within any set timeframe, we should instead require exchanges to respond to any written comments issued by the Commission or its staff within 90 days.

Two commentators requested that we clarify that the exchanges may provide their listed issuers a transition period to come into compliance with the listing standards required by Rule

²³⁹ See letter from Debevoise.

²⁴⁰ See letter from NYSE.

10C-1.²⁴¹ Two other commentators requested that the Commission include a transition period for newly listed issuers directly in Rule 10C-1.²⁴² One of these commentators also recommended a two-year delayed phase-in period for smaller reporting companies, if they are not exempted entirely from the compensation committee and independence requirements and consultant disclosures.²⁴³ Another commentator requested that we establish a specific time period by which all listed issuers must comply with an exchange's new or amended rules meeting the requirements of our final rules.²⁴⁴ This commentator believed that a longer time frame, such as a year, would give listed issuers sufficient time to comply with the new standards.

After consideration of the comments, we are adopting the implementation period as proposed. We believe that retaining the requirement for each exchange to have final rule or rule amendments that comply with our final rule approved by the Commission no later than one year after publication of our final rule in the Federal Register will ensure that the exchanges work expeditiously and in good faith to meet the requirements of the new rule. We also note that Rule 10A-3 included a similar requirement with a significantly shorter compliance period.²⁴⁵ Although the final rule does not provide an extended transition period for newly listed issuers, we note that the exemptive authority provided to the exchanges under the final rule permits them to propose appropriate transition periods. As noted above, we are exempting smaller reporting companies from the requirements of Rule 10C-1.

²⁴¹ See letters from NYSE and S&C.

²⁴² See letters from ABA and Davis Polk.

²⁴³ See letter from ABA.

²⁴⁴ See letter from Debevoise.

²⁴⁵ The release adopting Rule 10A-3 was published in the Federal Register on April 16, 2003. The exchanges were required to have final rules or rule amendments that complied with Rule 10A-3 approved by the Commission no later than December 1, 2003.

Section 10C(c)(2) provides that the compensation consultant conflict of interest disclosure would be required with respect to meetings occurring on or after the date that is one year after the enactment of Section 10C, which was July 21, 2011; however, the statute also requires these disclosures to be “in accordance with regulations of the Commission,” and, prior to the adoption of these new rules, our regulations have not required such disclosures to be made. We recognize that issuers will need to implement disclosure controls and procedures to collect and analyze information relevant to whether their compensation consultants have a conflict of interest. As a result, we have decided to require compliance with new Item 407(e)(3)(iv) in any proxy or information statement for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting) at which directors will be elected occurring on or after January 1, 2013.

III. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the final rule and rule amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).²⁴⁶ We published a notice requesting comment on the collection of information requirements in the Proposing Release for the rule amendments, and we submitted these requirements to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.²⁴⁷ The titles for the collection of information are:

- (1) “Regulation 14A and Schedule 14A” (OMB Control No. 3235-0059);
- (2) “Regulation 14C and Schedule 14C” (OMB Control No. 3235-0057); and

²⁴⁶ 44 U.S.C. 3501 *et seq.*

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

(3) "Regulation S-K" (OMB Control No. 3235-0071).²⁴⁸

Regulation S-K was adopted under the Securities Act and Exchange Act; Regulations 14A and 14C and the related schedules were adopted under the Exchange Act. The regulations and schedules set forth the disclosure requirements for proxy and information statements filed by companies to help investors make informed investment and voting decisions. The hours and costs associated with preparing, filing and sending the schedules constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the new rule and rule amendments will be mandatory. Responses to the information collections will not be kept confidential, and there is no mandatory retention period for the information disclosed.

B. Summary of the Final Rules

As discussed in more detail above, we are adopting new Rule 10C-1 under the Exchange Act and amendments to Item 407(e)(3) of Regulation S-K. Rule 10C-1 will direct the exchanges to prohibit the listing of any equity security of an issuer, subject to certain exceptions, that is not in compliance with several enumerated standards relating to the issuer's compensation committee and the process for selecting a compensation adviser to the compensation committee. Rule 10C-1 will not impose any collection of information requirements on the exchanges or on listed issuers.

The amendments to Item 407(e)(3) will require issuers, other than registered investment companies,²⁴⁹ to disclose, in any proxy or information statement relating to an annual meeting of

²⁴⁸ The paperwork burden from Regulation S-K is imposed through the forms that are subject to the disclosure requirements in Regulation S-K and is reflected in the analysis of these forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burden imposed by Regulation S-K to be a total of one hour.

shareholders (or a special meeting in lieu of an annual meeting) at which directors are to be elected, whether the work of any compensation consultant that has played any role in determining or recommending the amount or form of executive and director compensation (other than any role limited to consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers of the registrant, and that is available generally to all salaried employees; or providing information that either is not customized for a particular registrant or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice) has raised a conflict of interest. If so, the issuer must also disclose the nature of the conflict and how the conflict is being addressed.

C. Summary of Comment Letters and Revisions to Proposals

In the Proposing Release, we requested comment on our PRA burden hour and cost estimates and the analysis used to derive such estimates. Only one commentator specifically addressed our PRA analysis and burden estimates of the proposed amendments.²⁵⁰ This commentator asserted that some of the estimates we used to calculate the burden hours of the proposed amendments may be inaccurate, which could result in our underestimating the actual burden of the amendments. This commentator, however, did not provide any alternative burden hour or cost estimates for us to consider and did not identify any particular estimates included in the Proposing Release that it believed to be inaccurate.

In response to comments on the proposals, we have made modifications to the rule proposals that will reduce the compliance burden on issuers. First, the final rule amendments

²⁴⁹ Registered investment companies are subject to separate proxy disclosure requirements set forth in Item 22 of Schedule 14A, which do not include the compensation consultant disclosure requirement in Item 407(e)(3) of Regulation S-K. See Item 7(g) of Schedule 14A. As we proposed, registered investment companies will continue to provide disclosure under Item 22 and will not be subject to the amendments to Item 407(e) adopted in this release.

²⁵⁰ See letter from Chamber.

leave intact the existing exemption from the requirement to disclose the role of a compensation consultant where that role is limited to providing advice on broad-based plans and information that either is not customized for a particular issuer or is customized based on parameters that are not developed by the consultant and about which the consultant does not provide advice. Accordingly, issuers will be required to provide less disclosure than would have been required under the proposed amendments. Second, we have retained the existing disclosure trigger in Item 407(e)(3) and eliminated the proposed instruction regarding whether a compensation committee has "obtained the advice" of a compensation consultant. Based on comments received that issuers are already familiar with and have adopted business practices to comply with the existing disclosure trigger, we believe retaining the existing disclosure trigger will make it easier for issuers to determine whether conflict of interest disclosure is required for a particular compensation consultant.

D. Revisions to PRA Reporting and Cost Burden Estimates

As a result of the changes described above, we have reduced our reporting and cost burden estimates for the collection of information under the final amendments. The final rule amendments to Item 407(e)(3) of Regulation S-K will require additional disclosure in proxy or information statements filed on Schedule 14A or Schedule 14C of whether the work of a compensation consultant that has played any role in determining or recommending the amount or form of executive and director compensation, with certain exceptions, has raised a conflict of interest, and, if so, the nature of the conflict and how the conflict is being addressed. The instruction to Item 407(e)(3)(iv) provides that an issuer, in determining whether there is any such conflict, should consider the same six independence factors that the compensation committee of a listed issuer is required to consider before selecting a compensation adviser. For purposes of

the PRA, we now estimate that the total annual increase in the paperwork burden for all companies to prepare the disclosure that would be required under the proposed amendments will be approximately 11,970 hours of in-house personnel time and approximately \$1,596,000 for the services of outside professionals.²⁵¹ We estimate that the amendments to Item 407(e)(3) of Regulation S-K would impose on average a total of two incremental burden hours per issuer. These estimates include the time and the cost of collecting the required information, preparing and reviewing responsive disclosure, and retaining records. We continue to believe it is appropriate to assume that the burden hours associated with the amendments will be comparable to the burden hours related to similar disclosure requirements under our current rules regarding compensation consultants. Our estimates, as well as their reasonableness, were presented to the public for consideration, and we received no alternative burden hour or cost estimates in response.²⁵²

The table below shows the total annual compliance burden, in hours and in costs, of the collection of information pursuant to the final amendments to Item 407(e)(3) of Regulation S-K.²⁵³ The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review the adopted disclosure requirements. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. For purposes of the PRA, we estimate that 75% of the burden of preparation of Schedules 14A and 14C is carried by the issuer internally and that 25% of the burden of preparation is carried by

²⁵¹ Our estimates represent the average burden for all issuers, both large and small.

²⁵² See Proxy Disclosure Enhancements Release (in which the Commission estimated the average incremental disclosure burden for the rule amendments to Item 407(e)(3) relating to compensation consultants to be three hours).

²⁵³ For convenience, the estimated hour and cost burdens in the table have been rounded to the nearest whole number.

outside professionals retained by the issuer at an average cost of \$400 per hour. There is no change to the estimated burden of the collections of information under Regulation S-K because the burdens that this regulation imposes are reflected in our burden estimates for Schedules 14A and 14C.

Table 1. Estimated incremental paperwork burden under the final rules for Schedules 14A and 14C.

	Number of responses (A) ²⁵⁴	Incremental burden hours/form (B)	Total incremental burden hours (C)=(A)*(B)	Internal company time (D)	External professional time (E)	Professional costs (F)=(E)*\$400
Sch. 14A	7,300	2	14,600	10,950	3,650	\$1,460,000
Sch. 14C	680	2	1,360	1,020	340	\$ 136,000
Total	7,980		15,960	11,970	3,990	\$1,596,000

IV. ECONOMIC ANALYSIS

A. Background and Summary of the Rule Amendments

As discussed above, we are adopting a new rule and rule amendments to implement Section 10C of the Exchange Act, as added by Section 952 of the Act. Section 10C of the Exchange Act requires us to adopt rules directing the exchanges to prohibit the listing of any equity security of an issuer, with certain exceptions, that is not in compliance with several enumerated standards regarding compensation committees. In addition, Section 10C(c)(2) requires each listed issuer to disclose in any proxy or consent solicitation material for an annual meeting of shareholders (or a special meeting in lieu of the annual meeting), in accordance with Commission regulations, whether the issuer's compensation committee retained or obtained the

²⁵⁴ The information in this column is based on the number of responses for these schedules as reported in the OMB's Inventory of Currently Approved Information Collections, available at <http://www.reginfo.gov/public/do/PRAMain.jsessionid=D37174B5F6F9148DB767D63DF6983A65>.

advice of a compensation consultant; whether the work of the compensation consultant has raised any conflict of interest; and, if so, the nature of the conflict and how the conflict is being addressed. The rule and rule amendments we are adopting implement these mandates, and also include the following provisions:

- New Rule 10C-1 will direct the exchanges to adopt listing standards that apply to any board committee that oversees executive compensation, whether or not such committee performs other functions or is formally designated as a “compensation committee.”
- The exchanges will be directed to apply the required listing standards, other than those relating to the authority to retain compensation advisers in Rule 10C-1(b)(2)(i) and required funding for payment of such advisers in Rule 10C-1(b)(3), also to those members of a listed issuer’s board of directors who, in the absence of a board committee performing such functions, oversee executive compensation matters on behalf of the board of directors.
- With respect to the factors required by Section 10C(b) of the Exchange Act, we are adopting one additional independence factor that compensation committees must consider before engaging a compensation adviser.
- An instruction to final Rule 10C-1(b)(4) will provide that the compensation committee of a listed issuer is not required to consider the independence factors before consulting with or receiving advice from in-house counsel.
- We are exempting security futures products, standardized options, and smaller reporting companies from the scope of Rule 10C-1.

- For purposes of Rule 10C-1, we are modifying the definition of a controlled company, which is exempt from Rule 10C-1, to be a listed company in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company, which is consistent with the definition used by the NYSE and Nasdaq.
- The final rules will require the disclosures relating to compensation consultant conflicts of interest called for by Section 10C(c)(2) only in proxy or information statements for meetings at which directors are to be elected.
- The compensation consultant conflicts of interest disclosure requirement will apply when a compensation consultant plays “any role” in “determining or recommending the amount or form of executive and director compensation,” other than any role limited to consulting on broad-based plans or providing non-customized benchmark data, which is consistent with the existing Item 407(e)(3)(iii) of Regulation S-K standard.
- The compensation consultant conflicts of interest disclosure requirement will apply to all issuers subject to our proxy rules, including controlled companies, smaller reporting companies and non-listed issuers.
- The compensation consultant conflicts of interest disclosure requirement will require disclosure of compensation consultant conflicts of interest that relate to director compensation, in addition to executive compensation.
- The instruction to the compensation consultant conflicts of interest disclosure requirement provides that an issuer, in determining whether there is a conflict of interest, should consider the same six independence factors that the compensation

committee of a listed issuer is required to consider before selecting a compensation adviser.

We are sensitive to the costs and benefits imposed by our rules. The discussion below attempts to address both the costs and benefits of Section 10C, as well as the incremental costs and benefits of the rule and rule amendments we are adopting within our discretion to implement Section 10C. These two types of costs and benefits may not be entirely separable to the extent our discretion is exercised to realize the benefits that we believe were intended by Section 952 of the Act. Section 23(a)(2) of the Exchange Act requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition.²⁵⁵ In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 2(b) of the Securities Act²⁵⁶ and Section 3(f) of the Exchange Act²⁵⁷ require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. We have integrated our consideration of those issues into this economic analysis.

In the Proposing Release, we solicited comment on the costs and benefits of the proposed rules, whether the proposed rule and rule amendments would place a burden on competition, and the effect of the proposal on efficiency, competition, and capital formation. Only one commentator specifically addressed the cost-benefit analysis we included in the Proposing Release or our analysis of whether the proposals would burden competition or impact efficiency,

²⁵⁵ 15 U.S.C. 78w(a)(2).

²⁵⁶ 15 U.S.C. 77b(b).

²⁵⁷ 15 U.S.C. 78c(f).

competition, and capital formation.²⁵⁸ This commentator argued that the proposals would impose additional compensation disclosure and director independence requirements that could be burdensome and result in additional disclosure of an issuer's use of compensation consultants, without in every case providing meaningful benefit to issuers or investors, and that could also confuse investors or deter investors from "reading proxy materials by increasing their length and density without pruning other, less pertinent, or dated disclosures."²⁵⁹ As discussed throughout this release, we have made numerous revisions to the proposed rules in order to address these concerns and reduce compliance burdens where consistent with investor protection. Other commentators addressed specific aspects of the proposed rule amendments that identified possible costs, benefits, or effects on efficiency, competition or capital formation, which we discuss in more detail below.

B. Benefits and Costs, and Impact on Efficiency, Competition and Capital Formation

1. Section 10C of the Exchange Act, as added by Section 952 of the Act

New Rule 10C-1 implements the listing standard requirements of Section 10C by directing the exchanges to prohibit the listing of any equity security of an issuer that is not in compliance with the following standards:

- Each member of the compensation committee of the issuer must be a member of the issuer's board of directors and independent according to independence criteria determined by each exchange following consideration of specified factors;
- The compensation committee of each issuer must be directly responsible for the appointment, compensation, retention and oversight of the work of any compensation

²⁵⁸ See letter from Chamber.

²⁵⁹ Id.

adviser retained by the committee, and each such compensation adviser must report directly to the compensation committee;

- Each compensation committee must have the authority to retain independent legal counsel and other compensation advisers;
- The compensation committee of each issuer may select a compensation adviser only after assessing the adviser's independence using specified factors; and
- Each issuer must provide appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to compensation advisers retained by the compensation committee.

Under the final rule, subject to our review in accordance with Section 19(b) of the Exchange Act, an exchange may exempt any category of issuers from the compensation committee listing requirements and any particular relationships from the compensation committee member independence requirements, as the exchange determines is appropriate, after consideration of the impact of the requirements on smaller reporting issuers and other relevant factors.

The rules we are adopting are intended to benefit both issuers and investors. The final rules are expected to help achieve Congress's intent that listed issuers' board committees that set compensation policy consist only of directors who are independent. By requiring compensation committees to consider the independence of potential compensation advisers before they are selected, the final rules should also help assure that compensation committees of affected listed issuers are better informed about potential conflicts, which could reduce the likelihood that they are unknowingly influenced by conflicted compensation advisers. The provisions of the listing standards that will require compensation committees to be given the authority to engage, oversee and compensate independent compensation advisers should bolster the access of board

committees of affected listed issuers that are charged with oversight of executive compensation to the resources they need to make better informed compensation decisions. Taken as a whole, these requirements could benefit issuers and investors to the extent they enable compensation committees to make better informed decisions regarding the amount or form of executive compensation.

The listing standard provisions of the rule and rule amendments will also result in certain costs to exchanges and affected listed issuers. Final Rule 10C-1 directs the exchanges to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. Exchanges will incur direct costs to comply with the rule, as they will need to review their existing rules and propose appropriate rule changes to implement the requirements of Rule 10C-1. Once the exchanges have adopted listing standards required by Rule 10C-1, listed issuers will incur costs in assessing and demonstrating their compliance with the new listing standards. We note that these costs are primarily imposed by statute.

The adoption of new listing standards may have some distributional effects as some listed issuers may seek to list on foreign exchanges or other markets to avoid compliance with listing requirements that an exchange develops. To the extent they do so, listed issuers would incur costs in seeking to transfer their listings, and exchanges that lose issuer listings would, as a result, lose related fees and trading volume. We believe that any such effect would be minimal as the exchanges already require directors on compensation committees or directors determining

or recommending executive compensation matters for domestic issuers to be “independent” under their general independence standards.²⁶⁰

As required by Section 10C, Rule 10C-1 directs the exchanges to develop a definition of independence applicable to compensation committee members after considering the relevant factors set forth in Exchange Act Section 10C(a)(3). These factors include:

- a director’s source of compensation, including any consulting, advisory or compensatory fee paid by the issuer; and
- whether a director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

We are not adopting any additional factors that the exchanges must consider in determining independence requirements for compensation committee members. Instead, Rule 10C-1 affords the exchanges latitude in determining the required independence standards. Several commentators indicated that the proposed rule would permit the exchanges to determine listing standards that take into account the characteristics of each exchange’s listed issuers.²⁶¹ We believe that affording the exchanges flexibility in determining the required independence standards, subject to our review pursuant to Section 19(b) of the Exchange Act, will result in more efficient and effective determinations as to the types of relationships that should preclude a finding of independence with respect to membership on a board committee that oversees executive compensation. We believe that because listed issuers frequently consult the exchanges regarding independence determinations, the exchanges will be in the best position to identify the

²⁶⁰ See, e.g., NYSE Listed Company Manual Section 303A.05(a) and Nasdaq Rule 5605(d). Foreign private issuers are permitted under these listing standards to follow home country practice with respect to executive compensation oversight.

²⁶¹ See letters from ABA and NYSE.

types of relationships that are likely to compromise the ability of an issuer's compensation committee to make impartial determinations on executive compensation.

We acknowledge, however, that because exchanges compete for listings, they may have an incentive to propose standards that issuers will find less onerous. This could affect investor confidence in the degree of independent oversight of executive compensation at issuers listed on exchanges with less onerous standards and could also result in costs to exchanges that adopt relatively more rigorous standards, to the extent they lose issuer listings as a result.

In accordance with Section 10C(a)(1), Rule 10C-1(b)(1)(iii) exempts limited partnerships, companies in bankruptcy proceedings, registered open-end management investment companies and foreign private issuers that provide annual disclosures to shareholders of the reasons why the foreign private issuer does not have an independent compensation committee from the compensation committee member independence listing standards required under Rule 10C-1(a). With respect to the independence requirements of Rule 10C-1, we have not provided any exemptions for categories of issuers beyond those specified in Section 10C(a)(1). The final rule, however, exempts smaller reporting companies, controlled companies, security futures products and standardized options from all of the requirements of Rule 10C-1, including the independence requirements. Under Rule 10C-1, exchanges are provided the authority to propose additional exemptions for appropriate categories of issuers. An exchange that exercises this authority will incur costs to evaluate what exemptions to propose and to make any required rule filings pursuant to Section 19(b) of the Exchange Act.

We are implementing the disclosure requirements of Section 10C by adopting amendments to Item 407(e)(3) of Regulation S-K. Given the number of discretionary choices

that we have made in implementing this provision of Section 10C, we discuss the amendments to Item 407 as a whole below.

2. Discretionary Amendments

As adopted, new Rule 10C-1 will direct the exchanges to adopt listing standards that apply to any committee of the board that oversees executive compensation, whether or not such committee performs other functions or is formally designated as a "compensation committee." Some exchange listing standards currently require issuers to form compensation or equivalent committees, and others permit independent directors to oversee specified compensation matters in lieu of the formation of a compensation or equivalent committee. The final rule will also direct the exchanges to apply the required listing standards relating to director independence, consideration of a compensation adviser's independence and responsibility for the appointment, compensation and oversight of compensation advisers to those members of a listed issuer's board of directors who, in the absence of a board committee performing such functions, oversee executive compensation matters on behalf of the board of directors.²⁶² Several commentators supported our proposal to apply the Section 10C requirements to all board committees that oversee executive compensation, and also recommended that the requirements also apply to those independent directors who oversee executive compensation in lieu of a board committee.²⁶³ We believe these aspects of the rule will help achieve the objectives of the statute and benefit listed issuers by providing clarity and reducing any uncertainty about the application of Section

²⁶² With respect to these aspects of the rule, we have defined "compensation committee" to include those board members who oversee executive compensation matters on behalf of the board of directors in the absence of a board committee. In our discussion of the final rule throughout this release, references to an issuer's "compensation committee" include, unless the context otherwise requires, any committee of the board that performs functions typically performed by a compensation committee, including oversight of executive compensation, whether or not formally designated as a "compensation committee," as well as, to the extent applicable, those members of a listed issuer's board of directors who oversee executive compensation matters on behalf of the board of directors in the absence of such a committee.

²⁶³ See, e.g., letters from Barnard, CFA and Railpen.

10C. Moreover, this should benefit investors because it will limit the ability of listed issuers to avoid the compensation committee independence requirements under Section 10C simply by delegating oversight of executive compensation to a board committee that is not formally designated as the "compensation committee," but performs that function or to directors acting outside of a formal committee structure.

If we did not apply Rule 10C-1 to apply the requirements relating to director independence, consideration of the independence of compensation advisers and responsibility for the appointment, compensation and oversight of compensation advisers to directors who oversee executive compensation matters in the absence of a board committee, issuers could be incentivized to seek to list on exchanges that do not require the formation of a compensation or equivalent committee in order to avoid having to comply with the compensation committee independence standards that would otherwise apply. Our decision to apply the requirements relating to director independence, consideration of the independence of compensation advisers and responsibility for the appointment, compensation and oversight of compensation advisers to these directors should minimize any such incentive. As a result, we believe this application also minimizes any potential costs that issuers might incur to alter their existing committee structure or seek to list on a different exchange to avoid having to comply with the new standards, as well as any related costs that exchanges would incur from any resulting loss of issuer listings, related fees, and trading volume. These impacts may not be significant, however, since the exchanges' existing requirements already impose independence requirements on directors who oversee executive compensation matters. Finally, we note that, in overseeing executive compensation matters, these independent directors are acting as the board of directors, and the same board processes that attend to other types of board decisions – e.g., scheduling meetings, preparing

review materials, attending meetings, preparing and reviewing meeting minutes – also presumably attend to board decisions about executive compensation. Accordingly, we do not believe that the application of the requirements relating to director independence, consideration of the independence of compensation advisers and responsibility for the appointment, compensation and oversight of compensation advisers to directors who oversee executive compensation matters in the absence of a board committee will result in any disproportionate incremental burdens for issuers that do not have a compensation committee or any other board committee that oversees executive compensation.

As required by Section 10C(g), controlled companies are exempt from all requirements of Rule 10C-1 pursuant to final Rule 10C-1(b)(5)(ii). Rule 10C-1 as adopted includes a slightly broader definition of “controlled company” than the definition provided in Section 10C. Under Section 10C(g)(2) of the Exchange Act, a “controlled company” is defined as an issuer that is listed on an exchange and that holds an election for the board of directors of the issuer in which more than 50% of the voting power is held by an individual, a group or another issuer. We proposed to incorporate this definition into Rule 10C-1(c)(2). In response to comments that our proposed definition would not exempt listed issuers that would otherwise be controlled companies but for the fact that they do not hold director elections,²⁶⁴ we have removed from the definition the phrase “holds an election for the board of directors” in order to align the definition in Rule 10C-1 more closely to the definition of controlled company currently used by the NYSE and Nasdaq. This change will eliminate any unnecessary compliance burdens for listed issuers that do not hold director elections but satisfy the definition of “controlled company” pursuant to listing standards of the NYSE, Nasdaq and other exchanges with a similar definition.

²⁶⁴ See letter from V&E.

Under Rule 10C-1(b)(4), the exchanges are directed to adopt listing standards that require a compensation committee to take into account the five independence factors enumerated in Section 10C(b)(2) before selecting a compensation adviser. In addition to these five factors, we are including in the final rule one additional independence factor that must be considered before a compensation adviser is selected: any business or personal relationships between the executive officers of the issuer and the compensation adviser or the person employing the adviser. Several commentators supported requiring compensation committees to consider any business or personal relationship between an executive officer of the issuer and an adviser or the person employing the compensation adviser.²⁶⁵ This would include, for example, situations where the chief executive officer of a listed issuer and the compensation adviser have a familial relationship or where the chief executive officer and the compensation adviser (or the adviser's employer) are business partners. We agree with commentators that such relationships would be relevant to an assessment of the independence of the compensation adviser and believe that adding this factor complements the five independence factors enumerated in Section 10C(b)(2). Adding this factor should help compensation committees reach better informed decisions in selecting compensation advisers since any business or personal relationship that a compensation adviser, or the person employing the adviser, may have with an executive officer may be relevant to assessing whether there is a conflict of interest. Section 10C(b) mandates that the independence factors to be considered must be competitively neutral among categories of compensation advisers and that compensation committees must be able to retain the services of members of any such category. We believe that the six factors included in the final rule, when

²⁶⁵ See, e.g., letters from ABA, Better Markets, Merkl and USS.

considered as a whole, are competitively neutral and that this requirement will therefore not inhibit competition among categories of compensation advisers.

We have included an instruction to Rule 10C-1(b)(4) that provides that the compensation committee of a listed issuer is not required to consider the independence factors with respect to in-house counsel with whom the compensation committee consults or obtains advice. Several commentators noted that, as in-house legal counsel are employees of the issuer, they are not held out to be independent.²⁶⁶ As such, the benefits of requiring the compensation committee to consider the independence factors with respect to in-house counsel would seem to be minimal. We do not believe that our determination to exclude in-house counsel from this required consideration will negatively impact competition among compensation advisers, as we do not believe compensation committees consider that in-house counsel serve in the same role as a compensation consultant or outside legal counsel.

As adopted, the final rule exempts security futures products and standardized options from the scope of Rule 10C-1. We believe that exempting security futures products and standardized options is appropriate because these securities are fundamentally different than the equity securities of an operating company. This exemption will benefit the issuers of these securities and the exchanges on which such securities trade by providing clarity and eliminating any regulatory uncertainty about the application of Section 10C to these products.

In addition, we are exempting smaller reporting companies from the requirements of Rule 10C-1. We appreciate that the burdens of complying with the listing standards mandated by Rule 10C-1 for listed smaller reporting companies may not be significant given that such issuers are already subject to listing standards requiring directors on compensation committees or

²⁶⁶ See letters from Davis Polk and S&C.

directors determining or recommending executive compensation matters to be “independent” under the exchanges’ general independence standards. We do believe, however, that exempting smaller reporting companies from the listing standards mandated by Rule 10C-1 can offer cost savings to these issuers to the extent that an exchange, in connection with the listing standards review required by Rule 10C-1, chooses to create a new independence standard for compensation committee members that is more rigorous than its existing standards – for example, a new standard could address personal or business relationships between members of the compensation committee and the listed issuer’s executive officers. Issuers subject to the exchange’s new standard may need to replace existing compensation committee members, and incur the associated costs, if they do not qualify as independent under the new standard. In addition, although listed smaller reporting companies do not often engage outside compensation consultants, there would be cost savings to these listed issuers from not having to comply with the listing standards involving the compensation committee’s engagement and oversight of compensation advisers. For example, the exchanges are required to adopt listing standards that require the compensation committee to consider the six independence factors listed in Rule 10C-1(b)(4) before selecting a compensation adviser. To comply with these listing standards, compensation committees will likely need to create procedures for collecting and analyzing information about potential compensation advisers before they can receive advice from such advisers, which would require the listed issuers to incur costs. We expect, however, that a portion of these cost savings would likely be offset by the costs that smaller reporting companies may incur in order to comply with the new disclosure requirements in Item 407(e)(3)(iv) of Regulation S-K relating to compensation consultants’ conflicts of interest.

We are adopting amendments to Item 407(e)(3) of Regulation S-K to implement the disclosure requirements of Section 10C(c)(2). Under these amendments, issuers subject to our proxy rules will be required to disclose whether the work of any compensation consultant that has played any role in determining or recommending the form or amount of executive and director compensation has raised a conflict of interest, and, if so, the nature of the conflict and how the conflict is being addressed. Issuers subject to our existing proxy disclosure rules must already discuss the role played by compensation consultants in determining or recommending the amount or form of executive and director compensation, including the nature and scope of their assignment and any material instructions or directions governing their performance under the engagement. The current item excludes from the disclosure requirement any role of compensation consultants limited to consulting on any broad-based plan that does not discriminate in scope, terms or operation in favor of executive officers or directors of the registrant and that is available generally to all salaried employees, or limited to providing information that either is not customized for a particular registrant or is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice. We believe the amendments complement our existing disclosure requirements by increasing the transparency of issuers' policies regarding compensation consultant conflicts of interest for all issuers subject to the existing disclosure requirement.

The final amendments preserve the existing disclosure requirements under Item 407(e)(3), including the disclosure trigger in Item 407(e)(3)(iii) of "any role" played by the consultant and the disclosure exemption for compensation consulting services involving only broad-based, non-discriminatory plans and the provision of non-customized survey data. Some

commentators suggested that retaining the existing disclosure trigger in Item 407(e)(3)(iii) and including a separate disclosure item within Item 407 to address the conflict of interest disclosure requirements of Section 10C(c)(2)(B) would be the better approach to implement Section 10C(c)(2) requirements.²⁶⁷ Additionally, commentators contended that eliminating the disclosure exemptions in Item 407(e)(3)(iii) would be inconsistent with our past determination that consulting on broad-based plans or providing non-customized benchmark data did not raise conflict of interest concerns that warrant disclosure of the consultant's selection, terms of engagement or fees.²⁶⁸ We agree with these commentators and believe that the amendment to Item 407(e)(3) that we are adopting, which retains the existing disclosure exemptions, is the better approach to implementing Section 10C(c)(2)'s requirements. By retaining the existing disclosure trigger and disclosure exemptions under Item 407(e)(3)(iii), the final amendments will require disclosure of conflicts of interest only when a compensation consultant's role is otherwise required to be disclosed. We believe this will promote efficiency by mitigating an issuer's compliance burden in situations where a compensation consultant does not provide "analytical input, discretionary judgment or advice."²⁶⁹

To promote comprehensive disclosure about compensation consultants, the amendments to Item 407(e)(3) extend the disclosure requirements of Section 10C(c)(2) to proxy and information statements where action is to be taken with respect to an election of directors, as well as to conflicts of interests for compensation consultants who play any role in determining or recommending the amount or form of director compensation. Existing Item 407(e)(3) already requires these proxy and information statements to include disclosure about any role of

²⁶⁷ See, e.g., letter from ABA.

²⁶⁸ See letters from ABA, Chamber and SCSGP.

²⁶⁹ See letter from SCSGP.

compensation consultants in determining or recommending the amount or form of executive compensation and director compensation, including the nature and scope of their assignment, any material instructions or directions governing their performance under the engagement, and specified information with respect to fees paid to the compensation consultants.

Several commentators supported applying the new disclosure requirements to all Exchange Act issuers subject to our proxy rules.²⁷⁰ However, other commentators believed that this is not required by Section 10C and opposed extending the disclosure requirements to non-listed issuers.²⁷¹ We are expanding the statutory disclosure requirement to those categories of issuers that will not be subject to the listing standards adopted by the exchanges pursuant to Rule 10C-1, including non-listed issuers, smaller reporting companies and controlled companies, because we believe that timely disclosure of compensation consultants' conflicts of interests will enable investors in these categories of issuers to better monitor compensation committee performance and will help investors make better informed voting decisions with respect to the election of directors, including members of the compensation committee. In addition, this would promote consistent disclosure on these topics among reporting companies and should benefit investors by fostering comparability of disclosure of compensation practices across companies.

Non-listed issuers, smaller reporting companies and controlled companies may incur additional costs to develop more formalized selection processes than they otherwise would have absent such a disclosure requirement. For example, even though they will not be subject to the listing standard requiring compensation committees to consider independence factors before selecting a compensation adviser, in light of this disclosure requirement, at the time any compensation consultant is selected, compensation committees of non-listed issuers, smaller

²⁷⁰ See, e.g., letters from AON and Merkl.

²⁷¹ See letter from Debevoise.

reporting companies and controlled companies may devote time and resources to analyzing and assessing the independence of the compensation consultant and addressing and resolving any conflicts of interest.²⁷² Although the disclosure requirement does not prohibit a compensation committee from selecting a compensation consultant of its choosing, some committees may elect to engage new, alternative or additional compensation consultants after considering what disclosure might be required under our final rules. Such decisions could result in additional costs to issuers, including costs related to termination of existing services and search and engagement costs to retain new consultants. In addition, costs may increase if an issuer decides to engage multiple compensation consultants for services that had previously been provided by a single consultant. We believe these potential costs are likely to be limited because our existing disclosure rules already require disclosure of any role played by compensation consultants in determining or recommending the amount or form of executive and director compensation, including the nature and scope of their assignment, any material instructions or directions governing their performance under the engagement, and specified information with respect to fees paid to the compensation consultants. To the extent the new requirement to disclose compensation consultant conflicts of interest results in an issuer significantly modifying its consultant selection processes, we believe it would also likely result in such issuer making better-informed choices regarding compensation consultant selection.

²⁷² For purposes of the PRA, we estimated that the total annual increase in the paperwork burden for all companies to prepare the disclosure that would be required under the proposed amendments will be approximately 11,970 hours of in-house personnel time and approximately \$1,596,000 for the services of outside professionals. One commentator asserted that some of the estimates we used to calculate the burden hours of the proposed amendments may be inaccurate, which could result in our underestimating the PRA burden of the final amendments. See letter from Chamber. As described in the discussion of the PRA, we received no alternative paperwork burden hour or cost estimates in response to our estimate of the paperwork burden in the Proposing Release. We believe our reduced paperwork burden estimate is reasonable in light of the modifications we have made to the proposals to reduce the compliance burden on issuers.

To the extent that providing advice on director compensation raises a conflict of interest on the part of a compensation consultant, disclosure would be required in response to new Item 407(e)(3)(iv). Issuers are currently required to discuss in proxy and information statements the role played by compensation consultants in determining or recommending the amount or form of director compensation to the same extent that the disclosure is required regarding executive compensation. In light of the approach we are taking to the new disclosure requirement generally, which is to add the new requirement to the existing disclosure requirements using the existing triggers, we determined that the compensation consultant conflict of interest disclosure requirement should apply to director compensation in the same manner as executive compensation. We believe this will benefit investors by providing for more complete and consistent disclosures on how the board manages compensation-related conflicts of interest.

The amendments to Regulation S-K may promote efficiency and competitiveness of the U.S. capital markets by increasing the transparency of executive compensation decision-making processes. Increased transparency may improve the ability of investors to make better informed voting and investment decisions, which may encourage more efficient capital allocation and formation. Some commentators asserted that the increased disclosure should improve the ability of investors to monitor performance of directors responsible for overseeing compensation consultants, thus enabling them to make more informed voting and investment decisions.²⁷³

The amendments also may affect competition among compensation consultants. By requiring disclosure of the existence of compensation consultant conflicts of interest and how those conflicts of interest are addressed, the new disclosure requirement may lead compensation committees to engage in more thorough and deliberative analyses of adviser independence. This

²⁷³ See, e.g., letters from CalSTRS and FLSBA.

could result in the selection of compensation advisers that are more independent or impartial than might otherwise be chosen, which, in turn, could promote more effective executive compensation practices. The amendments may also incentivize compensation consultants to adopt policies that serve to minimize any conflicts of interest and for compensation committees to avoid hiring consultants perceived as having a conflict of interest.

V. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Final Regulatory Flexibility Analysis ("FRFA") has been prepared in accordance with the Regulatory Flexibility Act.²⁷⁴ This FRFA relates to new Exchange Act Rule 10C-1, which will require the exchanges to prohibit the listing of an equity security of an issuer that is not in compliance with several enumerated requirements relating to the issuer's compensation committee, and to amendments to Item 407(e)(3) of Regulation S-K, which will require new disclosure from issuers regarding any conflict of interest raised by the work of a compensation consultant that has played a role in determining or recommending the form or amount of executive and director compensation.

A. Need for the Amendments

We are adopting the new rule and rule amendments to implement Section 10C of the Exchange Act. Exchange Act Rule 10C-1 directs the exchanges to prohibit the listing of the equity securities of any issuer that does not comply with Section 10C's compensation committee and compensation adviser requirements. The amendments to Regulation S-K will require issuers to provide certain disclosures regarding their use of compensation consultants and how they address compensation consultant conflicts of interest.

B. Significant Issues Raised by Public Comments

²⁷⁴ 5 U.S.C. 603.

In the Proposing Release, we requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposed rules, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposed rule and amendments. We did not receive comments specifically addressing the IRFA. However, some commentators addressed aspects of the proposed rules that could potentially affect small entities. In particular, one commentator expressed concern that smaller issuers may experience difficulty in locating qualified candidates to serve on compensation committees who could meet the independence standards that will be developed by the exchanges.²⁷⁵ This commentator advocated that smaller companies should be exempted from all or parts of the amendments.

C. Small Entities Subject to the Final Rules

The final rules will affect some companies that are small entities. The Regulatory Flexibility Act defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”²⁷⁶ The Commission’s rules define “small business” and “small organization” for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Exchange Act Rule 0-10(e)²⁷⁷ provides that the term “small business” or “small organization,” when referring to an exchange, means any exchange that: (1) has been exempted from the reporting requirements of Exchange Act Rule 601,²⁷⁸ and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined under Exchange Act Rule 0-10. No exchanges are small entities

²⁷⁵ See letter from ABA.

²⁷⁶ 5 U.S.C. 601(6).

²⁷⁷ 17 CFR 240.0-10(e).

²⁷⁸ 17 CFR 242.601.

because none meet these criteria. Securities Act Rule 157²⁷⁹ and Exchange Act Rule 0-10(a)²⁸⁰ define a company, other than an investment company, to be a “small business” or “small organization” if it had total assets of \$5 million or less on the last day of its most recent fiscal year. The final rules will affect small entities that have a class of equity securities that are registered under Section 12 of the Exchange Act. We estimate that there are approximately 457 such registrants, other than registered investment companies, that may be considered small entities. An investment company, including a business development company, is considered to be a “small business” if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year.²⁸¹ We believe that the amendments to Regulation S-K will affect some small entities that are business development companies that have a class of securities registered under Section 12 of the Exchange Act. We estimate that there are approximately 28 business development companies that may be considered small entities.

D. Reporting, Recordkeeping and Other Compliance Requirements

Under new Exchange Act Rule 10C-1, the exchanges will be directed to prohibit the listing of an equity security of an issuer that is not in compliance with Section 10C’s compensation committee and compensation adviser requirements. These requirements relate to:

- the independence of compensation committee members;
- the authority of the compensation committee to retain compensation advisers;

²⁷⁹ 17 CFR 230.157.

²⁸⁰ 17 CFR 240.0-10(a).

²⁸¹ 17 CFR 270.0-10(a).

- the compensation committee's responsibility to assess factors that affect the independence of compensation advisers before their selection by the compensation committee; and
- the compensation committee's responsibility for the appointment, compensation, and oversight of the work of compensation advisers retained by the compensation committee; and funding for consultants and other advisers retained by the compensation committee.

Rule 10C-1 will not impose any reporting or recordkeeping obligations on the exchanges, or any issuers with equity securities listed on an exchange. Furthermore, the rule does not require a listed issuer to establish or maintain a compensation committee. As discussed in more detail below, we have exempted smaller reporting companies from the requirements of Rule 10C-1. We do not believe the new rule will have a significant impact on small entities because the listing requirements will apply only to issuers that have equity securities listed on an exchange and that are not smaller reporting companies.²⁸² All of the exchanges generally impose a combination of quantitative requirements such as market capitalization, minimum revenue, and shareholder equity thresholds that an issuer must satisfy in order to be listed on the exchange. Consequently, the substantial majority of small entities are not listed on an exchange but are quoted on the OTC Bulletin Board or the OTC Markets Group.²⁸³ Rule 10C-1 will not apply to

²⁸² Based on data obtained from the Thomson Financial's Worldscope database, we estimate that as of December 31, 2010, there were two exchange-listed small entities that would not qualify as a smaller reporting company.

²⁸³ Based on information retrieved from the Thomson Financial's Worldscope database, we estimate that as of December 31, 2010, there were less than twelve issuers that had total assets of \$5 million or less listed on an exchange.

In 2011, the Commission approved a proposal from NASDAQ OMX BX to create a new listing market, the BX Venture Market, which allows issuers meeting minimal quantitative requirements – including those with fewer than \$5 million in assets – to list on that exchange. A BX Venture Market-listed company is required to meet qualitative requirements that are, in many respects, similar to those required for listing on Nasdaq or other exchanges, including a requirement to have independent directors make decisions regarding the compensation of executive officers. See

the OTC Bulletin Board or the OTC Markets Group, and therefore small entities whose securities are quoted on these interdealer quotation systems would not need to comply with any listing standards developed under the rule by the exchanges. Small entities that are listed on an exchange and that are not smaller reporting companies would generally need to comply with the standards adopted by the exchange pursuant to Rule 10C-1 if they wish to have their equity securities listed on the exchange. Small entities subject to these listing standards may need to spend additional time and incur additional costs to comply with these standards. Consistent with Section 10C(f)(3), the final rule will allow the exchanges flexibility to propose exemptions for small entities, subject to our review and approval under the Exchange Act Section 19(b) rule filing process.

The amendments to Item 407(e)(3) of Regulation S-K will impose some reporting and recordkeeping obligations on small entities. Under the amendments, an issuer will be required to disclose whether the work of any compensation consultant that has played a role in determining or recommending the amount or form of executive and director compensation has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed. This disclosure requirement will apply equally to both large and small issuers. One commentator has noted that many small entities do not use the services of a compensation consultant,²⁸⁴ which should significantly minimize the impact of the reporting and recordkeeping requirements under the amendments on small entities.

E. Agency Action to Minimize Effect on Small Entities

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Thereto to Create a Listing Market on the Exchange, Release No. 34-64437 (May 6, 2011) [76 FR 27710]. We understand that this new market has not yet listed any issuers or become operational. Small entities eligible to list on this market that are not smaller reporting companies would be subject to the listing standards required by Rule 10C-1.

²⁸⁴ See letter from ABA.

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating or simplifying compliance and reporting requirements under the rules for small entities;
- Using performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

In connection with Exchange Act Rule 10C-1, we considered, but did not establish, different compliance requirements, or an exemption, for small entities. As noted above, very few small entities list their securities on an exchange. The substantial majority of small entities with publicly held equity securities are quoted on the OTC Bulletin Board and the OTC Markets Group. As these interdealer quotation systems are not affected by Rule 10C-1, the substantial majority of small entities will not be affected by the requirements under the rule.

In addition, we are providing an exemption from the requirements in Rule 10C-1 for smaller reporting companies. We estimate that as of December 31, 2010, the most recent data available, most of the small entities that were listed on an exchange would qualify as a smaller reporting company.²⁸⁵ Smaller reporting companies that are listed on an exchange are already subject to listing standards requiring directors on compensation committees or directors determining or recommending executive compensation matters to be “independent” under the

²⁸⁵ Based on data obtained from the Thomson Financial's Worldscope database, we estimate that as of December 31, 2010, there were two exchange-listed small entities that would not qualify as a smaller reporting company.

exchanges' general independence standards. Accordingly, we do not believe that the additional burdens of complying with Rule 10C-1 are warranted for smaller reporting companies.

In addition, under Rule 10C-1, the exchanges will be expressly authorized to exempt particular categories of issuers from the requirements of Section 10C and particular relationships from the compensation committee membership requirements of Section 10C(a), taking into account the potential impact of the requirements on smaller reporting issuers. Because of the close relationship and frequent interaction between the exchanges and their listed issuers, we believe the exchanges will be in the best position to determine additional types of issuers, including any small entities that are not smaller reporting companies, that should be exempted from the listing requirements under the rule.

In connection with the amendments to Regulation S-K, we considered alternatives, including establishing different compliance or reporting requirements that take into account the resources available to small entities, clarifying or simplifying compliance and reporting requirements under the amendments for small entities, using performance rather than design standards, and exempting small entities from all or part of the amendments. We considered, but did not establish, different compliance requirements, or an exemption, for small entities. Although we believe it is appropriate to exempt smaller reporting companies from Rule 10C-1 because we do not believe that the additional burdens of complying with Rule 10C-1 are warranted for smaller reporting companies, we are unable to reach the same conclusion with respect to the disclosure requirements of amended Item 407(e)(3).

In our view, mandating uniform and comparable disclosures for all issuers subject to our proxy rules is consistent with the statute and will promote investor protection. We believe that investors have an interest in, and would benefit from disclosure regarding, conflicts of interest

involving compensation consultants, to the extent that they are used by small entities. Several commentators opposed providing an exemption to small issuers and noted that the required disclosure would provide investors with additional information that would allow them to make better informed investment and voting decisions.²⁸⁶ Different compliance requirements or an exemption from the amendments to Regulation S-K for small entities would interfere with achieving the goal of enhancing the information provided to all investors.

The amendments to Regulation S-K clarify, consolidate and simplify the compliance and reporting requirements for all entities, including small entities. Under the amendments, disclosure will only be required if a compensation consultant plays a role in determining or recommending the form or amount of executive and director compensation and the compensation consultant's work raises a conflict of interest. Although we believe the disclosure requirements are clear and straightforward, we have attempted to further clarify, consolidate and simplify the compliance and reporting requirements, by including an instruction to the amendments to provide guidance to issuers as to when a conflict of interest may be present that would require disclosure.

Final Rule 10C-1 uses a mix of performance and design standards. We are not specifying the procedures or arrangements an issuer or compensation committee must develop to comply with the listing standards required by Rule 10C-1, but compensation committees will be required to consider the factors specified in Rule 10C-1(b)(4) when conducting the required independence assessments. The amendments to Regulation S-K employ design standards rather than performance standards, as Section 10C(c)(2) mandates the specific disclosures that must be provided. Moreover, based on our past experience, we believe specific disclosure requirements

²⁸⁶ See, e.g., letters from CalPERS, FLSBA and RailPen.

will promote consistent and comparable disclosure among all companies, and the amendments are intended to result in more comprehensive and clear disclosure.

VI. STATUTORY AUTHORITY AND TEXT OF THE AMENDMENTS

The amendments contained in this release are being adopted under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act and Sections 3(b), 10C, 12, 14, 23(a) and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 229 and 240

Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENTS

For the reasons set out in the preamble, the Commission amends title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229 - STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K

1. The general authority citation for part 229 is revised and the sub-authorities are removed to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78j-3, 78l, 78m, 78n, 78n-1, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

2. § 229.407 is amended by adding paragraph (e)(3)(iv) and an instruction to paragraph (e)(3)(iv) to read as follows:

§ 229.407 (Item 407) Corporate governance.

* * * * *

(e) * * *

(3) * * *

(iv) With regard to any compensation consultant identified in response to Item 407(e)(3)(iii) whose work has raised any conflict of interest, disclose the nature of the conflict and how the conflict is being addressed.

Instruction to Item 407(e)(3)(iv).

For purposes of this paragraph, the factors listed in §240.10C-1(b)(4)(i) through (vi) of this chapter are among the factors that should be considered in determining whether a conflict of interest exists.

* * * * *

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

3. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78j-3, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

4. Add an undesignated center heading following § 240.10A-3 to read as follows:

Requirements Under Section 10C

5. Add § 240.10C-1 to read as follows:

§240.10C-1 Listing standards relating to compensation committees.

(a) Pursuant to section 10C(a) of the Act (15 U.S.C. 78j-3(a)) and section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111-203, 124 Stat. 1900):

(1) National securities exchanges. The rules of each national securities exchange registered pursuant to section 6 of the Act (15 U.S.C. 78f), to the extent such national securities exchange lists equity securities, must, in accordance with the provisions of this section, prohibit the initial or continued listing of any equity security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.

(2) National securities associations. The rules of each national securities association registered pursuant to section 15A of the Act (15 U.S.C. 78o-3), to the extent such national securities association lists equity securities in an automated inter-dealer quotation system, must, in accordance with the provisions of this section, prohibit the initial or continued listing in an automated inter-dealer quotation system of any equity security of an issuer that is not in compliance with the requirements of any portion of paragraph (b) or (c) of this section.

(3) Opportunity to cure defects. The rules required by paragraphs (a)(1) and (a)(2) of this section must provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for a prohibition under paragraph (a) of this section, before the imposition of such prohibition. Such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of this section for reasons outside the member's reasonable control, that person, with notice by the issuer to the applicable national securities exchange or national securities association, may remain a compensation committee member of the listed issuer until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

(4) Implementation. (i) Each national securities exchange and national securities association that lists equity securities must provide to the Commission, no later than 90 days

after publication of this section in the Federal Register, proposed rules or rule amendments that comply with this section. Each submission must include, in addition to any other information required under section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, a review of whether and how existing or proposed listing standards satisfy the requirements of this rule, a discussion of the consideration of factors relevant to compensation committee independence conducted by the national securities exchange or national securities association, and the definition of independence applicable to compensation committee members that the national securities exchange or national securities association proposes to adopt or retain in light of such review.

(ii) Each national securities exchange and national securities association that lists equity securities must have rules or rule amendments that comply with this section approved by the Commission no later than one year after publication of this section in the Federal Register.

(b) Required standards. The requirements of this section apply to the compensation committees of listed issuers.

(1) Independence. (i) Each member of the compensation committee must be a member of the board of directors of the listed issuer, and must otherwise be independent.

(ii) Independence requirements. In determining independence requirements for members of compensation committees, the national securities exchanges and national securities associations shall consider relevant factors, including, but not limited to:

(A) The source of compensation of a member of the board of directors of an issuer, including any consulting, advisory or other compensatory fee paid by the issuer to such member of the board of directors; and

(B) Whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.

(iii) Exemptions from the independence requirements. (A) The listing of equity securities of the following categories of listed issuers is not subject to the requirements of paragraph (b)(1) of this section:

- (1) Limited partnerships;
- (2) Companies in bankruptcy proceedings;
- (3) Open-end management investment companies registered under the Investment Company Act of 1940; and
- (4) Any foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.

(B) In addition to the issuer exemptions set forth in paragraph (b)(1)(iii)(A) of this section, a national securities exchange or a national securities association, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, may exempt from the requirements of paragraph (b)(1) of this section a particular relationship with respect to members of the compensation committee, as each national securities exchange or national securities association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

(2) Authority to retain compensation consultants, independent legal counsel and other compensation advisers.

(i) The compensation committee of a listed issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser.

(ii) The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the compensation committee.

(iii) Nothing in this paragraph shall be construed:

(A) To require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or

(B) To affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

(3) Funding. Each listed issuer must provide for appropriate funding, as determined by the compensation committee, in its capacity as a committee of the board of directors, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

(4) Independence of compensation consultants and other advisers. The compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

(i) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser;

(ii) The amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;

(iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;

(iv) Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;

(v) Any stock of the issuer owned by the compensation consultant, legal counsel or other adviser; and

(vi) Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the issuer.

Instruction to Paragraph (b)(4) of this Section: A listed issuer's compensation committee is required to conduct the independence assessment outlined in paragraph (b)(4) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house legal counsel.

(5) General exemptions. (i) The national securities exchanges and national securities associations, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, may exempt from the requirements of this section certain categories of issuers, as the national securities exchange or national securities association determines is appropriate, taking into consideration, among other relevant factors, the potential impact of such requirements on smaller reporting issuers.

(ii) The requirements of this section shall not apply to any controlled company or to any smaller reporting company.

(iii) The listing of a security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) or that is exempt from the

registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q-1(b)(7)(A)) is not subject to the requirements of this section.

(iv) The listing of a standardized option, as defined in § 240.9b-1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q-1) is not subject to the requirements of this section.

(c) Definitions. Unless the context otherwise requires, all terms used in this section have the same meaning as in the Act and the rules and regulations thereunder. In addition, unless the context otherwise requires, the following definitions apply for purposes of this section:

(1) In the case of foreign private issuers with a two-tier board system, the term board of directors means the supervisory or non-management board.

(2) The term compensation committee means:

(i) a committee of the board of directors that is designated as the compensation committee; or

(ii) in the absence of a committee of the board of directors that is designated as the compensation committee, a committee of the board of directors performing functions typically performed by a compensation committee, including oversight of executive compensation, even if it is not designated as the compensation committee or also performs other functions; or

(iii) for purposes of this section other than paragraphs (b)(2)(i) and (b)(3), in the absence of a committee as described in (i) or (ii) above, the members of the board of directors who oversee executive compensation matters on behalf of the board of directors.

(3) The term controlled company means an issuer:

(i) That is listed on a national securities exchange or by a national securities association; and

(ii) Of which more than 50 percent of the voting power for the election of directors is held by an individual, a group or another company.

(4) The terms listed and listing refer to equity securities listed on a national securities exchange or listed in an automated inter-dealer quotation system of a national securities association or to issuers of such securities.

(5) The term open-end management investment company means an open-end company, as defined by Section 5(a)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-5(a)(1)), that is registered under that Act.

By the Commission.



Elizabeth M. Murphy
Secretary

June 20, 2012

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 67221 / June 20, 2012

ADMINISTRATIVE PROCEEDING

File No. 3-14923

In the Matter of

**Florida First Equities Corp. (n/k/a
Data Imaging Services, Inc.),
Foodquest, Inc.,
Foodvision.com, Inc.,
Forefront, Inc. (f/k/a Anyox
Resources, Inc.),
Futronix Group, Inc.,
Genicom Corp. (n/k/a Oldgen, Inc.), and
Global Online India, 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 Florida First Equities Corp. (n/k/a Data Imaging Services, Inc.), Foodquest, Inc., Foodvision.com, Inc., Forefront, Inc. (f/k/a Anyox Resources, Inc.), Futronix Group, Inc., Genicom Corp. (n/k/a Oldgen, Inc.), and Global Online India, Inc.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. Florida First Equities Corp. (n/k/a Data Imaging Services, Inc.) (CIK No. 37577) is a dissolved Florida corporation located in North Miami, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g).

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Florida First Equities is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 1993, which reported a net loss of over \$17,000 for the prior three months.

2. Foodquest, Inc. (CIK No. 889266) is a dissolved Florida corporation located in Fort Lauderdale, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Foodquest is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 1996, which reported a net loss of over \$125,000 for the prior three months.

3. Foodvision.com, Inc. (CIK No. 1098995) is a forfeited Delaware corporation located in Marietta, Georgia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Foodvision.com is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2000, which reported a net loss of over \$4.3 million for the prior nine months. As of June 19, 2012, the company's stock (symbol "FVSN") was traded on the over-the-counter markets.

4. Forefront, Inc. (f/k/a Anyox Resources, Inc.) (CIK No. 1071572) is a permanently revoked Nevada corporation located in Tampa, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Forefront is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended March 31, 2001, which reported a net loss of over \$1.1 million for the prior three months. On August 14, 2001, an involuntary Chapter 7 petition was filed against Forefront in the U.S. Bankruptcy Court for the Middle District of Florida, and the case was terminated on March 7, 2006.

5. Futronix Group, Inc. (CIK No. 1108703) is a permanently revoked Nevada corporation located in Homosassa, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Futronix Group is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended June 30, 2002. On April 5, 2005, Futronix Group filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Middle District of Florida, and the case was terminated on January 11, 2007.

6. Genicom Corp. (n/k/a Oldgen, Inc.) (CIK No. 766738) is a forfeited Delaware corporation located in Chantilly, Virginia with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). Genicom Corp is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q/A for the period ended October 3, 1999, which reported a net loss of over \$36,000 for the prior nine months. On March 10, 2000, Genicom filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, and the case was terminated on July 26, 2005.

7. Global Online India, Inc. (CIK No. 32866) is a void Delaware corporation located in Boone, North Carolina with a class of securities registered with the

Commission pursuant to Exchange Act Section 12(g). Global Online India is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended September 30, 2001, which reported a net loss of over \$642,000 for the prior nine months. As of June 19, 2012, the company's stock (symbol "GOLX") was traded on the over-the-counter markets.

B. DELINQUENT PERIODIC FILINGS

8. As discussed in more detail above, all of the Respondents are delinquent in their periodic filings with the Commission, have repeatedly failed to meet their obligations to file timely periodic reports, and failed to heed delinquency letters sent to them by the Division of Corporation Finance requesting compliance with their periodic filing obligations or, through their failure to maintain a valid address on file with the Commission as required by Commission rules, did not receive such letters.

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

*Commissioner Aguilar
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67230 / June 21, 2012

INVESTMENT COMPANY ACT OF 1940
Release No. 30120 / June 21, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14924

In the Matter of

Howard L. Blum,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 9(b) OF THE
INVESTMENT COMPANY ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Howard L. Blum ("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

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proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of Respondent Blum's role as a broker for a stock-collateralized loan business operated by Ayuda Equity Funding, LLC ("Ayuda"), which is controlled by Manuel M. Bello ("Bello"). From at least 2007, Respondent Blum engaged in the business of identifying, soliciting, and communicating with potential borrowers to transfer to Ayuda ownership of publicly traded stock as collateral for loans. By engaging in this conduct and receiving transaction-based compensation therewith, Blum acted as unregistered broker.

Respondent

2. **Howard L. Blum**, age 51, is a resident of New York, New York. During the relevant period, Blum worked as a broker for Ayuda. Blum formerly held Series 3 and 7 securities licenses. During the relevant period, Blum was not registered with the Commission in any capacity.

Other Relevant Entities

3. **Ayuda Equity Funding, LLC** is a Nevada limited liability company located in North Butler, New Jersey. Ayuda Equity Funding, LLC is wholly owned by Ayuda Funding Corporation. Bello is the President and CEO of Ayuda Funding Corporation. Ayuda Equity Funding, LLC is not registered with the Commission in any capacity.

Background

4. In 2007, Blum was engaged by Ayuda as a salesperson for Ayuda's stock-collateralized loan business. Blum was responsible for identifying potential borrowers, soliciting those borrowers, and acting as an intermediary between potential borrowers and Ayuda. From time to time, Blum also supervised Ayuda's sales team.

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

5. While acting as a broker, Blum's activities went beyond identifying potential borrowers who might be interested in pledging stock to Ayuda as collateral for loans. For example, Blum acted as an intermediary in negotiations between Ayuda and potential borrowers by relaying the terms of the deals between Bello and the borrowers.

6. Blum was also responsible for ensuring that the loan transactions he brokered for Ayuda closed. For example, he would routinely follow up with borrowers to ensure that they received the term sheet from Ayuda. If the borrower approved the term sheet, Blum would then send the term sheet to the appropriate person at Ayuda. Blum would also follow up with the borrower once they received the loan documentation and answer any questions that the borrowers had regarding the loan documents or the closing. Finally, Blum was responsible for ensuring that the borrower provided the collateral to Ayuda in order to close the loan. On some occasions, Blum also recommended legal counsel to potential borrowers to assist with the loan transaction.

7. During the relevant period, Ayuda paid Blum \$904,880 as transaction-based compensation for brokering more than 25 stock-collateralized loans. Ayuda calculated Blum's transaction-based compensation as a percentage of the loan amount, and only paid Blum if the loan transaction closed.

8. In performing the above-described conduct, for which he received transaction-based compensation, Blum knew or should have known that he was required to register as a broker-dealer or associate with a registered broker-dealer.

Blum Acted as an Unregistered Broker

9. Section 15(a)(1) of the Exchange Act makes it unlawful for any broker or dealer to use the means of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless such broker or dealer is registered with the Commission, or in the case of a natural person, is associated with a registered broker-dealer. Section 3(a)(4) of the Exchange Act defines a "broker" as any person, other than a bank, "engaged in the business of effecting transactions in securities for the account of others."

10. Based on the conduct described above, Blum acted as a broker without being registered or associated with a registered broker-dealer.

11. As a result, Blum willfully² violated Section 15(a) of the Exchange Act.

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

Undertaking

12. Respondent has undertaken to provide to the Commission, within thirty (30) days after the end of the twelve (12) month suspension period described below, an affidavit that he has complied fully with the sanctions described in Section IV below.

IV.

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

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

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

B. Respondent Blum be, and hereby is:

suspended from association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent;

prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

suspended 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;

for a period of twelve (12) months, effective on the second Monday following the entry of this Order.

C. Respondent Blum shall pay disgorgement of \$904,880 and prejudgment interest of \$112,862 to the United States Treasury. Payment shall be made in five installments according to the following schedule: (1) \$508,871, within ten days of the entry of this Order, plus post-order interest thereon pursuant to SEC Rule of Practice 600; (2) \$127,218, on or before September 11, 2012, plus post-order interest thereon pursuant to SEC Rule of Practice 600; (3) \$127,218, on or before December 11, 2012, plus post-order interest thereon pursuant to SEC Rule of Practice 600; (4) \$127,218, on or before March 11, 2013, plus post-order interest thereon pursuant to SEC Rule of Practice 600; and (5) \$127,217, on or before June 11, 2013, plus post-order interest thereon pursuant to SEC Rule of Practice 600. If any payment is not made by the date the payment is


required by this Order, the entire outstanding balance, plus interest accrued pursuant to SEC Rule of Practice 600, shall be due and payable immediately, without further application. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F Street, N.E., Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Howard L. Blum as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Julie M. Riewe, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-5010;

D. Respondent Blum shall, within ten (10) days of the entry of this Order, pay a civil money penalty of \$50,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F Street, N.E., Stop 6042, Washington, DC 20549; and (D) submitted under cover letter that identifies Howard L. Blum as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Julie M. Riewe, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549-5010; and

E. Respondent shall comply with the undertaking enumerated in Section III, paragraph 12 above.

By the Commission.

Elizabeth M. Murphy
Secretary


By: Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

*Commissioner Walter,
Commissioner Karades,
Commissioner Gallagher
not participating*

Securities Exchange Act of 1934
Release No. 67243 / June 22, 2012

Administrative Proceeding
File No. 3-12936

In the Matter of

Heartland Advisors, Inc., William J.
Nasgovitz, Paul T. Beste, Thomas J.
Conlin, Greg D. Winston, Kevin D.
Clark, Kenneth J. Della, and Hugh F.
Denison,

Respondents.

**ORDER APPROVING THE FINAL
ACCOUNTING, AUTHORIZING THE
TRANSFER OF RESIDUAL FUNDS AND
ANY FUTURE FUNDS RECEIVED BY THE
FAIR FUND TO THE U.S. TREASURY,
DISCHARGING THE FUND
ADMINISTRATOR, AND TERMINATING
THE FAIR FUND**

On January 25, 2008, Heartland Advisors, Inc., William J. Nasgovitz, Paul T. Beste, Thomas J. Conlin, Greg D. Winston, Kevin D. Clark, Kenneth J. Della, and Hugh F. Denison (collectively, the "Respondents") consented to the entry of an Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b)(4), 15(b)(6) and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order") (Securities Act Rel. No. 8884), which directed, among other things, that Respondents pay disgorgement, prejudgment interest and civil penalties totaling \$3,907,095. The Order further established a Fair Fund to provide for the distribution of these payments.

On February 3, 2010, the Commission published a Notice of Proposed Distribution Plan and Opportunity for Comment in connection with this proceeding (Exchange Act Rel. No. 61481). No comments were received and, on April 1, 2010, the Commission issued an order approving the Plan, among other things (Exchange Act Rel. No. 61823). The Plan provided the methodology used to distribute the Fair Fund to eligible investors.

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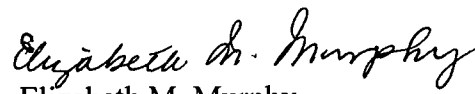
On October 25, 2010, the Commission issued an order directing disbursement of the Fair Fund, which consisted of a total of \$3,931,808.05 (Exchange Act Rel. No. 63173). Beginning in November 2010, over \$3.5 million was disbursed through wires or checks to eligible investors. An amount of \$452,570.60 in residual funds remains.

The Plan provides that amounts which cannot be distributed to investors be returned to the Commission to be transferred to the U.S. Treasury. Consistent with the provision, the remaining funds were returned to the Commission, and the staff requested authorization to transfer \$452,570.60 remaining in the Fair Fund to the U.S. Treasury, as well as any funds returned to the Fair Fund in the future. A final accounting has been provided by the Fund Administrator and the staff also requested that the Commission approve the Final Accounting; therefore, the Fair Fund is eligible for termination.

Accordingly, IT IS ORDERED that:

- A. The final accounting for the Fair Fund is approved;
- B. The \$452,570.60 remaining in the Fair Fund shall be transferred to the U.S. Treasury;
- C. Any funds returned in the future to the Fair Fund shall be transferred to the U.S. Treasury;
- D. The Fund Administrator, Rust Consulting, Inc., is hereby discharged; and
- E. The Fair Fund is terminated.

By the Commission.


Elizabeth M. Murphy
Secretary

*Commissioner Walter,
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67249 / June 25, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3421 / June 25, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14925

In the Matter of

MATTHEW M. TANNIN,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934
AND SECTION 203(f) OF THE
INVESTMENT ADVISERS ACT OF 1940,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Matthew M. Tannin ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

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

1. Respondent was a senior managing director of Bear Stearns Asset Management ("BSAM"), an investment adviser registered with the Commission. Respondent acted as chief operating officer and portfolio manager of two hedge funds for which BSAM was the general partner and investment adviser, the Bear Stearns High-Grade Structured Credit Strategies Fund ("High Grade Fund") and Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Fund ("Enhanced Leverage Fund"). From August 1994 through March 2008, Respondent was also a registered representative associated with broker-dealers registered with the Commission. Respondent, 50 years old, is a resident of New York, NY.

2. On June 18, 2012, a final judgment was entered by consent against Respondent, permanently enjoining him from future violations of Section 17(a)(2) of the Securities Act of 1933, in the civil action entitled Securities and Exchange Commission v. Ralph R. Cioffi, et al., Civil Action Number 08 Civ. 2457 (FB), in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleged that, in connection with the offer or sale of limited partnership interests, Respondent misrepresented the extent to which certain of the assets in the Funds' portfolio were backed by subprime mortgages, and whether he was going to add to his personal investment in the Enhanced Leverage Fund. The complaint also alleged that during an investor call, Respondent misrepresented the prospects of the Funds going forward.

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 and Section 203(f) of the Advisers 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,

with the right to apply for reentry after two years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially

waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

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

*Commissioner Walter,
Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67250 / June 25, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3422 / June 25, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14926

In the Matter of

RALPH R. CIOFFI,

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 Ralph R. Cioffi ("Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings and the findings contained in Section III.2 below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

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III.

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

1. Respondent was a senior managing director and member of the board of directors of Bear Stearns Asset Management ("BSAM"), an investment adviser registered with the Commission. Respondent acted as senior portfolio manager of two hedge funds for which BSAM was the general partner and investment adviser, the Bear Stearns High-Grade Structured Credit Strategies Fund ("High Grade Fund") and Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Fund ("Enhanced Leverage Fund"). From August 1985 through November 2007, Respondent was also a registered representative associated with broker-dealers registered with the Commission. Respondent, 56 years old, is a resident of Collier County, Florida.

2. On June 18, 2012, a final judgment was entered by consent against Respondent, permanently enjoining him from future violations of Section 17(a)(2) of the Securities Act of 1933, in the civil action entitled Securities and Exchange Commission v. Ralph R. Cioffi, et al., Civil Action Number 08 Civ. 2457 (FB), in the United States District Court for the Eastern District of New York.

3. The Commission's complaint alleged that, in connection with the offer or sale of limited partnership interests, Respondent misrepresented the extent to which certain of the assets in the Funds' portfolio were backed by subprime mortgages, and the level of investor redemptions during an investor call. The complaint also alleged that respondent did not tell investors about a redemption of a portion of his personal investment in the Enhanced Leverage Fund used to invest in a third fund for which he acted as portfolio manager.

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 and Section 203(f) of the Advisers 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,

with the right to apply for reentry after three years to the appropriate self-regulatory organization, or if there is none, to the Commission.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any

disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Elizabeth M. Murphy
Secretary

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67267 / June 26, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3423 / June 26, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14927

In the Matter of

ROBERTO ALEPH
ESPINOSA,

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 Roberto Aleph Espinosa ("Espinosa" 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)

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of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

1. From 2006 to 2011, Espinosa operated Aleph Consulting Group LLC ("Aleph"), an unregistered investment advisory and securities brokerage business. Espinosa, through Aleph, solicited investors to purchase certain securities, handled investor funds, received payment of transaction-based compensation, and advised clients on their investment strategy. In addition, Espinosa, through Aleph, advised clients on the purchase of securities in exchange for advisory fees, and served as the investment manager for the ACG Global Fund, Ltd., a Cayman Islands company, which was only available to U.S. tax exempt entities and non-U.S. citizens and entities. The ACG Global Fund, Ltd., invested primarily in U.S. exchange traded stocks, options and exchange traded funds as well as foreign reverse convertible notes. From October 2008 to September 2010 Espinosa was neither registered as a broker or dealer with the Commission nor associated with a registered broker or dealer. Espinosa, 37 years old, currently resides in Mexico.

2. On June 12, 2012, a final judgment was entered by consent against Espinosa, permanently enjoining him from future violations of Section 15(a) of the Exchange Act, Sections 206(1), 206(2), 206(4), and Rule 206(4)-8(a) of the Advisers Act, and aiding and abetting violations of Sections 206(1), 206(2), 206(4), and Rule 206(4)-8(a) of the Advisers Act in the civil action entitled Securities and Exchange Commission v. Jorge Gomez and Roberto Aleph Espinosa, Civil Action Number 12-CV-21962-Ungaro, in the United States District Court for the Southern District of Florida.

3. The Commission's complaint alleged that, from October 2008 to September 2010, Espinosa, through Aleph, operated as a broker-dealer while he was not registered with the Commission as a broker or dealer and was not associated with an entity registered as a broker or dealer. In addition, while serving as investment adviser to a client (the "Client"), Espinosa observed the Client's co-adviser withdraw more than \$4.3 million from the Client's brokerage account without alerting the Client to the activity. Moreover, upon receipt of a September 11, 2010 email, which alerted Espinosa to the possibility that the co-adviser was committing fraud, Espinosa failed to alert the client to the email or raise the issue of potential fraud with the Client. In addition, Espinosa failed to disclose various fees to the Client and his other investment advisory clients including the ACG Global Fund, Ltd.

IV.

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

Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Espinosa 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; with the right to apply for reentry after three years to the appropriate self-regulatory organization, or if there is none, to the Commission.

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

By the Commission.

Elizabeth M. Murphy
Secretary


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

*Commissioner Gallagher
not participating*

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 67279 / June 27, 2012

INVESTMENT ADVISERS ACT OF 1940
Release No. 3424 / June 27, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14928

In the Matter of

HARBINGER CAPITAL
PARTNERS, LLC,

Respondent.

ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934 AND SECTION
203(e) OF THE INVESTMENT ADVISERS
ACT OF 1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), and Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act") against Harbinger Capital Partners, LLC ("Harbinger" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934 and Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

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III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. These proceedings arise out of three violations of Rule 105 of Regulation M of the Exchange Act by Harbinger, an investment adviser and hedge fund manager located in New York, New York. Rule 105 prohibits buying an equity security made available through a public offering, conducted on a firm commitment basis, from an underwriter or broker or dealer participating in the offering after having sold short the same security during the restricted period as defined therein.
2. Between April and June 2009, Harbinger purchased shares in three public offerings after having sold the same securities short during the restricted period. Harbinger's conduct resulted in unlawful profits of approximately \$857,950.
3. After an inquiry from the Commission, Harbinger self-reported two of the violative transactions.
4. During the relevant period, Harbinger provided no training to its employees concerning Rule 105, and it did not have any policies, procedures and controls in place sufficient to prevent or detect violations of Rule 105.

Respondent

5. Harbinger is a limited liability company organized in Delaware and based in New York, New York. Harbinger registered as an investment adviser with the Commission in March 2012. During the relevant time period, Harbinger managed a number of private investment funds, including Harbinger Capital Partners Master Fund I, Ltd. ("HCP Fund I"). Harbinger effected the trades that are the subject of these proceedings on behalf of HCP Fund I.

Legal Framework

6. Rule 105 prohibits short selling securities during a restricted period and then purchasing the same securities in a public offering. 17 C.F.R. § 242.105. *See Short Selling in Connection with a Public Offering*, Rel. No. 34-56206, 72 Fed. Reg. 45094 (Aug. 10, 2007)(effective Oct. 9, 2007). The Rule 105 restricted period is the shorter of the period: (1) beginning five business days before the pricing of the offered securities and ending with such pricing; or (2) beginning with the initial filing of a registration statement or notification on Form 1-A or Form 1-E and ending with pricing. "The goal of Rule 105 is to promote offering prices that are based upon open market prices determined by supply and demand rather than artificial forces." *Final Rule: Short Sales*, Release No. 34-50103 (July 28, 2004; effective September 7, 2004). Because the Rule is prophylactic in nature, its prohibitions apply irrespective of a short seller's intent.

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

Harbinger's Transactions

7. On April 23, 2009, Harbinger sold a total of one million shares of U.S. Steel Corp. ("U.S. Steel") common stock short at prices ranging from \$27.1825 to \$27.71 per share. On April 27, 2009, Harbinger shorted another 500,000 shares of U.S. Steel at \$27.4693 per share. On April 28, 2009, U.S. Steel announced the pricing of a follow-on offering of 23.6 million shares of its common stock at \$25.50 per share. Harbinger received an allocation of 300,000 shares in this offering. Harbinger's profit on these transactions was \$570,150.

8. On June 4, 2009, Harbinger sold 200,000 shares of the common stock of Western Refining, Inc. ("Western Refining") short at a price of \$9.939 per share. Prior to the opening of the market on June 5, 2009, Western Refining announced the pricing of a follow-on offering of 20 million shares of its common stock at \$9.00 per share. Harbinger received an allocation of 1,510,000 shares in this offering. The difference between Harbinger's proceeds from the short sale of 200,000 shares of Western Refining stock and the cost of 200,000 shares acquired in the offering was \$187,800. Thus, Harbinger's profit on these transactions was \$187,800.

9. On June 11, 2009, Harbinger sold 100,000 shares of the common stock of Vulcan Materials, Inc. ("Vulcan Materials") short at a price of \$42.00 per share. After the close of business that day, Vulcan Materials announced the pricing of a follow-on offering of 11.5 million shares of its common stock at \$41.00 per share. Harbinger received an allocation of 100,000 shares in this offering. Harbinger's profit on the transactions was \$100,000.

Violations of Rule 105 of Regulation M

10. As a result of the conduct described above, Harbinger willfully violated Rule 105 of Regulation M under the Exchange Act on three separate occasions.²

11. In total, Harbinger's violations of Rule 105 resulted in profits of \$857,950.

Harbinger's Remedial Efforts

12. After Harbinger learned of its Rule 105 violations, it voluntarily provided training to its employees on Regulation M, and developed and implemented policies, procedures and controls to prevent or detect future Rule 105 violations. In determining to accept the Offer, the Commission considered Harbinger's remedial efforts and the cooperation it afforded the Commission staff in the investigation.

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

IV.

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

Accordingly, pursuant to Section 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondent Harbinger cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act;

B. Harbinger is censured;

C. Harbinger shall within fourteen (14) days of the entry of this Order pay disgorgement in the amount of \$857,950, prejudgment interest in the amount of \$91,838, and a civil monetary penalty in the amount of \$428,975 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. § 3717. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Securities and Exchange Commission, Office of Financial Management, 100 F St., N.E., Stop 6042, Washington, D.C. 20549; and (D) submitted under cover letter that identifies Harbinger as a Respondent in these proceedings and the file number of these proceedings. A copy of that cover letter and proof of payment shall be sent to Conway T. Dodge, Jr., Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Mail Stop 6561A, Washington, D.C. 20549.

By the Commission.

Elizabeth M. Murphy
Secretary


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

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34-67286; File No. S7-44-10]

RIN 3235-AK87

Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: In accordance with Section 763(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is adopting rules under the Securities Exchange Act of 1934 ("Exchange Act") to specify the process for a registered clearing agency's submission for review of any security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing, the manner of notice the clearing agency must provide to its members of such submission and the procedure by which the Commission may stay the requirement that a security-based swap is subject to mandatory clearing while the clearing of the security-based swap is reviewed. The Commission also is adopting a rule to specify that when a security-based swap is required to be cleared, the submission of the security-based swap for clearing must be for central clearing to a clearing agency that functions as a central counterparty. In addition, the Commission is adopting rules to define and describe when notices of proposed changes to rules, procedures or operations are required to be filed by designated financial market utilities in accordance with Section 806(e) of Title VIII of the Dodd-Frank Act and to set forth the process for filing such notices with the Commission. Finally, the Commission is adopting

- g. Other Issues Related to Security-Based Swap Submissions
- h. Additional Comments
- 2. Prevention of Evasion of the Clearing Requirement
- B. Stay of the Clearing Requirement and Review by the Commission
- C. Title VIII Notice Filing Requirements for Designated Clearing Agencies
 - 1. Standards for Determining When Advance Notice is Required
 - 2. Providing Notice of the Matters Included in an Advance Notice to the Board and Interested Persons
 - 3. Timing and Determination of Advance Notice Pursuant to Section 806(e)
 - 4. Implementation of Proposed Changes and Emergency Changes Pursuant to Section 806(e)
- D. Amendments to Form 19b-4
- E. Amendments to Rule 19b-4 Relating to Section 916 of the Dodd-Frank Act
- F. New Requirements Under Exchange Act Section 3C and Section 806(e) and the Existing Filing Requirements in Exchange Act Section 19(b)
- G. Effective and Compliance Dates

III. PAPERWORK REDUCTION ACT

- A. Summary of Collection of Information
 - 1. Amendments to Rule 19b-4 and Form 19b-4
 - 2. Stay of Clearing Requirement
- B. Use of Information
 - 1. Amendments to Rule 19b-4 and Form 19b-4
 - 2. Stay of Clearing Requirements
- C. Respondents
 - 1. Amendments to Rule 19b-4 and Form 19b-4
 - 2. Stay of Clearing Requirement
- D. Total Annual Reporting and Recordkeeping Burden
 - 1. Background
 - 2. Rule 19b-4 and Form 19b-4
 - a. Introduction
 - b. Internal Policies and Procedures
 - c. Proposed Rule Changes
 - d. Security-Based Swap Submissions
 - e. Advance Notices
 - f. Summary
 - 3. Posting of Security-Based Swap Submissions, Advance Notices and Proposed Rule Changes on Clearing Agency Websites
 - 4. Amendment to Conform to Section 916 of the Dodd-Frank Act
 - 5. New Rule 3Ca-1
- E. Retention Period of Recordkeeping Requirements
- F. Collection of Information is Mandatory
- G. Responses to Collection of Information Will Not Be Kept Confidential

IV. ECONOMIC ANALYSIS

- A. Background
 - 1. Dodd-Frank Act Requirements for Clearing Security-Based Swaps

intended to bolster the existing regulatory structure and provide regulatory tools to oversee the OTC derivatives market, which has grown exponentially in recent years. Title VII provides that the CFTC will regulate “swaps,” the Commission will regulate “security-based swaps,” and the CFTC and the Commission will jointly regulate “mixed swaps.”⁴

Title VII was designed to provide greater certainty that, wherever possible and appropriate, swap and security-based swap contracts formerly traded exclusively in the OTC market are centrally cleared.⁵ The swaps and security-based swaps markets traditionally have been characterized by privately negotiated transactions entered into by two counterparties, in

⁴ Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation with the Board of Governors of the Federal Reserve System (“Board”), shall further define the terms “swap,” “security-based swap,” “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” “eligible contract participant,” and “security-based swap agreement.” The Commission and the CFTC jointly have proposed to further define the terms “swap,” “security-based swap,” and “security-based swap agreement.” See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Securities Act Release No. 9204, Securities Exchange Act Release No. 64372 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011), corrected in Securities Act Release No. 9204A, Securities Exchange Act Release No. 64372A (June 1, 2011), 76 FR 32880 (June 7, 2011) (“Product Definition Proposing Release”). Further, the Commission and CFTC jointly have adopted rules to further define the terms “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and eligible contract participant,” See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, Securities Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012). Moreover, section 712(a)(8) of the Dodd-Frank Act provides that the Commission and the CFTC, after consultation with the Board, shall jointly promulgate such regulations regarding “mixed swaps” as may be necessary to carry out the purposes of Title VII. The Commission and the CFTC have jointly proposed such regulations. See Product Definition Proposing Release.

⁵ See, e.g., Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176 at 34 (stating that “[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.”).

CCP assumes the counterparty credit risk of each of the original counterparties that are members of the CCP.¹⁰ Structured and operated appropriately, CCPs may improve the management of counterparty risk and may provide additional benefits such as multilateral netting of trades.¹¹

One key way in which the Dodd-Frank Act promotes clearing of such contracts is by requiring a process by which the Commission would determine whether a security-based swap is required to be cleared. Section 3C of the Exchange Act, as added by Section 763(a) of the Dodd-Frank Act (“Exchange Act Section 3C”),¹² creates, among other things, a clearing requirement with respect to certain security-based swaps. Specifically, this section provides that “[i]t shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared.”¹³ Exchange Act Section 3C requires the Commission to adopt rules for a

¹⁰ See Cecchetti, Gyntelberg and Hollanders, Central counterparties for over-the-counter derivatives, BIS Quarterly Review, Sept. 2009, available at: http://www.bis.org/publ/qtrpdf/r_qt0909f.pdf.

¹¹ See *id.* at 46 (stating that the structure of a CCP “has three clear benefits. First, it improves the management of counterparty risk. Second, it allows the CCP to perform multilateral netting of exposures as well as payments. Third, it increases transparency by making information on market activity and exposures – both prices and quantities – available to regulators and the public”); see also Bank for International Settlements’ Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions, Guidance on the application of the 2004 CPSS-IOSCO Recommendations for Central Counterparties to OTC derivatives CCPs: Consultative report, (May 2010), available at: <http://www.bis.org/publ/cpss89.pdf>.

¹² 15 U.S.C. 78c-3 *et seq.*

¹³ See 15 U.S.C. 78c-3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act). The requirement that a security-based swap be cleared will stem from the determination to be made by the Commission. Such determination may be made in connection with the review of a clearing agency’s submission regarding a security-based swap, or any group, category, type or class of security-based swaps, that the clearing agency plans to accept for clearing. See 15 U.S.C. 78c-3(b)(2)(C)(ii) (as added by Section 763(a) of the Dodd-Frank Act) (“[t]he Commission shall . . . review each submission made under

may still be cleared on a non-mandatory basis by the clearing agency if the clearing agency has rules that permit it to clear such security-based swap. In addition, Exchange Act Section 3C(b)(1) provides that “[t]he Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared” (“Commission-initiated Review”).¹⁶

Title VIII of the Dodd-Frank Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act” or “Title VIII”), provides for enhanced regulation of financial market utilities, such as clearing agencies, that manage or operate a multilateral system for the purpose of transferring, clearing or settling payments, securities or other financial transactions among financial institutions or between financial institutions and the financial market utility.¹⁷ The regulatory regime in Title VIII will only apply, however, to financial market utilities that the Financial Stability Oversight Council (“Council”) designates as systemically important (or likely to become systemically important) in accordance with Section 804 of the Clearing Supervision Act.¹⁸ Among other requirements prescribed under Title VIII,

¹⁶ See 15 U.S.C. 78c-3(b)(1) (as added by Section 763(a) of the Dodd-Frank Act). The Dodd-Frank Act does not require rulemaking with respect to Commission-initiated Reviews.

¹⁷ The definition of “financial market utility” in Section 803(6) of the Clearing Supervision Act contains a number of exclusions that include, but are not limited to, certain designated contract markets, registered futures associations, swap data repositories, swap execution facilities, national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, security-based swap execution facilities, brokers, dealers, transfer agents, investment companies and futures commission merchants. 12 U.S.C. 5462(6)(B) (as added by Title VIII).

¹⁸ Pursuant to Section 803(9) of the Clearing Supervision Act, a financial market utility is systemically important if the failure of or a disruption to the functioning of such financial market utility could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States. 12 U.S.C. 5462(9) (as added by Title VIII). Under

Clearing agencies registered with the Commission are financial market utilities, as defined in Section 803(6) of Title VIII;²² thus, the Commission may be the Supervisory Agency of a clearing agency that is designated as systemically important by the Council (“designated clearing agency”).²³ A clearing agency must begin filing Advance Notices pursuant to Section 806(e) once the Council designates the clearing agency as systemically important as of the compliance date of new Rule 19b-4(o), which the Commission is adopting today.

On December 15, 2010, the Commission proposed amendments to Rule 19b-4 under the Exchange Act to implement these new requirements by requiring that Security-Based Swap Submissions under Exchange Act Section 3C and Advance Notices under Section 806(e) be filed with the Commission on Form 19b-4.²⁴ The Proposing Release also contained two new rules that were proposed in accordance with the authority granted to the Commission pursuant to Exchange Act Section 3C: (i) proposed Rule 3Ca-1, which would establish a procedure by which the Commission, at the request of a counterparty or on its own initiative, may stay the requirement that a security-based swap is subject to mandatory clearing, and (ii) proposed Rule 3Ca-2, which was intended to prevent evasions of the clearing requirement by specifying that security-based swaps required to be cleared must be submitted for central clearing to a clearing agency that functions as a CCP. Finally, the Commission proposed technical, conforming and clarifying amendments to Rule 19b-4 and Form 19b-4 to conform the rule and

²² 12 U.S.C. 5462(6) (as added by Title VIII).

²³ See *supra* note 20 discussing the definition of “Supervisory Agency” under the Dodd-Frank Act.

²⁴ See Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Securities Exchange Act Release No. 34-63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010) (“Proposing Release”).

Rule 19b-4 and Form 19b-4 and new Rule 3Ca-1 under the Exchange Act to establish processes for (i) how clearing agencies registered with the Commission must submit Security-Based Swap Submissions to the Commission for a determination by the Commission of whether the security-based swap (or group, category, type or class of security-based swaps) referenced in the submission is required to be cleared, and to determine the manner of notice the clearing agency must provide to its members of such submission and (ii) how the Commission may stay the requirement that a security-based swap is subject to mandatory clearing. The Commission also is adopting new Rule 3Ca-2 to prevent evasion of the clearing requirement.

In addition, the Commission is adopting amendments to Rule 19b-4 and Form 19b-4 to implement Section 806(e), which requires any designated clearing agency for which the Commission is the Supervisory Agency to provide an Advance Notice to the Commission.

Moreover, the Commission is adopting amendments to Rule 19b-4 and Form 19b-4 to conform to the requirements specified in Exchange Act Section 19(b), as amended by Section 916 of the Dodd Frank Act.²⁸ Section 916 provided for new deadlines by which the Commission must publish and act upon a proposed rule change submitted by a self-regulatory organization (“SRO”) and new standards for the approval, disapproval and temporary suspension of a proposed rule change. Finally, the Commission is adopting a number of technical and clarifying amendments to Rule 19b-4 and Form 19b-4.

As set forth in the Proposing Release, Security-Based Swap Submissions and Advance Notices will be required to be filed with the Commission on Form 19b-4 using the existing Electronic Form 19b-4 Filing System (“EFFS”). Currently, EFFS is used by SROs, which

²⁸ 15 U.S.C. 78s(b) (as amended by Section 916 of the Dodd-Frank Act).

To facilitate this filing requirement, the Commission is adopting Rule 19b-4(o)(2) to require clearing agencies to use EDFS and Form 19b-4 for Security-Based Swap Submissions. As discussed in the Proposing Release, registered clearing agencies, as SROs, are already required to file proposed rule changes on Form 19b-4 on EDFS. Using the same filing process for Security-Based Swap Submissions would leverage existing technology and reduce the resources clearing agencies would have to expend on meeting Commission filing requirements. Moreover, in situations where a single clearing agency action would trigger more than one filing requirement, allowing for each filing to be made pursuant to a single Form 19b-4 submission would improve efficiency in the filing process. The Commission is adopting the requirements in new Rule 19b-4(o)(2) substantially as proposed, with modifications made to allow for the transition to EDFS filing. Specifically, the Commission is currently in the process of designing and implementing the Commission system upgrades that are necessary in order for Security-Based Swap Submissions to be filed on EDFS. The Commission expects the system upgrades to EDFS to be completed no later than December 10, 2012. In order to avoid delaying clearing agencies from making Security-Based Swap Submissions, the Commission has decided to provide for a temporary means of submission. As a result, the Commission is adopting Rule 19b-4(o)(2) to provide that Security-Based Swap Submissions filed before December 10, 2012 must be filed with the Commission by submitting the Security-Based Swap Submission to a dedicated email inbox to be established by the Commission. A clearing agency that files a Security-Based Swap Submission by email must include in the submission the same information that is required to be included for Security-Based Swap Submissions in the General Instructions for Form 19b-4, as such form has been modified by the rules the Commission is adopting today. Security-Based Swap Submissions filed on or after December 10, 2012 on Form 19b-4 would

permitting it to clear the security-based swap in question.³⁴ Another commenter requested that the Commission “de-couple the determination that a clearing agency may clear a security-based swap from the determination that a security-based swap should be subject to a mandatory clearing obligation.”³⁵ Finally, one commenter asked for confirmation that “the Commission intends that a clearing agency ‘eligibility to clear’ review is to be separate from and precede a security-based swap mandatory clearing review and [that] it is not intended that both reviews can commence simultaneously.”³⁶

In response to the three comments described above, the Commission notes that its process for determining whether a security-based swap is required to be cleared pursuant to Exchange Act Section 3C (which process is triggered by the filing of a Security-Based Swap Submission in accordance with the amendments being adopted today to Rule 19b-4 and Form 19b-4) is separate and distinct from the Commission’s process for determining whether to approve a request by a clearing agency to commence voluntary clearing of a security-based swap (which process will be triggered by the filing of a proposed rule change pursuant to Exchange Act Section 19(b)).³⁷ Each filing process, as well as each resulting Commission determination, is governed by separate sections of the Exchange Act, and each operates under separate timeframes. Thus, a clearing agency will be required to make a Security-Based Swap Submission regardless of whether it has existing rules permitting it to clear the security-based swap referred to in the submission.

³⁴ See OCC Letter at 3.

³⁵ See LCH.Clearent Letter at 2-3.

³⁶ See ISDA Letter at 4.

³⁷ A more detailed discussion regarding the separation of the two filing requirements (and subsequent Commission actions) is contained in section II.F of this release. Notably, the requirement to submit a proposed rule change is not affected by the rules the Commission is adopting today related to the process for filing Security-Based Swap Submissions.

In addition, while the Commission recognizes the concerns raised by the commenter requesting that these two processes not commence simultaneously,⁴⁰ the Commission notes that the timing and sequencing of each of these processes ultimately will be determined based on the individual facts and circumstances of a particular filing. The Commission generally believes that when a security-based swap is submitted for review under Exchange Act Section 3C and concurrently filed under Exchange Act Section 19(b) as a proposed rule change, the two separate reviews will be carried out on the same general timeline and likely involving the same staff, both as a practical matter and to promote efficiency in the use of Commission resources. However, in circumstances where no proposed rule change filing would be required, such as a case where a clearing agency's rules already permit it to clear the security-based swap in question, EFTS and Form 19b-4 still will be used for the Security-Based Swap Submission.

The Commission also received a comment letter that attached a copy of a separate letter that the commenter submitted to the CFTC requesting, among other things, that the CFTC clarify that a designated clearing organization ("DCO") would not be required to make any submission to the CFTC for swaps previously listed for clearing by a DCO prior to the date of enactment of Section 723 of the Dodd-Frank Act ("pre-enactment swaps") or for any swaps that a DCO cleared prior to the effective date of the CFTC's final rules setting forth its swap submission process.⁴¹ While this commenter did not explicitly make a concurrent request with respect to security-based swaps, the Commission notes that it will need to have certain information regarding any security-based swap (or any group, category, type, or class of security-based swaps) listed for clearing by a clearing agency as of the date of enactment of Exchange Act Section 3C (i.e., July 21, 2010) ("pre-enactment security-based swaps") in light of Exchange Act

⁴⁰ See supra note 36 and accompanying text.

⁴¹ See Exhibit A to CME Letter.

determinations made by an ISDA committee will apply to the security-based swaps that the clearing agency clears.⁴⁵ In response to this commenter, the Commission notes that as a general matter, registered clearing agencies have an ongoing responsibility to ensure that their rules are in compliance with Section 17A of the Exchange Act, regardless of the source of, or justification behind, a new rule or rule change. Accordingly, the Commission would need to review actions on a case-by-case basis to determine whether specific actions taken by ISDA or another industry organization would require the filing of a separate proposed rule change or Security-Based Swap Submission. In that respect, the Commission encourages clearing agencies to discuss particular actions with Commission staff in order to determine whether a filing is required.

a. Substance of Security-Based Swap Submissions: Consistency with Section 17A of the Exchange Act

New Rule 19b-4(o)(3)(i), which the Commission is adopting as proposed, requires that each Security-Based Swap Submission contain a statement explaining how the submission is consistent with Section 17A of the Exchange Act. The requirement to submit the information specified in Rule 19b-4(o)(3)(i) is intended to assist the Commission in its review of the Security-Based Swap Submission in accordance with the standards set forth in Exchange Act Section 3C(b)(4)(A).⁴⁶ Section 17A specifies, among other things, that the Commission is directed, having due regard for the public interest, the protection of investors, the safeguarding of securities and funds and maintenance of fair competition among brokers and dealers, clearing

⁴⁵ See *id.*

⁴⁶ See 15 U.S.C. 78c-3(b)(4)(A) (as added by Section 763(a) of the Dodd-Frank Act) (“[i]n reviewing a [Security-Based Swap Submission], the Commission shall review whether the submission is consistent with section 17A.”).

accurate clearance and settlement of securities transactions, assuring the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, fostering cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, removing impediments to and perfecting the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, protecting investors and the public interest.⁵⁰ A registered clearing agency also is required under Section 17A(b)(3) of the Exchange Act to provide fair access to clearing and to have the capacity to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible, as well as to safeguard securities and funds in its custody or control or for which it is responsible.⁵¹

The Commission did not receive any comments on the requirement contained in Rule 19b-4(o)(3)(i) that a clearing agency explain how the Security-Based Swap Submission is consistent with Section 17A of the Exchange Act. However, one commenter recommended that the Commission provide further specificity as to precisely what elements of Section 17A(b)(3) of the Exchange Act “are relevant to the decision to clear a security-based swap and thus must be addressed in a clearing agency’s submission.”⁵² Because each Security-Based Swap Submission

⁵⁰ See 15 U.S.C. 78q-1(b)(3)(F).

⁵¹ See 15 U.S.C. 78q-1(b)(3)(A), (B) and (F).

⁵² See CME Letter at 2, n.1. In its comment letter, CME Group, Inc. states that Exchange Act Section 3C “governs the Commission’s responsibility to determine whether a security-based swap that a clearing agency chooses to clear may be cleared” and also “requires the Commission to make determinations respecting whether a security-based swap is subject to the mandatory clearing requirement.” The Commission notes, however, that Exchange Act Section 3C only relates to mandatory clearing determinations. The question of whether a clearing agency may clear a security-based swap will depend on whether clearing of the security-based swap is permitted under the clearing agency’s rules. To the extent that a clearing agency’s rules must also be modified to permit clearing of a new security-based swap (or group, category, type or class of security-based swaps), such change would need to be approved as a proposed

agency could specify such procedures. The Commission also encourages clearing agencies to specify and briefly describe any departures from processes contemplated by clearing agency rules in reaching a decision to commence clearing the security-based swap, such as exercises of discretion not to consult established management committees, board committees or participant committees.

To the extent relevant to its initial conclusion to clear a security-based swap, the clearing agency could include a clear statement whether it believes that the security-based swap (or group, category, type or class of security-based swaps) that is the subject of the Security-Based Swap Submission should or should not be required to be cleared by the Commission, together with a discussion of the reasons for its belief. If the Commission's decision to require or not to require the security-based swap (or group, category, type or class of security-based swaps) that is the subject of the submission to be cleared would or would not materially affect the clearing agency's judgment that the clearing proposal is consistent with Section 17A of the Exchange Act, the clearing agency is encouraged to include a statement of this nature and explain why this is the case.⁵³

b. Substance of Security-Based Swap Submissions: Quantitative and Qualitative Factors

The Commission also is adopting new Rule 19b-4(o)(3)(ii) to specify what qualitative and quantitative factors should be discussed by a clearing agency in its Security-Based Swap Submission. This rule is being adopted substantially as proposed, with certain non-substantive changes having been made to correct paragraph numbering. To provide context for the

⁵³ As compliance with each of the standards of Section 17A of the Exchange Act is required of each registered clearing agency, the information specified throughout this paragraph is expected to be provided by each clearing agency for any security-based swap (or group, category, type or class of security-based swaps) being considered by the Commission, including pre-enactment swaps.

4(o)(3)(ii) pertaining to the five qualitative and quantitative factors.⁵⁵ For example, one commenter urged Commission staff to exercise judgment and flexibility in determining the scope of information required in connection with the five qualitative and quantitative factors, noting that some of these factors would require “at most a very cursory mention” in a specific Security-Based Swap Submission, particularly where the responsive information is already well-known to the Commission or where the Commission has extensive knowledge of the clearing agency’s rules or operations.⁵⁶ Further, this commenter requested that the Commission clarify that when a Rule 19b-4 filing is both a proposed rule change and a Security-Based Swap Submission, any information that is self-evident from the text of the proposed rule need not be repeated for the Security-Based Swap Submission aspect of the filing.⁵⁷

In response to this comment, the Commission reiterates that registered clearing agencies will be required to submit Security-Based Swap Submissions for the sole purpose of submitting the information necessary for the Commission to determine, pursuant to Exchange Act Section 3C(b)(2)(C)(ii), whether the security-based swap described in the submission is required to be cleared (*i.e.*, subject to mandatory clearing). As discussed in section II.A.1 and throughout this release, the process by which the Commission will determine whether a security-based swap is required to be cleared following the submission of a Security-Based Swap Submission is separate and distinct from the process by which the Commission will determine whether to approve a new security-based swap for voluntary clearing following the filing of a proposed rule

⁵⁵ See, e.g., CME Letter, LCH.Cleernet Letter and OCC Letter.

⁵⁶ See OCC Letter at 3-5.

⁵⁷ See id.

Section 3C(b)(4)(B) were most relevant to the Commission in making its determination as to whether a security-based swap is required to be cleared and less relevant in the context of a submission by a clearing agency seeking approval to clear a security-based swap.⁶⁰ This commenter maintained that requiring clearing agencies to perform an analysis of the qualitative and quantitative factors set forth in Exchange Act Section 3C(b)(4)(B) in connection with seeking approval to clear a security-based swap would be “broad and burdensome,” noting that the Commission has a great deal of information necessary to address the statutory factors by virtue of the extensive reporting requirements under the Dodd-Frank Act.⁶¹

Similarly, a separate commenter requested that the Commission amend the information requirements in the proposed rule “such that a clearing agency is required to include in its submission only that information which is necessary for determining the *suitability* of a security-based swap for clearing and the *eligibility* of a clearing agency to clear that security-based swap (but not the information required to support the determination of whether a security-based swap should be subject to a mandatory clearing obligation).”⁶² In furtherance of this suggestion, the commenter suggested specific deletions to the information requirements in the proposed rules that were based on the five statutory factors set forth in Exchange Act Section 3C(b)(4)(B).⁶³

In response to the commenters discussed in the two preceding paragraphs, the Commission notes that the factors specified in new Rule 19b-4(o)(3)(ii) are identical to the qualitative and quantitative factors that the Commission is required to consider pursuant to Exchange Act Section 3C(b)(4)(B) when determining whether a security-based swap (or group,

⁶⁰ See id.

⁶¹ See id.

⁶² See LCH.Cleernet Letter at 3.

⁶³ See id. at 4

In addition, the Proposing Release included examples of information that a clearing agency “could” consider including in its Security-Based Swap Submission in order to respond to the quantitative and qualitative factors specified in Exchange Act Section 3C.⁶⁴ Some commenters urged the Commission to incorporate these examples into its final rules, thereby requiring all of this information to be included in a clearing agency’s Security-Based Swap Submission.⁶⁵ For example, one commenter suggested that the proposed rules did not include requirements to ensure that Security-Based Swap Submissions provide sufficiently detailed information; this commenter stated that the range of information discussed in the proposed rule as information a clearing agency “could” include appears to be essential information that the Commission could use to “efficiently and effectively determine whether the clearing agency should be allowed to clear the swap, or whether the swap should be required to clear.”⁶⁶ A second commenter requested that the Commission, at a minimum, replace the word “could” with “shall” in the list of disclosures required to be included in a Security-Based Swap Submission.⁶⁷

A third commenter urged the Commission to “require every clearing agency to submit all of the information identified in the [Proposing] Release and in the instructions as potentially

⁶⁴ See Proposing Release, *supra* note 24, at section II.A.1.b.

⁶⁵ See, e.g., comment letter of Americans for Financial Reform (Feb. 14, 2011) (“AFR Letter”); comment letter of American Federation of State, County and Municipal Employees (“AFSCME”) (Feb. 14, 2011) (“AFSCME Letter”); and comment letter of Better Markets, Inc. (Feb. 14, 2011) (“Better Markets Letter”).

⁶⁶ See AFR Letter at 2.

⁶⁷ See AFSCME Letter at 3-4. While AFSCME suggested that all of the examples identified in the release be incorporated into the rule, it highlighted as particularly relevant the reference to information on product specifications, including copies of any standardized legal documentation, generally accepted contract terms, standard practices for managing and communicating any life cycle events associated with the security-based swap and related adjustments, and the manner in which the information contained in the confirmation of the security-based swap trade is transmitted.

In response to the three commenters discussed above, the Commission believes that the requirements contained in new Rule 19b-4(o)(3)(ii) strike an appropriate balance by requiring clearing agencies to submit the information necessary to allow the Commission to make informed and timely mandatory clearing determinations. In particular, the Commission believes that the information requirements contained in Rule 19b-4(o)(3)(ii) provide for the submission of a comprehensive set of information to be included in a preliminary Security-Based Swap Submission. For example, the Commission believes that most of the information discussed in the proposed rule as information a clearing agency “could” include in a Security-Based Swap Submission is already contemplated by the rules the Commission is adopting today. In fact, in the discussion set forth both the Proposing Release and in the paragraph immediately below, the Commission has attempted to tie each example identified as information a clearing agency

Commission when it decides not to make a Security-Based Swap Submission or when it “rejects a class” of security-based swaps for clearing, the Commission notes that, to the extent that these commenters’ suggestion is directed toward the Commission’s ability to ensure that clearing agencies do not reject new security-based swaps for clearing for improper reasons, such as anticompetitive reasons, other provisions of the Exchange Act provide the Commission with the ability to investigate and address potential anticompetitive behavior if it occurs. For example, Section 17A of the Exchange Act provides that clearing agency rules must not be designed to permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency and that the rules may not impose a burden of competition that is not necessary or appropriate in furtherance of the provisions of the Exchange Act. See 15 U.S.C. 78q-1(b)(3)(F) and (I). All proposed rule changes filed by clearing agency with the Commission under Exchange Act Section 19(b)(2) are subject to approval by the Commission and all Security-Based Swap Submissions will be subject to Commission review to determine whether a security-based swap should be required to be cleared. Pursuant to Rule 17a-1, a registered clearing agency must keep copies of all documents made or received by it in the course of its business as such and provide copies of any such documents to the Commission upon request. See 17 CFR 17a-1. The Commission has broad authority under Section 17(b) of the Exchange Act to conduct examinations of clearing agencies. See 15 U.S.C. 78q. And ultimately, under Section 19(h) of the Exchange Act, the Commission has the authority to bring an enforcement action against a clearing agency that has violated or is unable to comply with any provision of the Exchange Act, the rules or regulations thereunder, or its own rules. See 15 U.S.C. 78s.

4(o)(6) (to the extent that the information is requested in connection with an actual Security-Based Swap Submission) or in all cases pursuant to the Commission's general supervisory authority to the extent that it believes such information will be relevant to its consideration of the Security-Based Swap Submission or otherwise.

Nevertheless, and as described in the Proposing Release, the Commission believes that while the content of each Security-Based Swap Submission will depend on the specific product referenced therein and the particular set of circumstances related to the clearing arrangement, many common types of information likely will be responsive to a large number of these types of submissions. For example, with respect to Rule 19b-4(o)(3)(ii)(A), a statement describing the existence of outstanding notional exposures, trading liquidity and adequate pricing data could address pricing sources, models and procedures demonstrating an ability to obtain price data to measure credit exposures in a timely and accurate manner, as well as measures of historical market liquidity and trading activity, and expected market liquidity and trading activity if the security-based swap is required to be cleared (including information on the sources of such measures). With respect to Rule 19b-4(o)(3)(ii)(B), a statement describing the availability of a rule framework could include a discussion of the rules, policies or procedures applicable to the clearing of the relevant security-based swap. Additionally, a discussion of credit support infrastructure could include the methods to address and communicate requests for, and posting of, collateral. With respect to Rule 19b-4(o)(3)(ii)(C), a discussion of systemic risk could include a statement on the clearing agency's risk management procedures including, among other things, the measurement and monitoring of credit exposures, initial and variation margin methodology, methodologies for stress testing and back testing, settlement procedures and default management procedures. With respect to Rule 19b-4(o)(3)(ii)(D), a discussion of fees

access market participants) that may result from a determination that the security-based swap (or group, category, type or class of security-based swaps) is required to be cleared.⁷⁵

The Commission believes that basing the information submission requirements in new Rule 19b-4(o)(3)(ii) on the five statutory factors set forth in Exchange Act Section 3C(b)(4)(B), and supplementing these requirements by providing the above examples of information that the Commission believes could be responsive, is an appropriate approach to implementing the statute because it retains the flexibility provided for in the Proposing Release to allow clearing agencies to address the statutory factors based on the facts and circumstances of a particular submission without requiring specific data points that could be overly prescriptive at the outset. At the same time, the Commission recognizes that a requirement that does not provide enough detail could result in an inefficient use of clearing agency and Commission resources if Security-Based Swap Submissions contain a large amount of unnecessary or irrelevant information. To that extent, the Commission encourages clearing agencies to discuss, at least initially, prospective Security-Based Swap Submissions with Commission staff to help determine what materials would be responsive to the requirements of new Rule 19b-4(o)(3)(ii) and Exchange Act Section 3C(b)(4)(B) in the context of a particular submission.

c. Substance of Security-Based Swap Submissions: Open Access

Exchange Act Section 3C also requires that the rules of a clearing agency that clears

⁷⁵ In addition to the information required to be submitted to the Commission pursuant to new Rule 19b-4(o)(3), and any information identified in this release as an example of information that clearing agencies may wish to provide in their submissions, the Commission may also require additional information as necessary to assess any of the factors it determines to be appropriate in order to make a determination of whether the clearing requirement applies. See infra section II.A.1.g (discussing new Rule 19b-4(o)(6)).

Security-Based Swap Submission, the Commission notes that Exchange Act Section 3C(a)(2) provides the authority for including this requirement in new Rule 19b-4(o)(3)(ii) in that it requires that the rules of a clearing agency that clears security-based swaps subject to the clearing requirement be in compliance with the two open access provisions.⁷⁸ By requiring that compliance with the open access requirements be assessed each time a clearing agency files a Security-Based Swap Submission, the clearing agency will be required to demonstrate that it continues to satisfy these ongoing conditions prior to listing a new security-based swap (or group, category, type, or class of security-based swap) for clearing. Because clearing in a particular security-based swap is limited to a small number of clearing agencies, it is critical that access to the clearing agency be open and available to market participants having due regard for risk management considerations.⁷⁹ Further, the Commission believes that requiring clearing agencies to address the two open access requirements in a Security-Based Swap Submission generally would not require a clearing agency to conduct a completely novel analysis or to consider factors with which it is unfamiliar as clearing agencies are already required to address

⁷⁸ See 15 U.S.C. 78c-3(a)(2) (as added by Section 763(a) of the Dodd-Frank Act).

⁷⁹ The Commission has previously recognized that certain conflicts of interest at clearing agencies or among their members could restrict open access to the clearing agency. See Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC, Securities Exchange Act Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) (noting that “[a] consequence of increased use of central clearing services, however, is that participants that control or influence a security-based swap clearing agency may gain a competitive advantage in the security-based swaps market by restricting access to the clearing agency. If that occurred, financial institutions and marketplaces that do not have access to central clearing would have limited ability to trade in or list security-based swaps.”). The Commission also recognized, however, that clearing agencies may legitimately impose minimum participation standards that could affect open access. See *id.* (“The provisions in Section 17A recognize that a clearing agency may discriminate among persons in the admission to, or the use of, the clearing agency, by requiring that participants meet certain financial, operational, and other fitness standards. However, Section 17A also requires that sanctioned discriminations must not be unfair.”).

Commission believes that it is important to provide guidance on how it intends to implement these statutory requirements

in practice. Specifically, the Commission believes that the statutory requirement to “provide at least a 30-day public comment” was intended, at least in part, to enable the public to have an opportunity to comment on the Security-Based Swap Submission and to provide information for the Commission to consider as part of making its determination whether the clearing requirement should apply to the submission. Accordingly, the Commission will indicate in each notice that it publishes of a Security-Based Swap Submission that public comment will be accepted during the period specified in the notice (which will in no event be less than 30 days). In addition, the comment period will begin and end within the 90-day determination period (as opposed to beginning after the Commission has made its final determination). The Commission expects to publish notice of the Security-Based Swap Submission in the Federal Register and it also intends to publish notice on the Commission’s publicly-available website at www.sec.gov. Such notice would include the solicitation of public comment for the period specified in the notice. This process is consistent with the current process that is in place for proposed rule changes under Exchange Act Section 19(b)(2) and Rule 19b-4.

Although the Commission did not propose rules with respect to the procedure it will follow in publishing Security-Based Swap Submissions for public comment, one commenter requested that the Commission extend the minimum public review period to 45 days.⁸⁴ This commenter also recommended that the comment period should not commence until after: (1) the clearing agency has proven the ability to clear the product through testing; (2) the clearing agency has sufficient operational resources and established connectivity to the market using

⁸⁴ See ISDA Letter at 11.

commencement of the public comment process would delay the Commission's potential receipt of feedback from the public which, in the Commission's experience reviewing proposed rule changes, is often an important source of information for supplementing or challenging the material submitted by the SRO.

In addition, a commenter recommended that the Commission adopt an extended transition period between the date that a determination is made that a security-based swap is required to be cleared and the date clearing becomes mandatory for that product.⁸⁸ This commenter also recommended a second transition period from "when the 'exchange/security-based swap execution facility trading' requirement is determined to when such requirement takes effect."⁸⁹ Finally, this commenter recommended "full transparency of clearing agency requirements and performance during such period(s)."⁹⁰ Although the substance of the Commission's mandatory clearing determinations and the timing of implementation of those determinations are not addressed in the rules being adopted today, which focus on the process by which clearing agencies submit filings, the Commission understands the importance of ensuring that clearing agencies and market participants are given an appropriate amount of time and guidance to comply with a clearing mandate. In many cases, the determination of when and how a clearing requirement should be implemented will depend on the particular product that the Commission determines is required to be cleared. The Commission further notes that Exchange Act Section 3C(b)(4)(C) provides that the Commission, in making a mandatory clearing

Security-Based Swap Submission within twenty-one business days of the original submission.

⁸⁸ See ISDA Letter at 10-11.

⁸⁹ See id.

⁹⁰ See id. at 11.

agency is notified that the Security-Based Swap Submission is not properly filed.⁹⁵ These requirements should help ensure that submissions that are being actively considered by the Commission are readily available to the members of the clearing agency and the public and help provide for a more transparent process.

The Commission notes that the current instructions for Form 19b-4 require an SRO to file with the Commission copies of notices issued by the SRO soliciting comment on the proposed rule change and copies of all written comments on the proposed rule change received by the SRO (whether or not comments were solicited) from its members or participants.⁹⁶ Any correspondence the SRO receives after it files a proposed rule change, but before the Commission takes final action on the proposed rule change, also is required to be filed with the Commission.⁹⁷ The SRO is required to summarize the substance of all such comments received and respond in detail to any significant issues raised in the comments about the proposed rule change.⁹⁸ In accordance with the changes the Commission is adopting today, clearing agencies will be subject to these same requirements in connection with Security-Based Swap Submissions. The Commission believes that applying these requirements in the instructions to Form 19b-4 to Security-Based Swap Submissions will provide the Commission with an opportunity to consider the various viewpoints expressed by commenters by making sure relevant comments are included in the Security-Based Swap Submission.

Finally, one commenter requested that the Commission require clearing agencies “to notify the Commission, as well as the public, of the type of swap being considered at the time it

⁹⁵ Proposed Rule 19b-4(o)(5).

⁹⁶ See Items 5 and 9 (Exhibit 2) of the General Instructions for Form 19b-4. 17 CFR 240.819.

⁹⁷ See *id.*

⁹⁸ Item 5 of the General Instructions for Form 19b-4. 17 CFR 240.819.

security-based swaps to define different products: (1) instrument description; (2) acceptable currencies (and whether the contract is single currency); (3) acceptable indices; (4) types (e.g., total return or price return); (5) maximum residual term; (6) notional amount (minimum to maximum of the relevant currency unit); (7) applicable day count fraction; (8) applicable business day convention; (9) minimum residual term of the trade (i.e., the period from the date of submission of the trade to the date of termination); and (10) applicable calculation periods.¹⁰¹

Although the commenter did provide specific suggestions of certain characteristics that could be used to create groups, categories, types or classes of security-based swaps, the Commission did not receive any comment letters responding to its requests for suggestions as to how best to utilize the individual characteristics, which may include among other things the underlying security, tenor, and coupon of the security-based swap, to aggregate security-based swaps into groups, categories, types or classes. In addition, the Commission notes that it has not yet received any Security-Based Swap Submissions and does not have detailed information about how clearing agencies would create groups, categories, types or classes of security-based swaps in determining whether to clear such security-based swaps. For these reasons, the Commission believes that allowing these key terms to evolve over time as an iterative process between the clearing agencies and the Commission is preferable to prematurely hard-coding definitions into the rules without the benefit of experience.

Nevertheless, the Commission continues to believe that requiring multiple security-based swaps in each submission – to the extent that such groupings are practicable and reasonable (e.g., by taking into consideration appropriate risk management issues applicable to the aggregation) – would streamline the submission process for Commission staff and the clearing agencies. This

¹⁰¹ See ISDA Letter at 3-4.

g. Other Issues Related to Security-Based Swap Submissions

Proposed Rule 19b-4(o)(6)(i) provided that, in making a mandatory clearing determination, the Commission would take into account the factors addressed in the Security-Based Swap Submission and any additional factors the Commission determines to be appropriate. Proposed Rule 19b-4(o)(6)(i) also required a clearing agency to provide any additional information requested by the Commission as necessary to make a determination. In addition, proposed Rule 19b-4(o)(6)(ii) provided that, in making a determination of whether or not the clearing requirement would apply to the security-based swap (or any group, category, type, or class of security-based swaps) described in the submission, the Commission may require such terms and conditions as the Commission determines to be appropriate in the public interest.¹⁰³

In connection with proposed Rule 19b-4(o)(6), one commenter urged the Commission to remove the language allowing the Commission, in addition to considering the five statutory factors set forth in Exchange Act Section 3C(b)(4)(B), to consider “any additional factors the Commission determines to be appropriate” in connection with a mandatory clearing determination. The commenter believes that this language exceeds the Commission’s statutory authority and would expose the proposed rules to potential litigation.¹⁰⁴

The Commission has carefully considered the comments it received in respect of proposed Rule 19b-4(o)(6). While the Commission disagrees with the commenter that the Commission lacks authority to promulgate a rule allowing it to consider “any additional factors the Commission determines to be appropriate” in connection with a mandatory clearing

¹⁰³ See 15 U.S.C. 78c-3(b)(4)(C) (as added by Section 763(a) of the Dodd-Frank Act) and proposed Rule 19b-4(o)(6)(ii).

¹⁰⁴ See Better Markets Letter at 8-10.

As noted above in connection with the Commission's modifications to proposed Rule 19b(o)(6)(i), promulgating rules to reiterate existing Commission powers and obligations is unnecessary, and the Commission believes that it would be prudent to remove these types of provisions so as to simplify the final rule to focus on the process by which clearing agencies will be required to make Security-Based Swap Submissions with the Commission.

In the Proposing Release, the Commission also requested comment on whether a clearing agency, in connection with each submission or in some circumstances, should be required to include an independent validation of its margin methodology and its ability to maintain sufficient financial resources. In response to this request, one commenter expressed an opinion that independent validations may be helpful in verifying elements of a submission, but that the Commission should use caution in allowing them to become a substitute for the Commission's own judgment. This commenter also urged the Commission to pay careful attention to the question of what constitutes "independence" for these purposes.¹⁰⁷ Another commenter noted that a clearing agency should have an ongoing internal process for validating its internal risk models, which process should be independent of the internal models' development, implementation, and operation.¹⁰⁸ As such, this commenter believes that it should be permissible for the review personnel to be employed by the clearing agency, so long as they are not involved in the development, implementation, and operation of the risk models.¹⁰⁹ This commenter further recommended that the independent validation evaluate "empirical evidence and

based swaps, described in the submission is required to be cleared) and 15 U.S.C. 78c-3(b)(4)(C) (as added by Section 763(a) of the Dodd-Frank Act) (providing that the Commission, in making a mandatory clearing determination, may require such terms and conditions to the requirement as the Commission determines to be appropriate).

¹⁰⁷ See AFR Letter at 3.

¹⁰⁸ See OCC Letter at 3.

¹⁰⁹ See *id.*

initiated Reviews. Commission staff are in the process of determining how these reviews will proceed, particularly with respect to sources of and access to the information the Commission will need to conduct Commission-initiated Reviews, and whether any rulemaking related to these reviews is necessary, either now or in the future.

h. Additional Comments

The Commission also received a number of comments that did not directly relate to the process of filing Security-Based Swap Submissions or to any specific provision in new Rule 19b-4(o). In particular, many of these comments related to the clearing of security-based swaps in general and to the rationale underlying the Commission's specific mandatory clearing determinations. While the Commission appreciates receiving the benefit of the public's views on a wide range of issues, the Commission nevertheless reiterates that the rules that are being adopted today are limited solely to the process by which clearing agencies will be required to make Security-Based Swap Submissions with the Commission. Accordingly, the Commission is not modifying the final rules in response to the comments summarized below. However, the Commission continues to consider a number of important issues related to its substantive mandatory clearing determinations, including many of the points raised in these comment letters. To the extent that these issues are raised by a particular Security-Based Swap Submission, the Commission will address them at the appropriate time.

For example, one commenter urged the Commission to exempt certain structured security-based swaps from the mandatory clearing requirement on the basis that such instruments are "not clearable" as they are not standardized, their underlying collateral pool cannot be evaluated, they would transfer risk to the clearing entity and clearing would require the posting

three Japanese bank groups requested that the Commission adopt regulations under the Dodd-Frank Act “with the effect that Japanese banks, including their U.S. branches, are not made subject to the application of Title VII requirements.”¹¹⁸

In addition, one commenter provided the Commission with a copy of a separate comment that it submitted to the Commission in connection with proposed rules regarding the registration and regulation of security-based swap execution facilities (“SB SEFs”), suggesting that one aspect of proposed Rule 19b-4(o) relates to a proposed rule for SB SEFs.¹¹⁹ Another commenter provided a number of suggestions for expanding access to central clearing of security-based

¹¹⁸ See comment letter from the Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd., and Sumitomo Mitsui Banking Corporation (May 6, 2011). In the alternative, these commenters requested that the regulations issued pursuant to Title VII: (1) not apply to transactions between affiliates of a bank group regulated as a bank holding company and (2) not apply to a foreign dealer – particularly one that is subject to comprehensive home country regulation – with respect to requirements that would otherwise apply due to transactions entered into by the foreign dealer with a U.S. based dealer regulated as a swap dealer or security-based swap dealer pursuant to Title VII. Finally, these commenters requested that the effective dates of all adopting regulations under Title VII be deferred until December 31, 2012, which is the deadline for compliance with the G-20 mandate, so as to avoid overlapping and inconsistent regulatory regimes

¹¹⁹ See comment letter of GFI Group Inc. (“GFI”) (Apr. 4, 2011) and Registration and Regulation of Security-Based Swap Execution Facilities, Securities Exchange Act Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (“SB SEF Release”). Specifically, in the SB SEF Release, the Commission proposed Rule 812 to implement Section 3D(d)(3) of the Exchange Act, which would require that an SB SEF permit trading only in security-based swaps that are not readily susceptible to manipulation. Proposed Rule 812(b) would provide that, prior to permitting the trading of any security-based swap, an SB SEF’s swap review committee must have determined, after taking into account all of the terms and conditions of the security-based swap and the markets for the security-based swap and any underlying security or securities, that such swap is not readily susceptible to manipulation. GFI requested that the Commission specify that an SB SEF would be deemed to have satisfied the requirement in proposed Rule 812 with respect to a security-based swap if the Commission has previously required such security-based swap to be cleared. The Commission notes that this comment is unrelated to the process rules being adopted today. However, the Commission notes that it will consider this comment in the context of the SB SEF Release.

the context of the process rules being adopted today, but the Commission will consider the issues raised in these letters as they pertain to relevant areas outside of this rulemaking.¹²³

2. Prevention of Evasion of the Clearing Requirement.

New Rule 3Ca-2 is being adopted as proposed. Specifically, the new rule clarifies that the phrase “submits such security-based swap for clearing to a clearing agency” found in Exchange Act Section 3C(a)(1) – which establishes the mandatory clearing requirement for security-based swaps – to mean that the security-based swap subject to the clearing requirement must be submitted for central clearing to a clearing agency that functions as a CCP. Exchange Act Section 3C(d)(1) directs the Commission to prescribe rules (and interpretations of rules) the Commission determines to be necessary to prevent evasions of the clearing requirements.¹²⁴

Specifically, the term “clearing agency” is defined broadly under the Exchange Act,¹²⁵ and clearing agencies may offer a spectrum of clearing services. The Commission has identified the following entities and activities as falling within the definition of clearing agency:

(i) clearing corporations; (ii) securities depositories; and (iii) matching services.¹²⁶ As a result,

¹²³ For example, with respect to the international application of mandatory clearing determinations, rather than addressing the international implications of Title VII in a piecemeal approach, the Commission is considering addressing the relevant international issues holistically in a single proposal. Such a proposal would give investors, market participants, foreign regulators, and other interested parties an opportunity to consider the Commission’s proposed approach to the application of Title VII to cross-border security-based swap transactions and non-U.S. persons that act in capacities regulated under the Dodd-Frank Act. This approach should generate thoughtful and constructive comments for us to consider regarding the application of Title VII to cross-border transactions.

¹²⁴ See 15 U.S.C. 78c-3(d)(1) (as added by Section 763(a) of the Dodd-Frank Act) (stating that “[t]he Commission shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.”).

¹²⁵ See *supra* note 8 (discussing the definition of “clearing agency” pursuant to Exchange Act Section 3(a)(23)).

¹²⁶ See Order Approving the Clearing Agency Registration of Four Depositories and Four

for central clearing as opposed to other clearing functions or services. Accordingly, Rule 3Ca-2 clarifies the reference to “submits such security-based swap for clearing to a clearing agency” in Exchange Act Section 3C(a)(1) to mean that the security-based swap must be submitted for central clearing to a clearing agency that functions as a CCP. Upon the effective and compliance dates for Rule 3Ca-2, counterparties must submit security-based swaps to a clearing agency for central clearing in order to meet the clearing requirement set forth in Exchange Act Section 3C(a)(1).¹²⁹ The Commission believes that submission to a clearing agency for clearing services other than central clearing would not satisfy a mandatory clearing requirement because only a clearing agency that functions as a CCP guarantees performance on the trade and thus mitigates counterparty credit risk between the bilateral parties to the trade.

The Commission received two comments on Rule 3Ca-2, of which one expressed strong support for the rule to be adopted as proposed.¹³⁰ The second commenter suggested that the Commission propose rules to address the potential for evasion through “spurious customization,” such as situations where parties to a security-based swap intentionally include terms in the relevant contract that have no economic purpose other than to cause the contract to fall outside the scope of the clearing agency’s rules.¹³¹ The Commission is adopting Rule 3Ca-2 as proposed, but will continue to monitor the clearing of security-based swaps as the market develops and will consider whether additional action should be taken to implement the anti-evasion provisions of Exchange Act Section 3C, including the suggestion raised by the commenter described above.

B. Stay of the Clearing Requirement and Review by the Commission

New Rule 3Ca-1 establishes a procedure for staying a mandatory clearing requirement

¹²⁹ See 15 U.S.C. 78c-3(a)(1).

¹³⁰ See AFR Letter at 2-3.

¹³¹ See OCC Letter at 5-6.

security-based swap be cleared (i.e., the initial mandatory clearing determination) and the factors the Commission would consider when determining whether to subsequently reverse the prior determination. Accordingly, requiring a party seeking a stay to address the same factors that a clearing agency was required to include in the original Security-Based Swap Submission provides the Commission with a logical point from which to begin its analysis. Moreover, because the application for the stay will, pursuant to Exchange Act Section 3C(c)(1), be made by a counterparty to a security-based swap subject to a clearing requirement,¹³³ the Commission will need basic information on the clearing agency that clears the relevant security-based swap, particularly if the Commission needs to request additional information from the clearing agency in order to make a determination whether to grant the stay or whether to modify the existing clearing requirement. As such, to the extent that the Commission determines that it requires additional information in the possession of the clearing agency (as distinguished from the information it received from the counterparty), new Rule 3Ca-1(d) requires that any clearing agency that has accepted for clearing the security-based swap subject to the stay provide information requested by the Commission in the course of its review during the stay.¹³⁴

New Rule 3Ca-1(e)(1), which is being adopted as proposed, provides that, upon completion of its review,¹³⁵ the Commission may determine unconditionally, or subject to such

¹³³ See 15 U.S.C. 78c-3(c)(1) (as added by Section 763(a) of the Dodd-Frank Act) (indicating that a stay could be initiated either pursuant to an application of a counterparty to a security-based swap or on the Commission's own initiative).

¹³⁴ Rule 3Ca-1(d) is being adopted substantially as proposed, with the one modification being the deletion of the phrase "but need not be limited to" when describing what the Commission's review of a request for a stay should consider. The reasons for this deletion from the proposal and the Commission's explanation as to why it does not substantively affect the rule are discussed at the end of this section. 17 CFR 240.3Ca-1(d).

¹³⁵ Exchange Act Section 3C(c)(2) requires the Commission to complete such clearing review not later than 90 days after issuance of the stay, unless the clearing agency that

clearing requirement.¹⁴⁰ Specifically, this commenter cited situations in which there is an absence of competition, where there is an unresolved clearing member default at the only clearing agency then clearing the relevant product, where the Commission determines to impose a mandatory clearing requirement where no clearing agency has elected to clear the product, or where a product subject to mandatory clearing becomes so illiquid as to threaten the clearing agency's ability to calculate margin or to manage a default.¹⁴¹ In response to these comments, the Commission notes that the purpose of new Rule 3Ca-1 is, similar to new Rules 19b-4(n) and (o), to establish the process by which certain parties are required to submit information to the Commission. Nevertheless, the Commission appreciates the commenter's views and will consider them to the extent the issues raised by the commenter are implicated in a particular application for a stay.

A second commenter requested that the Commission delete the phrase "but need not be limited to" from proposed Rule 3Ca-1(d) when describing what the Commission's review of a request for a stay should consider.¹⁴² The commenter believes that this language exceeds the Commission's statutory authority and that the language in Exchange Act Section 3C permits the Commission only to consider the five qualitative and quantitative factors that the Commission is required to consider when making an initial mandatory clearing determination. The commenter further believes that the purpose of the stay provision is to "afford the Commission more time to complete its review."¹⁴³ In response to these comments, the Commission notes that statutory provisions regarding the Commission's ability to grant a stay of the clearing requirement refers

¹⁴⁰ See ISDA Letter at 12.

¹⁴¹ See *id.*

¹⁴² See Better Markets Letter at 10-11.

¹⁴³ See *id.*

its rules, procedures or operations that could materially affect the nature or level of risk presented by the financial market utility.¹⁴⁷ To implement this filing requirement, new Rule 19b-4(n) will require that an Advance Notice be submitted to the Commission electronically on Form 19b-4. In addition, Rule 19b-4(n) will define when a proposed change to a clearing agency's rules, procedures or operations could materially affect the nature or level of risks presented by the designated financial market utility. This definition will determine when an Advance Notice under Section 806(e) must be filed with the Commission. Further, the Commission is adopting, as proposed, corresponding amendments to Form 19b-4 as discussed in more detail in section II.D.

As with Security-Based Swap Submissions filed pursuant to Exchange Act Section 3C, the Commission anticipates that in many cases a proposed change may be required to be filed as an Advance Notice under Section 806(e) and as a proposed rule change under Exchange Act Section 19(b). This is because a proposal that qualifies as a proposed change to a rule, procedure or operation that materially affects the nature or level of risk presented by the designated clearing agency under Section 806(e) may also qualify as a proposed rule change under Exchange Act Section 19(b).¹⁴⁸ As a result, a designated clearing agency may be required to file a proposal as an Advance Notice and as a proposed rule change. Designated clearing agencies, as SROs, will

¹⁴⁷ See 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

¹⁴⁸ For example, if the proposed change described in the Advance Notice requires a change in addition to, or a deletion from, the rules of a designated clearing agency, the action also would require the filing of a proposed rule change under Exchange Act Section 19(b). Section 3(a)(27) of the Exchange Act defines "rules" broadly to include "the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing . . . and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency." 15 U.S.C. 78c(a)(27).

As a result, the Commission is revising proposed Rule 19b-4(n)(1) to provide that Advance Notices filed before December 10, 2012 must be filed with the Commission by submitting the Advance Notice to a dedicated email inbox to be established by the Commission.¹⁵⁰ A designated clearing agency that files an Advance Notice by email must include in the notice the same information that is required to be included for Advance Notices in the General Instructions for Form 19b-4, as such form has been modified by the rules the Commission is adopting today.¹⁵¹ Advance Notices filed on or after December 10, 2012 on Form 19b-4 would include the same substantive information.

1. Standards for Determining When Advance Notice is Required

Section 806(e)(1)(A) requires a designated financial market utility to provide 60 days advance notice to its Supervisory Agency of any proposed change to its rules, procedures or operations that could materially affect the nature or level of risks presented by the designated financial market utility.¹⁵² For purposes of this requirement, the phrase “materially affect the nature or level of risks presented” is defined in new Rule 19b-4(n)(2)(i) to mean the existence of a “reasonable possibility that the change could affect the performance of essential clearing and settlement functions or the overall nature or level of risk presented by the designated clearing

¹⁵⁰ The Commission’s Office of Information Technology maintains a system, known as the E-Mail Encryption Solution, that allows persons outside the agency to compose and send encrypted emails to users within the Commission. The guide for external users wishing to utilize the E-Mail Encryption Solution is available at:
http://wapps.sec.gov/oitintranet/oit_learn/pdf/Smail-external-guide-01-05-2011.pdf.

¹⁵¹ The Commission notes that a designated clearing agency must also continue to meet the filing requirements of Rule 19b-4 and Form 19b-4. For example, if the change that requires the designated clearing agency to file an Advance Notice with the Commission is also a proposed rule change under Exchange Act Section 19(b), the designated clearing agency must file the proposed rule change with the Commission on Form 19b-4 using EFFS and separately file the Advance Notice with the Commission by email.

¹⁵² 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

resources, liquidity and operational abilities to continue to make payments to non-defaulting participants on time. Additional examples of the types of matters that could fall within the categories listed above include changes to the methods for making margin calculations, liquidity arrangements and significant new services of the clearing agency.

Moreover, while a broad interpretation of the materiality threshold is consistent with the underlying principles of the Clearing Supervision Act and desirable to permit a review of all matters that affect the risks presented by clearing agencies, not every change to a designated clearing agency's rules, procedures or operations will be material. Accordingly, new Rule 19b-4(n)(2)(iii), which is being adopted as proposed, includes two broad categories of examples of changes to rules, procedures or operations that the Commission believes would not materially affect the nature or level of risks presented by a designated clearing agency, and therefore would not require the filing of an Advance Notice. The first category includes, but is not limited to, changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated clearing agency or persons using its payment, clearing, or settlement services and that do not adversely affect the safeguarding of securities, collateral, or funds in the custody or control of the designated clearing agency or for which it is responsible. The second category includes, but is not limited to, changes concerned solely with the administration of the designated clearing agency or related to the routine, daily administration, direction and control of employees. The Commission believes that both categories of changes do not pertain to the core functions performed by a clearing agency and, therefore, would not materially affect the nature or level of risk presented by the clearing agency.

require an Advance Notice for a termination or reduction of a liquidity arrangement at the instance of the clearing agency."¹⁶¹

A second commenter expressed concern regarding the potential scope and burden of the requirement to submit Advance Notices in general, with a specific emphasis on the Commission's proposed definition of "materially affect the nature or level of risks presented" in Rule 19b-4(n)(2).¹⁶² In particular, the commenter argued that the requirement to submit Advance Notices should apply only to "matters of true importance that require attention by the Commission and comment by the public."¹⁶³ Accordingly, the commenter urged the Commission to avoid an overly expansive application of the requirement so as not to create undue strain on the designated clearing agency's resources, and to take into account the designated clearing agency's prior experience and judgment in filing proposed rule changes with the Commission pursuant to Exchange Act Section 19(b), the positions taken by the designated clearing agency during its consultations with the Commission regarding a change that could potentially result in an obligation to file an Advance Notice and the role and views of other entities responsible for supervising the designated clearing agency.¹⁶⁴

After careful consideration of these two commenters' views that the definition of "materially affect the nature or level of risk presented" is over broad, the Commission has decided to adopt Rule 19b-4(n)(2), as proposed. As discussed in the Proposing Release, the

¹⁶¹ See id.

¹⁶² See DTCC Letter at 3-4.

¹⁶³ See id. The Commission notes that Section 806(e) of the Clearing Supervision Act, which establishes the requirement that a financial market utility submit Advance Notices to its Supervisory Agency, also contemplates review of the Advance Notice by the Board and consultation between the Board and the applicable Supervisory Agency. See 12 U.S.C. 5465(e)(3) and (4) (as added by Title VIII).

¹⁶⁴ See id.

decrease risk), the Commission notes that as a practical matter, many changes to the rules, procedures or operations of a designated clearing agency may have both risk-increasing effects in some respects of a designated clearing agency's operations and risk-reducing effects in other respects. For example, a change in the clearing agency's margin calculation methodology could result in increased margin requirements for some members of the clearing agency and decreased margin requirements for other members. For that reason, Section 806(e) establishes the requirement to file Advance Notices with the Commission without distinguishing between changes that could materially increase or decrease the nature or level of risk.

Finally, and in response to a commenter's suggestion that proposed changes relating to a line of credit or the renewal of a liquidity facility be excluded from the Advance Notice requirement on the basis that imposing a 60 day delay in a designated clearing agency's ability to rely on such financing could be impractical and potentially increase risk for the clearing agency, the Commission notes that Section 806(e)(1)(I) permits a designated clearing agency to implement a change in less than 60 days if the Commission notifies the designated clearing agency in writing that it does not object to the proposed change to the designated clearing agency's rules, procedures or operations and authorizes the designated clearing agency to implement the change on an earlier date, subject to any conditions imposed by the Commission.¹⁶⁶ Accordingly, a designated clearing agency that wishes to implement a change in less than 60 days may request that the Commission expedite review of the Advance Notice and provide the written notification under Section 806(e)(1)(I).

¹⁶⁶ 12 U.S.C. 5465(e)(1)(I) (as added by Title VIII).

One commenter requested that the Commission modify the public notice provisions contained in new Rule 19b-4(n) in order to permit designated clearing agencies to request confidential treatment with respect to an Advance Notice and any related material (including, in certain circumstances, the fact of the filing itself) where the public disclosure of the notice or any such related material would (i) jeopardize the ability of the designated clearing agency to successfully achieve the objective of the proposed change which is the subject of the Advance Notice or (ii) disclose sensitive non-public information.¹⁶⁸ This commenter noted specifically that because changes requiring the filing of an Advance Notice by their nature affect risk and risk management controls, “they may intrinsically involve matters of great sensitivity, which are not appropriate for public disclosure.”¹⁶⁹ Section 806(e) does not require that an Advance Notice be made publicly available. However, the Commission is requiring publication of these notices by rule in order to give interested persons an opportunity to express their views with respect to a proposed change filed under Section 806(e). Although as a general matter the Commission believes that providing for a public comment period will benefit its review of Advance Notices, the Commission also understands the commenter’s concern that changes requiring the filing of an Advance Notice could, in some cases intrinsically involve proprietary information regarding a designated clearing agency’s risk management, the public disclosure of which could potentially harm the operations of the clearing agency. In such circumstances, the Commission believes that it is appropriate that an Advance Notice be permitted to be non-public. Accordingly, the Commission has added new Rule 19b-4(n)(6) to provide that the provisions of new Rule 19b-4(n) requiring publication of the Advance Notice in the Federal Register and the posting of the notice on the designated clearing agency’s website will not apply to any information contained in

¹⁶⁸ See DTCC Letter at 7-8.

¹⁶⁹ See id.

under Section 806(e). Because Sections 806(e)(1)(G) and (I) provide that a designated clearing agency may implement a proposed change that is the subject of an Advance Notice if the Commission does not object to it, the Commission will not issue a public order granting approval of the relevant change, as it does with proposed rule changes under Exchange Act Section 19(b). Because there will not be a Commission action to indicate when an Advance Notice has been permitted to take effect, the Commission is adopting new Rule 19b-4(n)(4)(i) to require the designated clearing agency to post notice on its website. Moreover, new Rule 19b-4(b)(n)(ii), which is being adopted as proposed, requires the designated clearing agency to post notice on its website of the time at which the proposed change becomes effective if that date is different from the date on which the proposed change is permitted to become effective. In order to give interested parties timely notice of the change, this notice will be required to be posted within two business days of the effective date. The Commission is allowing two business days for the designated clearing agency to post such notice because the existing notice requirement in Rule 19b-4(l), which requires SROs to post a proposed rule change filed under Exchange Act Section 19(b) and any amendments thereto on its website, is two business days after filing of the proposed rule change, and any amendments thereto, with the Commission.¹⁷² Once the notice of the effectiveness of the proposed change has been posted, the designated clearing agency will be permitted to remove its original posting of the Advance Notice (and any amendments thereto) from its website because notice of the change will no longer be necessary after the public is notified that the change has taken effect. Pursuant to new Rule 19b-4(n)(3)(i), which is being adopted as proposed, a designated clearing agency also may remove the Advance Notice from its website if it withdrew the notice or if it was notified that such notice was not properly filed. The

¹⁷² 17 CFR 240.19b-4(l).

the date such information is received by the Commission.¹⁷⁵ The Commission, may however, pursuant to Section 806(e)(1)(H), extend the review period for an additional 60 days for proposed changes that raise novel or complex issues, subject to the Commission providing the designated clearing agency with prompt written notice of the extension.¹⁷⁶ Finally, Section 806(e)(4) requires that the Commission consult with the Board before taking any action on, or completing its review of, the change referred to in the Advance Notice.¹⁷⁷ The timeframes set forth in Section 806(e) determine when a proposed change to a designated clearing agency's rules, procedures or operations will become effective, and the Commission does not believe additional rulemaking related to these timeframes is necessary at this time.

4. Implementation of Proposed Changes and Emergency Changes Pursuant to Section 806(e)

Section 806(e)(1)(F) provides generally that a designated clearing agency may not implement a proposed change filed as an Advance Notice during the applicable review period,¹⁷⁸ which is typically 60 days from the Commission's receipt of the Advance Notice, but may be longer if the Commission requests additional information or extends the review period in

¹⁷⁵ 12 U.S.C. 5465(e)(1)(E) (as added by Title VIII). The Commission expects that a designated clearing agency would submit a comment letter to the Secretary of the Commission each time that it provides any additional information to the Commission on EDFS in response to a Commission request for information made pursuant to Section 806(e)(1)(D). For purposes of the time periods set forth in Sections 806(e)(1)(E) and (G), the new 60-day period will begin on the date the Commission receives the additional information and the comment letter. Because the Commission will include a copy of this letter in its specific comment file for the Advance Notice, which is available on the Commission's website, this approach will provide the means for notifying the public that the information was submitted.

¹⁷⁶ 12 U.S.C. 5465(e)(1)(H) (as added by Title VIII).

¹⁷⁷ 12 U.S.C. 5465(e)(4) (as added by Title VIII).

¹⁷⁸ 12 U.S.C. 5465(e)(1)(F) (as added by Title VIII).

order for the designated clearing agency to continue to provide its services in a safe and sound manner.¹⁸⁴ In reviewing the emergency notice, the Commission may require modification or rescission of the relevant change if it determines that the change is not consistent with the purposes of the Clearing Supervision Act, including all applicable rules, orders, or the risk management standards prescribed under Section 805(a) of the Clearing Supervision Act.¹⁸⁵ The Commission did not receive any comments on a designated clearing agency's ability to act on an emergency basis. Designated clearing agencies would be required to provide such emergency notice on Form 19b-4, pursuant to the General Instructions, which are being adopted substantially as proposed.

D. Amendments to Form 19b-4

In conjunction with new Rules 19b-4(n) and (o), the Commission is adopting amendments to Form 19b-4 to reflect the requirements to file Security-Based Swap Submissions and Advance Notices with the Commission. Specifically, the Commission is modifying the cover page of Form 19b-4 to add additional checkboxes so that a clearing agency may indicate that the filing is being submitted as a Security-Based Swap Submission or an Advance Notice (in the case of a designated clearing agency) as well as a proposed rule change under Exchange Act Section 19(b), in each case to the extent applicable. A clearing agency will be able to select more than one filing type, check the appropriate box or boxes to indicate the filing type and submit all related information as a single filing. In other words, in cases where a proposed change must be filed pursuant to all three filing requirements, the clearing agency would be able,

¹⁸⁴ 12 U.S.C. 5465(e)(2)(C) (as added by Title VIII).

¹⁸⁵ 12 U.S.C. 5465(e)(2)(D) (as added by Title VIII). Pursuant to Section 806(e)(3), the Commission is required to provide the Board concurrently with a complete copy of any notice, request or other information it receives. However, the Commission is proposing that the designated clearing agency file copies of any such notice, requests or other information directly with the Board in order to help meet this requirement.

associated with the designated clearing agency's payment, clearing or settlement activities and the sufficiency of any proposed risk management techniques.

The Commission also is adopting a new Exhibit 1A to the General Instructions for the Federal Register notice template used by clearing agencies as an exhibit to the Form 19b-4 filing. New Exhibit 1A will be used only by clearing agencies. All other SROs will continue to use the current Exhibit 1 to prepare the Federal Register notice for proposed rule changes. The Commission is adopting a separate exhibit for clearing agencies because the rules requiring notice of Security-Based Swap Submissions and Advance Notices to be published in the Federal Register will apply only to clearing agencies. Instructions on preparing a Federal Register notice for Security-Based Swap Submissions and Advance Notices are unnecessary for all other SROs. In order to avoid any confusion, the Commission is providing clearing agencies with Exhibit 1A to use to prepare a Federal Register notice for a proposed rule change, Security-Based Swap Submission, or Advance Notice, or any combination of the three. The amendments to the General Instructions for Form 19b-4 also incorporate the statutory timeframes and other procedural requirements that are contained in Exchange Act Section 3C and Section 806(e).

Moreover, pursuant to existing Rule 19b-4(j), SROs are required to sign Form 19b-4 electronically in connection with filing a proposed rule change and to retain a copy of the signature page in accordance with Rule 17a-1. Under the rules the Commission is adopting today, Rule 19b-4(j) has been modified such that it also would apply to Security-Based Swap Submissions filed in accordance with Exchange Act Section 3C and Advance Notices filed in accordance with Section 806(e).

In addition, the Commission is adopting changes to the General Instructions for Form 19b-4, as proposed, to reflect the new deadlines by which the Commission must publish

General Instructions thereto, as compared to the version that was included in the Proposing Release, to conform to changes made to new Rule 19b-4(o)(3), as described in detail in section II.A.1.b of this release, and to make other necessary clarifications to the form to reflect typographical edits, changes to the form made pursuant to an interim final rule that was adopted after publication of the Proposing Release,¹⁸⁸ and other non-substantive revisions to eliminate or correct potentially vague or confusing language.¹⁸⁹

E. Amendments to Rule 19b-4 Relating to Section 916 of the Dodd-Frank Act

Under Exchange Act Section 19(b)(2)(E),¹⁹⁰ as added by the Dodd-Frank Act, the Commission is required to send the notice of a proposed rule change filed by an SRO to the Federal Register for publication thereof within 15 days of the date on which the SRO's website

¹⁸⁸ See Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies, Securities Exchange Act Release No. 34-64832 (July 7, 2011), 76 FR 41056 (July 13, 2011).

¹⁸⁹ In addition to the changes described in this section, the Commission has also made a number of minor typographical and clarifying revisions to the form as compared to what was included in the Proposing Release, including: (i) correcting typographical errors and inserting missing graphics on the face of the form, (ii) correcting typographical errors in the descriptions of the components of the form and inserting missing language in the description of Exhibit 1A, (iii) inserting parentheses to distinguish existing language from new language in Item A of the General Instructions, (iv) inserting language into Item B of the General Instructions to make clear that Advance Notices and Security-Based Swap Submissions are submitted to the Commission pursuant to different statutes, (v) inserting a missing word and closed parenthesis in Item D of the General Instructions, (vi) deleting the word "also" in the second sentence in Item 1(a) to make clear that the text of the proposed rule change should be included "either" in Exhibit 5 or Exhibit 1 (or Exhibit 1A in the filing of a clearing agency) (vii) revising the title of Exhibit 1A in Item 11 of the General Instructions, (viii) clarifying a defined term in Item 3 in of the General Instructions (Note 3), (ix) adding the phrase "If the proposed rule change is subject to Commission approval" to the beginning of the sentence in Item 6 to reflect the fact that only certain types of proposed rule changes are subject to Commission approval and (x) modifying Item II of Exhibit 1A to clarify which items of the General Instructions are specifically applicable to the exhibit. Based on the non-substantive nature of these revisions, the Commission finds notice of the revisions is not necessary. See 5 U.S.C. 553(b).

¹⁹⁰ 15 U.S.C. 78s(b)(2)(E).

filing processes for Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) by proposing that all such filings be made electronically on Form 19b-4.

New Rules 19b-4(n) and (o) and the corresponding amendments to Form 19b-4 are being adopted to avoid duplicative filings and to streamline the process and burden on clearing agencies and the Commission. However, the filing requirements of Exchange Act Section 3C, Section 806(e) and Exchange Act Section 19(b) are distinct from each other and subject to different statutory standards for Commission review. As a result, a clearing agency that files pursuant to more than one of these sections must meet the requirements of the applicable regulatory scheme before the applicable change may become effective.

Accordingly, it is likely that many proposals made by clearing agencies may be filed and require review under more than one of the three Commission review procedures discussed herein. For example, a designated clearing agency may be required to submit an Advance Notice in connection with its Security-Based Swap Submission if the requirement to clear the security-based swap described in the submission would materially affect the nature or level of risks presented by the designated clearing agency. Moreover, if the designated clearing agency did not have existing authority under its rules to clear the relevant security-based swap, such action also would require a proposed rule change filing under Exchange Act Section 19(b).

In other cases, only one of the three Commission-review procedures may apply because the scope of proposals requiring review under each of Section 806(e) and Exchange Act Section 3C is in some ways broader and in other ways narrower in comparison to Exchange Act Section 19(b). There is, for example, the potential that certain changes to the operations of a designated clearing agency may not require the filing of a proposed rule change under Exchange

Security-Based Swap Submission or Advance Notice also meets the criteria for a proposed rule change.

Notices with the Commission and to make Security-Based Swap Submissions would not replace the existing Exchange Act Section 19(b) rule filing process, nor will a filing made under Exchange Act Section 3C or Section 806(e) eliminate the need to satisfy the requirements of the other processes to the extent they are applicable. In other words, the Commission review required by Exchange Act Section 3C is different from the review required under Section 806(e), which in turn is different from the review required under Exchange Act Section 19(b).

Section 806(e) requires an analysis of the risk management issues that may impact the clearing agency, its participants, or the market. Exchange Act Section 19(b), by contrast, requires a broader evaluation and an analysis as to whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules thereunder. Finally, Exchange Act Section 3C only applies when a clearing agency plans to accept for clearing a security-based swap (or a group, category, type or class of security-based swaps), and the standard for review is based on a number of specified factors, including but not limited to: (i) how the submission is consistent with Section 17A of the Exchange Act and (ii) the factors specified in Exchange Act Section 3C relating to the security-based swap, the market for the security-based swaps, and the clearing agency.

The Commission believes that these distinct reviews make it possible for a submission made on Form 19b-4 to be acceptable under the standards for review for one of the three purposes but not under the others.¹⁹³ For example, in cases where a clearing agency's plan to accept a new security-based swap (or any group, category, type or class of security-based swaps)

¹⁹³ The Commission notes, however, that when a proposal is required to be filed as both a proposed rule change and an Advance Notice, the proposal would not become effective until the statutory provisions applicable to both types of filings are satisfied. For example, a rule proposal may provide for sound risk management practices but also have an anticompetitive aspect that would not satisfy the requirements of the Exchange Act.

particularly as commenters have stated that a significant amount of data would need to be provided in connection with a Security-Based Swap Submission. More broadly, the Commission is cognizant of the general need to provide for the orderly and methodical implementation of mandatory clearing determinations, commencing with the determinations made with respect to pre-enactment security-based swaps.¹⁹⁴ After considering these issues, the Commission has determined that the compliance date for new Rule 19b-4(o) will be the date that is 60 days after the date the Commission issues its first written determination pursuant to Exchange Act Section 3C(b)(2)(C)(ii)¹⁹⁵ determining whether a security-based swap, or group, category, type, or class of security-based swaps, is required to be cleared.

The Commission expects that such first determination will address pre-enactment security-based swaps (i.e., security-based swaps listed for clearing by a clearing agency as of the date of enactment of Exchange Act Section 3C), which, pursuant to Exchange Act Section 3C(b)(2)(B), were deemed to be submitted to the Commission as of such date.¹⁹⁶ Two clearing agencies listed security-based swaps for clearing as of July 21, 2010, and provided an extension to the 90-day review period in Exchange Act Section 3C(b)(3), which otherwise would have commenced on July 21, 2010. However, as with other Security-Based Swap Submissions, the Commission is required by the Exchange Act Section 3C to make a determination with respect to such pre-enactment submissions within the applicable review period. As described above, that section also requires the Commission to make the submission of pre-enactment security-based swaps available to the public and to provide at least a 30-day public comment period regarding

¹⁹⁴ See supra note 43 and accompanying text.

¹⁹⁵ 15 U.S.C. 78c-3(b)(2)(C)(iii) (as added by Section 763(a) of the Dodd-Frank Act).

¹⁹⁶ See 15 U.S.C. 78c-3(b)(2)(B).

Specifically, the Commission has submitted revisions to the current collection of information titled "Rule 19b-4 Filings with Respect to Proposed Rule Changes by Self-Regulatory Organizations" (OMB Control No. 3235-0045). The Commission also has submitted revisions to the current collection of information titled "Form 19b-4 under the Securities Exchange Act of 1934" (OMB Control No. 3235-0045). Finally, the Commission has submitted a new collection of information titled "Rule 3Ca-1 Stay of Clearing Requirement and Review by the Commission under the Securities Exchange Act of 1934" to OMB for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. OMB has not yet assigned a control number to the new collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Any information submitted to the Commission will be made publicly available.

In the Proposing Release, the Commission solicited comments on the collection of information requirements.¹⁹⁹ No written comments were received on the estimates in the Proposing Release, although the Commission received informal comments from eight clearing agencies prior to issuing the Proposing Release in order to inform its estimates in that release. For the most part, the Commission is not making any changes to the estimates in the Proposing Release; however, some initial burden estimates have been adjusted, as discussed below, to reflect updated information on such burden estimates.

A. Summary of Collection of Information

1. Amendments to Rule 19b-4 and Form 19b-4

Rule 19b-4 currently requires an SRO seeking Commission approval for a proposed rule change to provide the information stipulated in Form 19b-4. Form 19b-4 currently requires a

¹⁹⁹ See Proposing Release, supra note 24.

risk presented by the designated clearing agency.

The Commission anticipates that in many cases, a clearing agency will be required to file a proposal under Exchange Act Section 3C or Section 806(e) when it is already required to file a proposed rule change under Exchange Act Section 19(b). Accordingly, clearing agencies will be able to submit on the same Form 19b-4, proposals required to be filed with the Commission under Exchange Act Section 3C or Section 806(e) that they are already required to submit under Exchange Act Section 19(b). In some cases, however, a clearing agency will be required to file a proposal under Exchange Act Section 3C or Section 806(e) and not under Exchange Act Section 19(b), for example where a proposal materially affects the nature or level of risks presented by the clearing agency but does not change the rules of the clearing agency.

In addition, Exchange Act Section 3C and Section 806(e) each require information to be provided as part of the filing that is in addition to the information required to be filed with a proposed rule change under Exchange Act Section 19(b). A clearing agency will be required to include as part of a Security-Based Swap Submission a statement that includes, but is not limited to: (i) how the submission is consistent with Exchange Act Section 17A; (ii) information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Exchange Act Section 3C; and (iii) how the rules of the clearing agency meet the criteria for open access.

Section 806(e) provides that the Advance Notice include a description of the nature of the proposed change and the expected effects on risks to the designated clearing agency, its participants, or the market and it must provide a description of how the designated clearing agency will manage any identified risks. A designated clearing agency also will be required to provide any additional information requested by the Commission as necessary to assess the

Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap and the clearing of the security-based swap that the clearing agency has accepted for clearing. A counterparty to a security-based swap that applies for a stay of the clearing requirement for a security-based swap (or group, category, type, or class of security-based swaps) will be required to submit to the Commission the information set forth in new Rule 3Ca-1(b).²⁰¹

Any clearing agency that has accepted for clearing a security-based swap (or group, category, type, or class of security-based swaps) that is subject to the stay of the clearing requirement will be required to provide information requested by the Commission as it determines to be necessary and appropriate to assess any of the factors in the course of the Commission's review.

B. Use of Information

1. Amendments to Rule 19b-4 and Form 19b-4

The information currently required under Rule 19b-4 and reported on Form 19b-4 is used by the Commission to review proposed rule changes filed by SROs pursuant to Exchange Act Section 19(b)(1)²⁰² and to provide notice of the proposals to the general public. The Commission relies upon the information received in SRO filings, as well as public comments regarding the information, in reviewing and reaching decisions about whether to approve a proposed rule change.

The information to be provided by clearing agencies pursuant to the amendments to Rule 19b-4 and Form 19b-4 will be used by the Commission to evaluate Security-Based Swap Submissions and Advance Notices. The Commission will use the information filed on Form

²⁰¹ See Supra section II.B.

²⁰² 15 U.S.C. 78s(b)(1).

Security-Based Swap Submission. As with proposed rule changes under Exchange Act Section 19(b), the Commission will solicit comment from interested parties on proposals filed under Exchange Act Section 3C and Section 806(e). Interested parties could use the information to comment on the proposed change and to provide feedback on the development of the clearing agency's service offerings and the rules, procedures and operations of the clearing agency.

The information collected by the Commission with respect to the date on which the SRO posted a proposed rule change on its website (if such posting date is not the same as the filing date) will be used to inform the Commission of the date by which the Commission must send the SRO notice to the Federal Register for publication.

2. Stay of Clearing Requirement

The information provided as required by new Rule 3Ca-1 will be used by the Commission to determine whether to grant the stay of the clearing requirement sought by a counterparty and to review whether the clearing requirement will continue to apply to the security-based swap (or group, category, type, or class of security-based swaps) referenced in the request for a stay.

C. Respondents

1. Amendments to Rule 19b-4 and Form 19b-4

Prior to the enactment of the Dodd-Frank Act, 25 SROs were making filings with the Commission subject to the collection of information under Rule 19b-4 and Form 19b-4. In fiscal year 2011, these SRO respondents filed 1,606 proposed rule changes subject to the current collection of information, of which 1,180 proposed rule changes ultimately became effective.²⁰⁴

²⁰⁴ Filings of proposed rule changes are available on the Commission's website at <http://www.sec.gov/rules/sro.shtml>. To avoid duplication, the total figure does not include certain pre-filings made with the Commission pursuant to Rule 19b-4(f)(6),

few more in the foreseeable future.²⁰⁷ In the Proposing Release, the Commission noted that four clearing agencies were at that time authorized to clear security-based swaps pursuant to the temporary conditional exemptions and estimated that four to six clearing agencies could in the future clear security-based swaps and be subject to the information collection requirements in the rules relating to Exchange Act Section 3C. The Commission used the higher estimate (six) for the PRA analysis in the Proposing Release and the Commission believes that such estimate is still appropriate given the potential for additional clearing agencies to clear security-based swaps in the future.

The amendments to Rule 19b-4 and Form 19b-4 relating to the requirement to file Advance Notices with the Commission pursuant to Section 806(e) will only apply to clearing agencies that are registered with the Commission, designated by the Council as systemically important, and for which the Commission is the Supervisory Agency. There are currently nine clearing agencies registered with the Commission; this includes four clearing agencies that were registered with the Commission to clear securities transactions prior to the effectiveness of the Dodd-Frank Act, two clearing agencies that currently do not clear any securities transactions, and three clearing agencies that were deemed registered under Section 17A(l) after the effective date of Title VII of the Dodd-Frank Act and that are currently clearing or that plan to clear security-based swaps.²⁰⁸ In addition, and as noted above and in the Proposing Release, a few

²⁰⁷ Based on the significant level of capital and other financial resources necessary for the formation of a clearing agency, the Commission does not expect there to be a large number of clearing agencies that seek to clear security-based swaps.

²⁰⁸ Of the four clearing agencies that were authorized to clear security-based swaps at the time the Proposing Release was issued, one was not deemed registered with the Commission under Section 17A(l) of the Exchange Act after the temporary exemptions expired. Accordingly, the Commission has adjusted its estimate of clearing agencies that currently clear or plan to clear security-based swaps. However, the Commission recognizes that this clearing agency, as well as others, may seek to clear security-based

to the Commission. A further amendment to Rule 19b-4 will require an SRO that files a proposed rule change with the Commission to inform the Commission of the date on which it posted such proposal on its website if the posting did not occur on the same day that the SRO filed the proposal with the Commission. Finally, new Rule 3Ca-1 specifies the process for a security-based swap counterparty to apply to the Commission for a stay of the clearing requirement.

2. Rule 19b-4 and Form 19b-4

a. Introduction

As noted in the Proposing Release, the Commission conducted a survey and received informal comments from the staff of eight clearing agencies that will be subject to the new requirements in the amendments to Rule 19b-4 and Form 19b-4. These comments were received prior to the publication of the Proposing Release and the Commission did not receive any additional comments from clearing agencies or any other parties on these estimates after the Proposing Release was published. Clearing agencies indicated they would have to train personnel and develop policies and procedures in order to implement the new filing requirements under Rule 19b-4 and Form 19b-4 in connection with Security-Based Swap Submissions and Advance Notices. In addition, clearing agencies indicated they would have to submit additional information to the Commission on Form 19b-4 in order to meet the requirements for filing Security-Based Swap Submissions or Advance Notices, either as separate filings or as part of filings also submitted as proposed rule changes under Exchange Act Section 19(b).

The clearing agencies emphasized that the estimated burdens would depend in large part on the rules ultimately adopted by the Commission to define and determine how frequently Security-Based Swap Submissions and Advance Notices will be required to be filed and the

appropriate because the estimates of the burden per filing varied among clearing agencies and could vary among the filings submitted (i.e., some proposals may be more complex and require more time for the clearing agency to prepare a Security-Based Swap Submission or an Advance Notice). In addition, the Commission calculated the burden for the requirements related to Advance Notices assuming that they would apply to ten clearing agencies and the burden for the requirements related to Security-Based Swap Submissions assuming they would apply to six clearing agencies.

Finally, the Commission recognized that there will likely to be some substantive and procedural overlap with respect to the processes for preparing and submitting Security-Based Swap Submissions, Advance Notices and proposed rule changes that relate to the same subject matter. For example, in connection with a decision to accept for clearing a new type of security-based swap that was not previously permitted under the clearing agency's rules, a clearing agency could be required to make a filing as a Security-Based Swap Submission, an Advance Notice and a proposed rule change. In this case, because these submissions all relate to the same underlying proposal, the amount of time required to prepare a single Form 19b-4 for all three purposes is likely to be less than the aggregate amount of time ordinarily required to prepare and submit three separate filings. Nevertheless, in the Proposing Release the Commission calculated the PRA burden for each process individually without accounting for any reduction due to the anticipated overlap in order to assure that the Commission did not underestimate the burdens. Additionally, the estimates in the Proposing Release were derived from discussions between the Commission's staff and staff of the clearing agencies, as described above. A detailed description of the estimated burdens related to Rule 19b-4 and Form 19b-4 is set forth in the sections below. The Commission did not receive any comments on the PRA estimates published in the Proposing

In the Proposing Release, the Commission estimated that, after the initial training was completed, each SRO (including pre-Dodd-Frank Act clearing agencies) would spend approximately 10 hours annually training new compliance staff members and updating the training of existing compliance staff members to use EFFS. The Commission believed that only a minimal amount of EFFS training would be submission-specific and that training a person to submit either a proposed rule change, Security-Based Swap Submission or Advance Notice would generally be sufficient to allow such person to make one or more of the other types of submissions. The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as they are being adopted today, resulting in a total annual burden of 350 hours ((six respondent clearing agencies X 10 hours) + (29 respondent SROs that are not clearing agencies X 10 hours)).

Based on staff discussions with the clearing agencies prior to issuing the Proposing Release, the Commission estimated in the Proposing Release that there would be a one-time paperwork burden of 130 hours for each newly-registered clearing agency to draft and implement internal policies and procedures relating to using EFFS to submit Security-Based Swap Submissions, Advance Notices and proposed rule changes with the Commission, for a total of 780 hours (130 hours X six newly-registered clearing agencies). In addition, and based on conversations with staff from the clearing agencies prior to issuing the Proposing Release, the Commission estimated that there would be a one-time paperwork burden of 30 hours for each pre-Dodd-Frank Act clearing agency to draft and implement modifications to existing internal policies and procedures for using EFFS in order to update them for submitting Security-Based Swap Submissions and/or Advance Notices with the Commission for a total of 120 hours (30 hours X four pre-Dodd-Frank Act clearing agencies). The Commission believes, based on its

estimates that 80 proposed rule changes could be characterized as novel or complex and 1,526 proposed rule changes could be characterized as average. The Commission estimates that the total annual reporting burden for filing proposed rule changes with the Commission under the amendments to Rule 19b-4 and Form 19b-4 will be 87,086 hours $((1,526/25) \times 35^{212}$ average rule change proposals $\times 34$ hours) + $((80/25) \times 35$ complex rule change proposals $\times 129$ hours)). Thus, on average, the reporting burden for filing proposed rule changes is 38.74 hours $(87,086 \text{ hours} / (2,136 \text{ average rule change proposals} + 112 \text{ complex rule change proposals}))$. The Commission made similar estimates in the Proposing Release, only using 2009 fiscal year numbers, and did not receive any comments on those estimates. Accordingly, the Commission believes the modified estimates with 2011 fiscal year numbers are appropriate and, accordingly, these estimates have been used for the rules being adopted today.

d. Security-Based Swap Submissions

The Commission stated in the Proposing Release that the time required by clearing agencies to prepare, review and submit Security-Based Swap Submissions to comply with new Rule 19b-4(o) likely would vary significantly based on the unique characteristics of each Security-Based Swap Submission and the submitting clearing agency. The Commission estimated based on previous discussions with staff from clearing agencies that the amount of time that a clearing agency would require to internally prepare, review and submit a Security-Based Swap Submission would be 140 hours. The Commission also estimated that each clearing agency would submit 20 Security-Based Swap Submissions annually based on previous discussions with staff from the clearing agencies. The Commission did not receive any

²¹² This figure includes the 32 SROs registered with the Commission as of June 15, 2012 plus the additional clearing agencies that the Commission has estimated could potentially register in the future to clear security-based swaps.

e. Advance Notices

In the Proposing Release, the Commission estimated that the amount of time that designated clearing agency representatives will require to internally prepare, review and electronically file each Advance Notice with the Commission to comply with Rule 19b-4(n)(1) would be 90 hours. This estimate in the Proposing Release was based on the staff's previous discussions with the clearing agencies. The Commission did not receive any comments on this estimate. The Commission is modifying Rule 19b-4(n)(1) from the proposal to provide that designated clearing agencies that file an Advance Notice before December 3, 2012 shall file such notice with the Commission by email. However, the Commission does not believe the requirement to submit Advance Notices by email for a limited period of time would change the estimated amount of time for clearing agencies to prepare, review, and electronically file the notices since the material required to be provided in the filing remains the same and the method for submitting the filing remains electronic. The Commission also estimated in the Proposing Release that two hours should be added to the time required to prepare each Advance Notice to comply with the requirement contained in new Rule 19b-4(n)(5) to provide to the Board copies of all materials submitted to the Commission relating to an Advance Notice contemporaneously with such submission to the Commission. The Commission estimated in the Proposing Release based on previous conversations with staff from clearing agencies that each designated clearing agency would submit 35 Advance Notices to the Commission annually. The Commission did not receive any comments on these estimated burdens in the Proposing Release and is using the estimates for the rules being adopted today. Accordingly, the Commission estimates that the total annual reporting burden on designated clearing agencies submitting Advance Notices electronically with the Commission pursuant to new Rule 19b-4(n) and Form 19b-4 will be

were to be deemed registered under Section 17A(l) or that may be regulated by the Commission in the future to clear security-based swaps could incur some one-time costs associated with posting Security-Based Swap Submissions, Advance Notices and proposed rule changes on their websites. The Commission estimated that each newly-registered clearing agency would spend approximately 15 hours creating or updating its existing website in order to provide the capability to post these submissions online resulting in a total one-time burden of 90 hours (six respondent clearing agencies X 15 hours). Three of those clearing agencies were deemed registered under Section 17A(l) in July 2012 and were required to begin posting proposed rule changes on their websites pursuant to existing Rule 19b-4(l).²¹⁵ Because new Rules 19b-4(o)(5) and (n)(3) will require Security-Based Swap Submissions and Advance Notices to be posted on a clearing agencies' websites in the same manner as is required for proposed rule changes, the Commission does not believe these three clearing agencies would incur any additional costs to create or update their websites to post Security-Based Swap Submissions or Advance Notices pursuant to the new rules. Accordingly, the Commission is modifying the number of respondent clearing agencies to include only the three clearing agencies it estimates may be regulated by the Commission in the future in order to clear security-based swaps. The Commission did not receive any comments on the estimated burden in the Proposing Release regarding the number of hours to create or update a website and is using this estimated hours burden for the rules as adopted. The revised estimate is a one-time total burden of 45 hours (three respondent clearing agencies X 15 hours).

With respect to annual burdens, the Commission estimated in the Proposing Release that four hours would be required by a clearing agency to post a Security-Based Swap Submission on

²¹⁵ 17 CFR 240.19b-4(l).

requirement that SROs post proposed rule changes on their websites under Rule 19b-4(l) given the similarities between the two requirements.²¹⁸ The Commission therefore estimated that the total annual reporting burden for designated clearing agencies to post notice on their websites of any changes to their rules, procedures or operations referred to in Advance Notices will be 1,400 hours (35 Advance Notices X four hours X 10 respondent clearing agencies). The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

The Commission has previously provided PRA estimates with respect to the requirement in Rule 19b-4(l) that all SROs post proposed rule changes and amendments to proposed rule changes on their websites. The Commission does not believe the rules being adopted today will change those estimated hour burdens because those rules do not affect the current requirement that SROs post proposed rule changes on their websites. However, the Commission is increasing the number of respondent SROs given the increased number of clearing agencies that have been deemed registered under Section 17A(l) or that may seek to clear security-based swaps in the future. Clearing agencies registered with the Commission are SROs and are required to comply with the requirements in Rule 19b-4, including the requirement in Rule 19b-4(l) that they post proposed rule changes and amendments to proposed rule changes on their websites and to make any related updates. The Commission's previous PRA estimates are that SROs take four hours to post proposed rule change proposals under Exchange Act Section 19(b) and amendments on their websites and four hours to update the posted SRO rules on their websites once the proposed rules become effective.²¹⁹ There were 1,606 proposed rule changes filed with the Commission

²¹⁸ See id.

²¹⁹ See id.

would impose only a minimal burden, if any, on an SRO. The Commission stated in the Proposing Release that it believes that SROs currently post their proposed rule changes on their website on the same day on which they file them with the Commission. Further, the Commission believes that it is in the interest of an SRO to continue to do so, since prompt website posting triggers the requirement on the Commission to publish notice of the proposal. The new notice requirement would only be applicable in a situation where the SRO is unable to post its proposed rule change on the same day that it files it with the Commission, which the Commission expects would be an unlikely occurrence. However, because the deadline applicable to Commission publication is tied to SRO website posting, and the Commission has no means of ascertaining when website posting was made other than by receiving that information from the SRO itself, the Commission is imposing this requirement to capture necessary information to allow it to comply with Exchange Act Section 19(b), as amended by Section 916 of the Dodd-Frank Act.

Based on the Commission's experience receiving and reviewing proposed rule changes filed by SROs, the Commission estimated in the Proposing Release that SROs will fail to post proposed rule changes on their websites on the same day as the filing was made with the Commission in 1% of all cases, or 16 times each year. Further, the Commission estimated that each SRO will spend approximately one hour preparing and submitting notice to the Commission of the date on which it posted the proposed rule change on its website, resulting in a total annual burden of 16 hours.

Thus, the Commission estimated that the total annual reporting burden under Rule 19b-4

Proposing Release. Those estimates are discussed below; however, the clearing agencies emphasized that the estimated burdens would depend in large part on the number of stays requested annually and the scope of the information requested by the Commission in the course of the related review.

Pursuant to Exchange Act Section 3C(c)(1), the Commission on its own initiative or on the application of a counterparty may stay a clearing requirement made pursuant to Exchange Act Section 3C(a)(1) until it completes a review of the terms of the security-based swap and the clearing arrangement. The Commission is unable to estimate accurately the number of times it may stay a clearing requirement pursuant to Exchange Act Section 3C(c)(1) because it has not yet made any mandatory clearing determinations and it does not know what counterparties may object to a determination or when they would make an application for a stay. However, the Commission recognizes that there will likely be some applications for stays from clearing requirements made pursuant to a Commission determination and, for purposes of the Proposing Release, the Commission estimated there would be five applications for stays of a clearing requirement per clearing agency per year. This figure would represent one quarter of the estimated number of Security-Based Swap Submissions from each clearing agency per year, for a total of 30 applications for stays per year (5 stay applications X 6 respondent clearing agencies). The Commission did not receive any comments on this estimate in the Proposing Release and is using the same estimate for the rules as adopted.

Based on the Commission staff's discussions with the clearing agencies, the Commission estimated in the Proposing Release that a clearing agency would spend approximately 18 hours to retrieve, review, and submit the information associated with the stay of the clearing requirement. The Commission also estimated that each clearing agency would be required to

prepare than a new submission, due to the fact that some of the information addressed in the application for a stay will have already been provided with the Security-Based Swap Submission when it was published for notice and comment. As discussed above, the Commission estimated in the Proposing Release that counterparties to security-based swaps transactions would submit 30 applications requesting stays of the clearing requirement. Assuming an hourly cost of \$354 for an outside attorney,²²³ the total annual cost in the aggregate for the respondent counterparties to meet these requirements would be \$1,062,000 (100 hours X \$354 per hour for an outside attorney X 30 stay of clearing applications). The Commission did not receive any comments on these estimates in the Proposing Release and is using them for the rules as adopted.

E. Retention Period of Recordkeeping Requirements

Clearing agencies will be required to retain records of the collection of information (the manually signed signature page of the Form 19b-4, a file available to interested persons for public inspection and copying, of all Security-Based Swap Submissions, Advance Notices and proposed rule changes made pursuant to Rule 19b-4) and all correspondence and other communications reduced to writing (including comment letters) to and from such SROs concerning any Security-Based Swap Submissions, Advance Notices and proposed rule changes, for a period of not less than five years, the first two years in an easily accessible place, according to the current recordkeeping requirements set forth in Exchange Act Rule 17a-1.²²⁴

The Commission believes that maintaining the physical signature pages, Security-Based Swap Submissions, Advance Notices, proposed rule changes and all related correspondence and other communications would enable interested parties, including the Commission, to access a

²²³ See id.

²²⁴ SROs may also destroy or otherwise dispose of such records at the end of five years according to Rule 17a-6 of the Act. 17 CFR 240.17a-6.

IV. ECONOMIC ANALYSIS

The rules that the Commission is adopting today are largely concerned with implementing certain processes for clearing agencies and security-based swap counterparties to submit filings to the Commission. These include Security-Based Swap Submissions, Advance Notices, and requests for a stay of an existing mandatory clearing requirement. The economic analysis set forth below focuses on the economic considerations related to those processes. The analysis does not seek to address the full range of considerations that may result from the Commission's future actions, such as determinations based on the information submitted in specific filings. The Commission believes instead that these considerations are more appropriately addressed at the time such future determinations are made as each filing may raise unique issues that are unrelated to the submission process. The Commission, however, recognizes that the process rules are being adopted in the larger context of substantive reforms to the financial system pertaining to the clearing of securities. The Commission is mindful of the potential economic consequences of this larger substantive effort in considering the more limited economic consequences of these final procedural rules. In particular, the Commission is cognizant of the potential impact future determinations made with respect to mandatory clearing could have on clearing practices, given that central clearing of security-based swaps is a relatively recent development and much of the current security-based swaps market is cleared on a bilateral basis.

In recognition of the larger context within which the final rules are being adopted, this analysis begins with a review of the Dodd-Frank Act's new clearing requirements, current clearing practices, and views on the new clearing requirements, including the broader economic considerations that those requirements, practices, and views may suggest. This discussion then

requirements be applied in a consistent manner.²³⁰ CCPs generally use liquid margin collateral to manage the risk of a CCP member's failure, and rely on the accuracy of their margin calculations and their access to that liquid collateral to protect against sudden movements in market prices. A CCP that stands between counterparties for OTC derivatives is generally perceived to decrease systemic risk.²³¹

Exchange Act Section 3C(b), which was added pursuant to Title VII of the Dodd Frank Act, requires the Commission to adopt rules for a clearing agency's submission of security-based swaps (or any group, category, type or class of security-based swaps) that a clearing agency plans to accept for clearing and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.²³²

2. Current Clearing Practices in the Security-Based Swap Market

Prior to the enactment of the Dodd-Frank Act, there was no provision in the Exchange Act or any other laws in the U.S. for the mandatory clearing of OTC derivatives. Although initiatives related to central clearing had been considered before 2008, certain events of September 2008 brought a new focus on CDS as a source of systemic risk and contributed to a

²³⁰ See Christopher Culp, OTC-Cleared Derivative: Benefits, Costs, and Implications of the "Dodd-Frank Wall Street Reform and Consumer Protection Act, (Journal of Applied Finance No. 2, 2010), available at: <http://www.rmcsinc.com/articles/OTCCleared.pdf>.

²³¹ See, e.g., Darrell Duffie and Haoxiang Zhu, Does a Central Clearing Counterparty Reduce Counterparty Risk?, (Stanford University, Working Paper, 2010), available at: <http://www.stanford.edu/~duffie/DuffieZhu.pdf>; Nout Wellink, Mitigating system risk in OTC derivatives markets, (Banque de France, Financial Stability Review, No. 14 – Derivatives – Financial innovation and stability, July 2010), available at: http://www.banque-france.fr/fileadmin/user_upload/banque_de_france/publications/Revue_de_la_stabilite_financiere/etude15_rsf_1007.pdf; and Manmohan Singh, Collateral, Netting and System Risk in the OTC Derivatives Market, (International Monetary Fund, Working Paper, 2009), available at: <http://www.imf.org/external/pubs/ft/wp/2010/wp1099.pdf>.

²³² See 15 U.S.C. 78c-3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

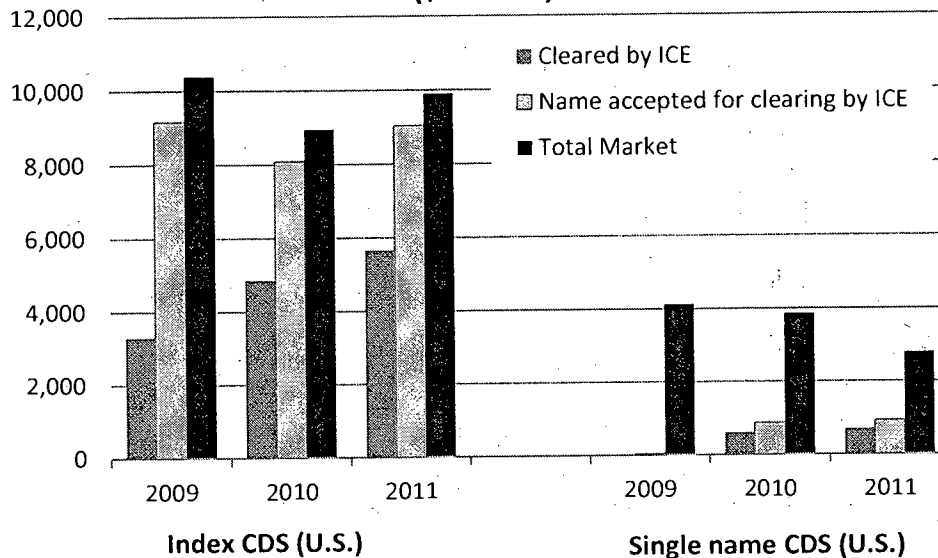
and other regulatory agencies monitored the activities of those clearing agencies, a significant volume of interdealer OTC CDS transactions and a smaller volume of dealer to non-dealer OTC CDS transactions were centrally cleared on a voluntary basis.²³⁷ As discussed in greater detail below, the level of voluntary clearing in swaps and security-based swaps has steadily increased since that time. Although the volume of interdealer CDS cleared to date is quite large,²³⁸ many security-based swap transactions are still ineligible for central clearing, and many transactions in security-based swaps eligible for clearing at a CCP continue to settle bilaterally.

Voluntary clearing of security-based swaps in the U.S. is currently limited to CDS products. Central clearing of security-based swaps began in March 2009 for index CDS products, in December 2009 for single-name corporate CDS products, and in November 2011 for single-name sovereign CDS products. At present, there is no central clearing in the U.S. for security based swaps that are not CDS products, such as those based on equity securities. The level of clearing activity appears to have steadily increased as more products have become eligible to be cleared. One illustration of this apparent trend is Figure 1 below, which shows the

²³⁷ Voluntary CCP clearing grew out of a series of meetings beginning in September 2005 hosted by the Federal Reserve Bank of New York with major market participants and their domestic and international supervisors for the purpose of discussing problems in the processing of credit default swaps, and related risk management and control issues. See <http://www.ny.frb.org/newsevents/news/markets/2005/an050915.html>. In June 2008 the attendees agreed to an agenda for improvement in the derivatives market infrastructure that included “developing a central counterparty for credit default swaps that, with a robust risk management regime, can help reduce systemic risk.” See <http://www.ny.frb.org/newsevents/news/markets/2008/ma080609.html>; see also <https://www.theice.com/marketdata/reports/ReportCenter.shtml>.

²³⁸ As of March 31, 2012, ICE Clear Credit had cleared approximately \$15.4 trillion notional amount of CDS contracts based on indices of securities, approximately \$1.4 trillion notional amount of CDS contracts based on individual reference entities or securities and \$151 billion notional amount of CDS contracts based on sovereigns. As of March 31, 2012, ICE Clear Europe had cleared approximately €7.7 trillion notional amount of CDS contracts based on indices of securities and approximately €1.2 trillion notional amount of CDS contracts based on individual reference entities or securities.

**Figure 1. Gross notional transaction volume*
(\$billions)**



*Source: DTCC-TIW

Figure 1 shows that U.S.-based index CDS products comprise a greater proportion of the CDS market than U.S. single-name corporate CDS products and account for the bulk of current clearing activity in U.S. CDS transactions. The proportion of transactions in names accepted for clearing that are ultimately cleared also appears to be higher in U.S.-based index CDS products than in U.S. corporate single-name CDS products. In calendar years 2010 and 2011, Figure 1 indicates that 90% of the total gross notional volume of transactions in index names was accepted for clearing as of the end of each calendar year and that cleared index transactions correspond to more than 50% of the total gross notional volume of index trades during the same period. By contrast, the figure suggests that the proportion of transactions in accepted names in U.S. single-name corporate CDS was only 33% during 2011, with cleared transactions during the same year totaling only 25% of the total trades during the same period.

Table 1, below, provides more detail of the data summarized in Figure 1. The Table reports the proportion of gross notional market activity in names accepted for clearing and the

transactions that are actually being cleared.

Table 1. Cleared trades and accepted trades as a percentage of gross notional transaction volume.

	U.S. Index CDS			U.S. Single Name CDS		
	2009	2010	2011	2009	2010	2011
Gross notional volume (\$ billions)	10,400	8,900	9,900	4,100	3,900	2,800
Percent of gross notional in names accepted for clearing						
- at calendar year end	88%	90%	91%	1%	23%	33%
- at time of trade execution	55%	87%	91%	0%	16%	29%
Cleared transactions: % of gross notional	32%	54%	57%	0%	16%	25%

One important limitation of the calendar year snapshots is that the volumes of cleared transactions reported by ICE Clear Credit likely overstate the percentages of total market activity that are cleared in a particular calendar year because many of the trades submitted for clearing to ICE Clear Credit are bilateral transactions entered into in a prior calendar year before ICE Clear Credit began clearing the particular security-based swap. Such transactions were submitted for clearing retroactively – through a process referred to as “backloading” – causing the termination of the original trade and the creation of two new trades with ICE Clear Credit, both of which are reported to DTCC-TIW by ICE Clear Credit as cleared transactions, but only one of which is reported for the purpose of calculating the clearing volume reported in Figure 1. Until April 2011, all newly cleared security-based swaps were submitted for clearing in this manner because same-day clearing was not available. Since April 2011, clearing members have been able to submit new trades in security-based swaps for clearing on the same day the counterparties enter into the trade. With same-day clearing, the trade is first submitted to the CCP for clearing, and the CCP then reports it to the DTCC-TIW as a single transaction. However, some backloading will likely continue to occur as long as CCPs continue to expand the roster of security-based swaps that they accept for clearing, making more past trades eligible for backloading.

segments of the security-based swap market remain uncleared, even where a CCP is available to clear the product in question on a voluntary basis. Due in part to this data, the Commission recognizes that mandatory clearing determinations made pursuant to Exchange Act Section 3C(a)(1) could alter current clearing practices at the time such determinations are made. One potential consequence of determinations that require mandatory clearing for certain security-based swaps could be a higher level of clearing for such security-based swaps than would take place under a voluntary system. Where the amount of clearing taking place under a voluntary system is significantly different from the level of clearing that would take place if trading in a product were mandatory and where such difference marks a shift in existing market clearing practices, the mandatory clearing determination could potentially have a material economic impact.

New Rule 19b-4(o) and the corresponding amendments to Form 19b-4 focus largely on the process for how a clearing agency is required to make Security-Based Swap Submissions. Interested parties, including a number of academics, have expressed their views on the potential impact of the underlying clearing determinations that will be made by the Commission in response to Security-Based Swap Submissions or pursuant to the Commission's own initiative. While these parties generally agree that a well-managed CCP would help to mitigate counterparty credit risk in the security-based swaps markets, their views vary on how effective a clearing requirement would be in controlling risk to the financial system. For example, some believe that central clearing is a core feature of the Dodd-Frank Act and is intended to mitigate systemic risk. According to this view, there should be as much central clearing of security-based

products.”²⁴⁶ In this commenter’s view, “[w]hile sound, centralized clearing affords clear benefits, it should be noted that centralized clearing also entails increased operational and collateral costs.”²⁴⁷ According to this commenter, these additional costs underscore the importance of the Commission “strik[ing] an appropriate balance in evaluating the relevant statutory standards applicable to a mandatory clearing determination, and weigh[ing] the relevant factors and market impacts with great care.”²⁴⁸

4. Overview of Statutory Requirements

Exchange Act Section 3C(b) requires the Commission to adopt rules for a clearing agency’s submission of security-based swaps (or any group, category, type or class of security-based swaps) that a clearing agency plans to accept for clearing and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.²⁴⁹ In addition, Section 806(e)(1)(B) of the Clearing Supervision Act requires each Supervisory Agency to adopt rules, in consultation with the Board, that define and describe when a designated financial market utility is required to file an Advance Notice with its Supervisory Agency.²⁵⁰ To satisfy these requirements, the Commission is today adopting new Rules 19b-4(n) and (o) and making corresponding amendments to Form 19b-4. In addition, Exchange Act

²⁴⁶ ISDA Letter at 2-3.

²⁴⁷ See id. Although the comment was submitted in response to the proposed process rule, the substance of the comments focused on the statutory requirements of Exchange Act Section 3C, including the Commission’s review of security-based swaps in order to determine whether the Commission should impose a mandatory clearing requirement (either pursuant to a Commission-initiated Review or a Security-Based Swap Submission).

²⁴⁸ See id.

²⁴⁹ See 15 U.S.C. 78c-3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

²⁵⁰ See 12 U.S.C. 5465(e)(1)(B) (as added by Title VIII).

and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.²⁵⁴ The Commission also is adopting two additional process-related rules related to the mandatory clearing of security-based swaps that are contemplated by the Dodd-Frank Act. Specifically, pursuant to Exchange Act Section 3C(c)(1), new Rule 3Ca-1 establishes a procedure for staying a mandatory clearing requirement and for the Commission's subsequent review of the terms of the security-based swap and the clearing arrangement. Separately, new Rule 3Ca-2, adopted pursuant to the anti-evasion authority granted to the Commission by Exchange Act Section 3C(d)(1), clarifies that the phrase "submits such security-based swap for clearing to a clearing agency" found in Exchange Act Section 3C(a)(1) – which establishes the mandatory clearing requirement for security-based swaps – means that the security-based swap subject to the clearing requirement must be submitted for central clearing to a clearing agency that functions as a CCP.

In adopting these rules, the Commission considered the procedural rules recently adopted by the CFTC pursuant to the mandatory clearing requirement in new Section 2(h) of the Commodity Exchange Act, as added by Section 723(a)(3) of the Dodd-Frank Act.²⁵⁵ The procedural rules adopted by the CFTC included, among other things, a rule for the submission of swaps by a DCO to the CFTC for a mandatory clearing determination.²⁵⁶ Given the similarity between the clearing requirements for swaps and security-based swaps under the CEA and the Exchange Act, respectively, the Commission carefully reviewed the rules adopted by the CFTC in formulating the rules the Commission is adopting today. Specifically, the Commission

²⁵⁴ See 15 U.S.C. 78c-3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

²⁵⁵ See Section 2(h) of the CEA, 7 U.S.C. 2(h) (as added by Section 723(a) of the Dodd-Frank Act).

²⁵⁶ See 76 FR 44464 (Jul. 26, 2011).

Specifically, the Commission is adopting new Rule 19b-4(n) and corresponding amendments to Form 19b-4 to set forth the process by which a designated clearing agency (for which the Commission is the Supervisory Agency) must file Advance Notices with the Commission.

Finally, the Commission is adopting technical, conforming and clarifying amendments to Rule 19b-4 and Form 19b-4 to conform the rule and form with new deadlines and approval, disapproval and temporary suspension standards with respect to proposed rule changes filed under Exchange Act Section 19(b), as modified by Section 916 of the Dodd-Frank Act.

The principal benefit of the final rules is that they will facilitate the operation of certain substantive regulations contemplated by the Dodd-Frank Act. Specifically, as described above, the Dodd-Frank Act establishes a number of reforms related to the substantive regulation of securities clearing including, for example, with respect to the mandatory clearing of security-based swaps and enhanced oversight of systemically important financial market utilities. While the final rules do not themselves implement these substantive reforms, they do establish certain processes that clearing agencies and security-based swap counterparties must follow in order for the broader substantive regulations to proceed.

For example, Exchange Act Sections 3C(b)(2)(A) and (b)(5) require the Commission to adopt rules for a clearing agency's submission of security-based swaps (or any group, category, type or class of security-based swaps) that a clearing agency plans to accept for clearing and to determine the manner of notice the clearing agency must provide to its members of such Security-Based Swap Submission.²⁶⁰ The Commission is then required to make a determination, pursuant to Exchange Act Section 3C(b)(2)(C)(ii), whether the security-based swap described in the submission is required to be cleared (*i.e.*, subject to mandatory clearing). New Rule 19b-4(o)

²⁶⁰ See 15 U.S.C. 78c-3(b)(2)(A) and (5) (as added by Section 763(a) of the Dodd-Frank Act).

Finally, Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.²⁶⁴ In addition, Section 23(a)(2) of the Exchange Act²⁶⁵ requires the Commission, when adopting rules and regulations under the Exchange Act, to consider the impact such new rule would have on competition. Section 23(a)(2) of the Exchange Act also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Because these rules focus on the process by which clearing agencies make Security-Based Swap Submissions, the Commission believes that the rules being adopted today will have a minimal, if any, impact on efficiency, competition, and capital formation. Although in some cases process rules themselves can have a significant impact on efficiency, competition, and capital formation, in this context, the rules are intended to simply facilitate implementation of the larger statutory regime regarding mandatory clearing. The Commission believes the rules are being implemented in a cost-efficient way consistent with the statute (e.g., leveraging existing infrastructure and procedures familiar to clearing agencies), but the rules themselves should have a minimal impact on efficiency, competition, and capital formation. The Commission nevertheless recognizes that its subsequent mandatory clearing determinations, which will be based on the particular facts and circumstances of each individual Security-Based Swap Submission, could potentially have an impact on efficiency, competition, and capital formation in the security-based swap market.

²⁶⁴ 15 U.S.C. 78c(f).

²⁶⁵ 15 U.S.C. 78w(a)(2).

systemic risk, the factors in Section 3C(b)(4)(B) require the Commission to consider the effect of a mandatory clearing determination on the market, whether market participants trading in the particular security-based swap could all meet a mandatory clearing requirement or if the costs of such a requirement would competitively disadvantage some participants, and whether the clearing agency has the operational and risk management systems in place to effectively mitigate systemic risk.

The Commission will conduct each review in accordance with Exchange Act Section 3C(b)(4),²⁶⁹ with determinations made on a case-by-case basis in connection with the unique facts and circumstances of each submission. The Commission will consider the factors in Exchange Act Section 3C(b)(4)(B) at the time the Commission conducts a review, drawing on the information provided by the relevant clearing agency in accordance with new Rule 19b-4(o).

In the Proposing Release, the Commission identified potential costs and benefits resulting from Rule 19b-4(o) and the related amendments to Form 19b-4, as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. Although the Commission did not receive any comments on the specific cost-benefit analysis contained in the Proposing Release, some commenters raised concerns about the overall scope of some of the proposed rules. In particular, one commenter suggested that new Rule 19b-4(o)(3), which sets forth the information that a clearing agency will be required to include in a Security-Based Swap Submission, is broad and burdensome, not authorized by the Dodd-Frank Act, and would

²⁶⁹ See 15 U.S.C. 78c-3(b)(4) (as added by Section 763(a) of the Dodd-Frank Act).

Act. The list of information required pursuant to new Rule 19b-4(o)(3)(ii) incorporates the identical qualitative and quantitative factors that the Commission is required to consider pursuant to Exchange Act Section 3C(b)(4)(B) when determining whether a security-based swap (or group, category, type or class of security-based swaps) will be subject to the mandatory clearing requirement.²⁷¹ In addition, the information required pursuant to new Rule 19b-4(o)(3)(i) (discussing how the Security-Based Swap Submission is consistent with Section 17A of the Exchange Act) and new Rules 19b-4(o)(3)(iii)-(iv) (describing how the clearing agency's rules for open access are applicable to the security-based swap described in the Security-Based Swap Submission) also track statutory requirements contained in Exchange Act Section 3C.²⁷² The Commission therefore believes that it has crafted new Rule 19b-4(o)(3) to allow it to obtain the information necessary to complete its statutory obligation to make the required determination, without imposing undue additional information requirements on clearing agencies. As described in greater detail below, the Commission also believes that the available alternatives to the approach being adopted would have been less cost-efficient because of the concentration of relevant information in the clearing agencies and would not represent the best option for appropriately implementing the statutory mandate.

However, the Commission is mindful that the new procedure set forth by Rule 19b-4(o) will result in costs for clearing agencies, even if that procedure were to achieve optimal efficiency. As in the Proposing Release, this analysis looks first to the hourly burdens contained in the PRA analysis in Section IV (which hourly figures have been updated from the estimates

²⁷¹ See 15 U.S.C. 78c-3(b)(4)(B)(i)-(v) (as added by Section 763(a) of the Dodd-Frank Act) (emphasis added).

²⁷² See 15 U.S.C. 78c-3(b)(4)(A) (as added by Section 763(a) of the Dodd-Frank Act) (regarding compliance with Section 17A of the Exchange Act) and 15 U.S.C. 78c-3(a)(2) (as added by Section 763(a) of the Dodd-Frank Act) (setting forth the standards for evaluating whether the rules of a clearing agency provide for open access).

list such security-based swap for clearing would result in the requirement to make a Security-Based Swap Submission despite the fact that the clearing agency may have previously filed a proposed rule change with respect to the same security-based swap. As a result, clearing agencies put in this position could incur additional costs by being required to make a greater number of filings than they do currently under Exchange Act Section 19(b). In addition, the Commission notes that Security-Based Swap Submissions filed before December 10, 2012, will not be filed on Form 19b-4 in order to allow time for the Commission to make the necessary system upgrades to EDFS. Accordingly, a clearing agency that files a Security-Based Swap Submission prior to December 10, 2012, that is also an Advance Notice or proposed rule change (or both) will be required to submit two separate filings with the Commission. However, the Commission believes that the requirement to file the Security-Based Swap Submission by email, as well as the temporary nature of the requirement, will impose relatively little additional burden on clearing agencies, which can use their existing email systems to make such filings.

While the Commission recognizes the importance of considering these costs, and appreciates that some costs may be unavoidable in establishing a new procedure, the Commission believes that new Rule 19b-4(o) is cost-efficient and appropriately implements the provisions identified by Congress as requiring Commission rulemaking. Specifically, while implementing the submission and notice requirements in Exchange Act Section 3C, the Commission anticipates that the rule will minimize unnecessary costs to filers by utilizing a format that clearing agencies should be familiar with and, as they become registered clearing agencies, will be otherwise required to use for all of their proposed rule changes under existing Commission rules.

complete in the first instance, reducing the likelihood that further information requests will be required and the associated costs for clearing agencies incurred.

Moreover, as described above, new Rule 19b-4(o) limits the information required to be provided to the Commission while, at the same time, allowing the Commission to meet its statutory requirements under specific categories established by the Dodd-Frank Act. The Commission, in seeking the most cost-efficient solution for the new procedure that also appropriately implements the statutory mandate, chose not to include additional information requests in the rule at this time because the Commission believes that the factors identified in the statute are capable of supporting a reasonable determination with respect to a Security-Based Swap Submission. Nevertheless, the Commission recognizes that a clearing agency may still require additional clarification or guidance with respect to what information must be included in a Security-Based Swap Submission. In that regard, Commission staff is in regular contact with each clearing agency and expects to be able to provide such clarification or guidance as necessary or appropriate based on the relevant facts and circumstances.

Finally, although the Commission is still in the process of determining how best to aggregate security-based swaps into groups, categories, types or classes, requiring that Security-Based Swap Submissions aggregate security-based swaps in this manner, to the extent reasonable and practicable to do so, as provided for in new Rule 19b-4(o)(4), could eventually lead to further cost efficiencies by reducing the number of filings required to be made with the Commission, and subsequently reducing the number of submissions that must be processed and reviewed by Commission staff.

Separately, with respect to notice, the Commission believes that new Rule 19b-4(5) appropriately implements the statutory mandate and creates a cost-efficient method of providing

of the clearing arrangement; and the reasons why a stay should be granted and why the security-based swap should not be subject to a clearing requirement, specifically addressing the same factors a clearing agency must address in its Security-Based-Swap Submission pursuant to Rule 19b-4(o).²⁷⁷ In the Proposing Release, the Commission identified potential costs and benefits resulting from Rule 3Ca-1 as proposed and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission did not receive any responses to this request.

The Commission is mindful of the costs associated with the final procedure for the application for a stay. As in the Proposing Release, this analysis looks first to the hourly burdens contained in the PRA analysis in Section IV (which hourly figures have been updated from the estimates provided in the Proposing Release) multiplied by the estimated hourly cost. As previously noted, the Commission is unable to estimate accurately the number of stay applications that it will receive pursuant to new Rule 3Ca-1 and Section 3C(c)(1) because the Commission has not yet made any mandatory clearing determinations, does not know which counterparties may object to a determination, and has no information as to when counterparties would make an application for a stay. Accordingly, the Commission has no reasonable basis for estimating the number of applications. In addition, the mere fact that a counterparty files an request for a stay does not automatically create an obligation on the relevant clearing agency to respond to the application. Rather, new Rule 3Ca-1(d) provides that any clearing agency that has accepted for clearing a security-based swap that is subject to the stay shall provide information requested by the Commission necessary to assess any of the factors it determines to be

²⁷⁷ Rule 3Ca-1(b).

\$8,238 per clearing agency per stay. These estimates of course also assume that there is an application (when in fact there may be none in cases where the Commission exercises its authority under Exchange Act Section 3C(c)(1) to grant a stay on its own initiative) and that it requires a clearing agency to respond (when in fact it may not be required to respond in cases where the Commission does not require the production of additional information pursuant to new Rule 3Ca-1(d)).

After considering these illustrative costs, the Commission believes that new Rule 3Ca-1 appropriately implements the provisions identified by Congress as requiring Commission rulemaking and is cost-efficient for the parties that will most likely be affected by the rule. In particular, the Commission believes that the information required of the counterparty and, if applicable, the clearing agency, is information that is most likely to be in the possession of the relevant party, and that alternative mechanisms for obtaining that information would be comparatively more costly for the parties involved. For example, similar to the analysis conducted with respect to Security-Based Swap Submissions, one alternative would have been to require that the Commission rely on information within its possession to make a determination with respect to the application for a stay. However, with respect to the counterparty, the Commission is all but certain not to have the full information required to understand the application – the counterparty alone will likely have its reasons as to why the stay should be granted and why the security-based swap should not be subject to a clearing requirement. Similarly, a clearing agency will only be required to submit information in connection with this process in response to a request by the Commission in order to facilitate the Commission's review of the application for a stay and, if the stay is granted, the applicable clearing

presented by the designated financial market utility.”²⁷⁹ In addition, Congress mandated that each Supervisory Agency, including the Commission, adopt rules, in consultation with the Board, that define and describe when a designated financial market utility is required to file an Advance Notice with its Supervisory Agency.²⁸⁰ Accordingly, new Rule 19b-4(n) was intended to define and describe when Advance Notices are required to be filed by designated clearing agencies and to set forth the process for filing such notices with the Commission.

In the Proposing Release, the Commission identified potential costs and benefits resulting from Rule 19b-4(n) and the related amendments to Form 19b-4 as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. Although the Commission did not receive any comments on the specific cost-benefit analysis contained in the Proposing Release, some commenters suggested that proposed 19b-4(n)(2), which defines the phrase “materially affect the nature or level of risks presented” for purposes of determining when a designated clearing agency will be required to submit an Advance Notice with the Commission, was overly broad and burdensome.²⁸¹ Specifically, these commenters generally argued that the definition would result in a requirement to submit Advance Notices to the Commission regarding matters that were risk-reducing, impractical, and potentially of lesser importance to the designated clearing agency and its regulators, which could potentially place an unnecessary strain on the existing resources of the clearing agency.²⁸²

²⁷⁹ See 12 U.S.C. 5465(e)(1)(A) (as added by Title VIII).

²⁸⁰ See 12 U.S.C. 5465(e)(1)(B) (as added by Title VIII).

²⁸¹ See supra notes 154 to 162 and accompanying text.

²⁸² See id.

contained in the PRA analysis in Section IV (which hourly figures have been updated from the estimates provided in the Proposing Release) multiplied by the estimated hourly cost. The Commission estimates the total annual cost related to filing and posting Advance Notices to be \$15,890,000 in the aggregate for ten respondent clearing agencies.²⁸⁵

In addition, the Commission recognizes that registered clearing agencies may incur some additional costs associated with filing Advance Notices that are not readily quantifiable. For example, some proposed changes may be required to be filed only as Advance Notices under Section 806(e) and not as proposed rule changes under Exchange Act Section 19(b). In these circumstances, clearing agencies will likely incur additional costs by being required to make a greater number of filings than they do currently under Exchange Act Section 19(b), which would result from the application of different standards for triggering a filing under the two statutory provisions. In addition, the Commission notes that Advance Notices filed before December 10, 2012, will not be filed on Form 19b-4 in order to allow time for the Commission to make the necessary system upgrades to EFFS. Accordingly, a designated clearing agency that is required to file a change as both an Advance Notice and a proposed rule change will be required to submit two separate filings with the Commission. However, the Commission believes that the requirement to file the Advance Notice by email, as well as the temporary nature of the requirement, will impose relatively little additional burden on clearing agencies, which can use their existing email systems to make such filings.

²⁸⁵ This figure consists of the total hourly burdens identified in sections III.D.2.e and III.3, multiplied by the costs per hour attributed to different specialists. Specifically, \$320 is attributed per hour for in-house compliance attorneys, \$354 per hour for outside attorneys and \$225 per hour for a Webmaster. These hourly rates were based on the corresponding figures set forth in SIFMA's Management & Professional Earnings in the Securities Industry 2010, modified by the Commission's staff to account for an 1800 hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

allowing the clearing agency to refer to and cross-reference information in one part of the submission if the information is relevant to a separate filing that is part of the same submission (so long as the requirements of each applicable rule are individually satisfied and if the clearing agency clearly explains how the information in one filing is applicable to the specific information required to be provided in the other filing).

5. Analysis of Final Rules to Amend Rule 19b-4 to Conform to the Requirements of Section 916 of the Dodd-Frank Act

The Commission has made a number of modifications to Rule 19b-4 and Form 19b-4 to conform to the requirements specified in Exchange Act Section 19(b), as amended by Section 916 of the Dodd Frank Act. These amendments were designed to incorporate changes required by Section 916, which provided for new deadlines by which the Commission must publish and act upon a proposed rule change submitted by all SROs and new standards for the approval, disapproval, and temporary suspension of a proposed rule change. In the Proposing Release, the Commission identified potential costs and benefits resulting from these amendments, as proposed, and requested comment on all aspects of the cost-benefit analysis, including the identification and assessment of any costs and benefits that were not discussed in the analysis. The Commission did not receive any responses to this request.

The Commission estimates that the requirement that an SRO inform the Commission of the date on which it posted a proposed rule change on its website (if the posting did not occur on the same day that the SRO filed the proposal with the Commission) will impose only a minimal burden, if any, on the SRO. As discussed in Section IV.B.4., the Commission believes that SROs currently post their proposed rule changes on their website on the same day on which they file them with the Commission. It would be unlikely that an SRO would fail to post its proposed rule change on the same day that it files with the Commission, since prompt website posting

Administrative Procedure Act,²⁸⁹ as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all rules it has proposed to determine the impact of such rulemaking on “small entities.”²⁹⁰ Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.²⁹¹

A. Self-Regulatory Organizations

New Rule 19b-4(n) and the corresponding amendments to Form 19b-4 will apply to all designated clearing agencies. New Rule 19b-4(o) and the corresponding amendments to Form 19b-4 will apply to all security-based swap clearing agencies. New rules 3Ca-1 and 3Ca-2 also will apply to all security-based swap clearing agencies. All of the remaining amendments to Rule 19b-4 and Form 19b-4, including those made to Rule 19b-4(l) to reflect the revisions to Exchange Act Section 19(b) pursuant to Section 916 of the Dodd-Frank Act, will apply to all SROs. Three entities are currently registered to provide central clearing services for CDS, a class of security-based swaps. The Commission believes, based on its understanding of the market, that likely no more than six security-based swap clearing agencies could be subject to the requirements of new Rule 19b-4(o) and new Rules 3Ca-1 and 3Ca-2. In addition, the Commission believes that approximately ten registered clearing agencies could be designated by the Council as systemically important (and for which the Commission will be the Supervisory Agency) and subject to the requirements of new Rule 19b-4(n), which includes the four

²⁸⁹ 5 U.S.C. 551 et seq.

²⁹⁰ Section 601(b) of the RFA permits agencies to formulate their own definitions of “small entities.” The Commission has adopted definitions for the term “small entity” for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10.

²⁹¹ See 5 U.S.C. 605(b).

and securities brokerage activities, entities with \$6.5 million or less in annual receipts; (ii) for entities engaged in trust, fiduciary and custody activities, entities with \$6.5 million or less in annual receipts; and (iii) funds, trusts and other financial vehicles with \$6.5 million or less in annual receipts.²⁹⁵

Based on the Commission's existing information about SROs, the Commission believes that such entities will not be small entities, but rather part of large business entities that exceed the thresholds defining "small entities" set out above. Additionally, while other clearing agencies may become eligible to operate as central counterparties for security-based swaps, the Commission does not believe that any such entities will be "small entities" as defined in Exchange Act Rule 0-10.²⁹⁶ Furthermore, the Commission believes it is unlikely that clearing agencies acting as central counterparties for security-based swaps would have annual receipts of less than \$6.5 million. Accordingly, the Commission believes that any clearing agencies clearing security-based swaps by acting as central counterparties for such transactions will exceed the thresholds for "small entities" set forth in Exchange Act Rule 0-10.

B. Security-Based Swap Counterparties

New Rule 3Ca-1 will apply to any counterparty to a security-based swap subject to the clearing requirement that applies for a stay of a mandatory clearing requirement. For the purposes of Commission rulemaking and as applicable to new Rule 3Ca-1, a small entity includes: (i) when used with reference to a clearing agency, a clearing agency that (a) compared, cleared and settled less than \$500 million in securities transactions during the preceding fiscal year, (b) had less than \$200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter) and (c) is

²⁹⁵ 13 CFR 121.201, Sector 52.

²⁹⁶ See 17 CFR 240.0-10(d).

impact upon such an entity. Given that the new stay application process entails the submission of a written statement to the Commission setting forth information about the security-based swap transaction for which the stay is sought, the Commission believes the impact of the application process on a counterparty would be minimal.³⁰¹ Furthermore, even if the stay application process were to have a significant economic impact upon such non-clearing agency counterparty, the Commission believes that the number of entities so impacted will be no more than 30.³⁰² Accordingly, in respect of non-clearing agency counterparties to security-based swap transactions, the Commission believes that new Rule 3Ca-1 will not have a significant economic impact on a substantial number of small entities.

C. Certification

For the reasons stated above, the Commission certifies that the amendments to Rule 19b-4, including new Rules 19b-4(n) and (o) and all corresponding amendments to Form 19b-4, and new Rules 3Ca-1 and 3Ca-2 will not have a significant economic impact on a substantial number of small entities for the purposes of the RFA.

³⁰¹ In the economic analysis, the Commission estimated that the 30 counterparties would incur \$1,062,000 in total aggregate costs to prepare and submit applications requesting a stay of a clearing requirement, which breaks down to \$35,400 per stay. See supra note 278 and accompanying text.

³⁰² As previously noted, the Commission is unable to estimate accurately the number of times it will receive an application for a stay pursuant to Section 3C(c)(1) because it has not yet made any mandatory clearing determinations and it does not know what counterparties may object to a determination or when they would make an application for a stay. However, the Commission recognizes that there will likely be applications for stays and, for purposes of conducting the PRA analysis, the Commission estimated there would be five applications for stays of a clearing requirement per clearing agency per year. This figure represents one quarter of the estimated number of Security-Based Swap Submissions from each clearing agency per year, for a total of 30 applications for stays per year. While the Commission recognizes that a counterparty may submit multiple stay applications, in order to use the most conservative estimate possible, the Commission is assuming that each of the 30 estimated applications will be submitted by different counterparties. See supra section III.D.4.

2. Add an undesignated center heading and §§240.3Ca-1 and 240.3Ca-2 following §240.3b-19 to read as follows:

Clearing of Security-Based Swaps

240.3Ca-1 Stay of clearing requirement and review by the Commission.

240.3Ca-2 Submission of security-based swaps for clearing.

* * * * *

§240.3Ca-1 Stay of clearing requirement and review by the Commission.

(a) After making a determination pursuant to a clearing agency's security-based swap submission that a security-based swap, or any group, category, type or class of security-based swaps, is required to be cleared, the Commission, on application of a counterparty to a security-based swap or on the Commission's own initiative, may stay the clearing requirement until the Commission completes a review of the terms of the security-based swap (or group, category, type, or class of security-based swaps) and the clearing of the security-based swap (or group, category, type, or class of security-based swaps) by the clearing agency that has accepted it for clearing.

(b) A counterparty to a security-based swap applying for a stay of the clearing requirement for a security-based swap (or group, category, type, or class of security-based swaps) shall submit a written statement to the Commission that includes:

- (1) A request for a stay of the clearing requirement;
- (2) The identity of the counterparties to the security-based swap and a contact at the counterparty requesting the stay;
- (3) The identity of the clearing agency clearing the security-based swap;
- (4) The terms of the security-based swap subject to the clearing requirement and a description of the clearing arrangement; and

phrase submits such security-based swap for clearing to a clearing agency in the clearing requirement of Section 3C(a)(1) of the Act shall mean that the security-based swap will be submitted for central clearing to a clearing agency that functions as a central counterparty.

* * * * *

3. § 240.19b-4 is amended by:
 - a. Removing the phrase “Preliminary Note:” in the undesignated introductory paragraph;
 - b. Removing paragraph (b);
 - c. Redesignating paragraph (a) as paragraph (b);
 - d. Adding new paragraph (a);
 - e. In paragraph (i), adding the phrase “notices and submissions” after “of all filings”;
 - f. In paragraph (i), adding the words “notice or submission,” after the phrase “any such filing,”;
 - g. In paragraph (i), removing the phrase “the filing of the proposed rule change.” and adding in its place “the filing, notice or submission of the proposed rule change, advance notice or security-based swap submission, as applicable.”;
 - h. In paragraph (j), first sentence, removing the words “with respect to proposed rule changes”;
 - i. Revising paragraph (l), introductory paragraph;
 - j. In paragraph (l)(4), revising the phrase “Web site” to read “website”;
 - k. In paragraph (m)(1), revising the phrase “Web site” to read “website”;
 - l. In paragraph (m)(2), revising the phrase “Web site” to read “website”;

U.S.C. 78c-3(b)(2)) for each security-based swap, or any group, category, type or class of security-based swaps, that such clearing agency plans to accept for clearing;

(6) The term stated policy, practice, or interpretation means:

(i) Any material aspect of the operation of the facilities of the self-regulatory organization; or

(ii) Any statement made generally available to the membership of, to all participants in, or to persons having or seeking access (including, in the case of national securities exchanges or registered securities associations, through a member) to facilities of, the self-regulatory organization ("specified persons"), or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to:

(A) The rights, obligations, or privileges of specified persons or, in the case of national securities exchanges or registered securities associations, persons associated with specified persons; or

(B) The meaning, administration, or enforcement of an existing rule.

* * * * *

(l) The self-regulatory organization shall post each proposed rule change, and any amendments thereto, on its website within two business days after the filing of the proposed rule change, and any amendments thereto, with the Commission. If a self-regulatory organization does not post a proposed rule change on its website on the same day that it filed the proposal with the Commission, then the self-regulatory organization shall inform the Commission of the date on which it posted such proposal on its website. Such proposed rule change and amendments shall be maintained on the self-regulatory organization's website until:

(iii) Changes to rules, procedures, or operations that may not materially affect the nature or level of risks presented by a designated clearing agency include, but are not limited to:

(A) Changes to an existing procedure, control, or service that do not modify the rights or obligations of the designated clearing agency or persons using its payment, clearing, or settlement services and that do not adversely affect the safeguarding of securities, collateral, or funds in the custody or control of the designated clearing agency or for which it is responsible; or

(B) Changes concerned solely with the administration of the designated clearing agency or related to the routine, daily administration, direction, and control of employees;

(3) The designated clearing agency shall post the advance notice, and any amendments thereto, on its website within two business days after the filing of the advance notice, and any amendments thereto, with the Commission. Such advance notice and amendments shall be maintained on the designated clearing agency's website until the earlier of:

(i) The date the designated clearing agency withdraws the advance notice or is notified that the advance notice is not properly filed; or

(ii) The date the designated clearing agency posts a notice of effectiveness as required by paragraph (n)(4)(ii) of this section.

(4)(i) The designated clearing agency shall post a notice on its website within two business days of the date that any change to its rules, procedures, or operations referred to in an advance notice has been permitted to take effect as such date is determined in accordance with Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465).

(ii) The designated clearing agency shall post a notice on its website within two business days of the effectiveness of any change to its rules, procedures, or operations referred to in an advance notice.

contain the information required to be included for security-based swap submissions in the General Instructions for Form 19b-4.

(3) A security-based swap submission submitted by a clearing agency to the Commission shall include a statement that includes, but is not limited to:

(i) How the security-based swap submission is consistent with Section 17A of the Act (15 U.S.C. 78q-1);

(ii) Information that will assist the Commission in the quantitative and qualitative assessment of the factors specified in Section 3C of the Act (15 U.S.C. 78c-3), including, but not limited to:

(A) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data;

(B) The availability of a rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded;

(C) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract;

(D) The effect on competition, including appropriate fees and charges applied to clearing; and

(E) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or one or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property;

(iii) A description of how the rules of the clearing agency prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are

with a statement of written reasons therefor.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The general authority citation for part 249 is revised and a sub-authority is added in section number order to read as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * *

Section 249.819 is also issued under 12 U.S.C. 5465(e).

* * * * *

5. Revise §249.819 to read as follows:

§249.819 Form 19b-4, for electronic filings with respect to proposed rule changes, advance notices and security-based swap submissions by all self-regulatory organizations.

This form shall be used by all self-regulatory organizations, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(26)), to file electronically proposed rule changes with the Commission pursuant to Section 19(b) of the Act (15 U.S.C. 78s(b)) and §240.19b-4, advance notices with the Commission pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act (12 U.S.C. 5465(e)) and §240.19b-4 and security-based swap submissions with the Commission pursuant to Section 3C(b)(2) of the Act (15 U.S.C. 78c-3(b)(2)) and §240.19b-4.

* * * * *

6. Form 19b-4 (referenced in §249.819) is revised to read as follows:

Note: The text of Form 19b-4 does not and the amendments will not appear in the Code of Federal Regulations.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
For complete Form 19b-4 instructions please refer to the EFFF website.

Form 19b-4 Information

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3).

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item 1 and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

Supervision Act and the rules and regulations thereunder, in each case as applicable to the self-regulatory organization and in accordance with the requirements for each type of filing. The self-regulatory organization must provide all the information called for by the form, including the exhibits, and must present the information in a clear and comprehensible manner.

The proposed rule change, security-based swap submission, or advance notice shall be considered filed on the date on which the Commission receives the proposed rule change, security-based swap submission, or advance notice if the filing complies with all requirements of this form. Any filing that does not comply with the requirements of this form may be returned to the self-regulatory organization. Any filing so returned shall for all purposes be deemed not to have been filed with the Commission. See also Rule 0-3 under the Act (17 CFR 240.0-3).

C. Documents Comprising the Completed Form

The completed form filed with the Commission shall consist of the Form 19b-4 Page 1, numbers and captions for all items, responses to all items, and exhibits required in Item 11. In responding to an item, the completed form may omit the text of the item as contained herein if the response is prepared to indicate to the reader the coverage of the item without the reader having to refer to the text of the item or its instructions. Each filing shall be marked on the Form 19b-4 with the initials of the self-regulatory organization, the four-digit year, and the number of the filing for the year (e.g., SRO-YYYY-XX). If the SRO is filing Exhibits 2 or 3 via paper, the exhibits must be filed within 5 calendar days of the electronic submission of all other required documents.

D. Amendments

If information on this form is or becomes inaccurate before the Commission takes action on the proposed rule change or the security-based swap submission, or prior to the expiration of

from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e., partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

If, after the Form 19b-4 is filed but before the Commission takes final action on it, the self-regulatory organization receives or prepares any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, security-based swap submission, or advance notice, the communications shall be filed as Exhibit 2. If information in the communication makes the filing inaccurate, the filing shall be amended to correct the inaccuracy. If such communications cannot be filed electronically in accordance with Instruction F, the communications shall be filed in accordance with Instruction G.

E. Completion of Action by the Self-Regulatory Organization on the Proposed Rule Change

The Commission will not approve a proposed rule change or make a determination regarding a security-based swap submission or raise no objection to an advance notice before the self-regulatory organization has completed all action required to be taken under its constitution, articles of incorporation, bylaws, rules, or instruments corresponding thereto (excluding action specified in any such instrument with respect to (i) compliance with the procedures of the Act or (ii) the formal filing of amendments pursuant to state law).

G. Procedures for Submission of Paper Documents for Exhibits 2 and 3

To the extent that Exhibits 2 and 3 cannot be filed electronically in accordance with Instruction F, four copies of Exhibits 2 and 3 shall be filed with the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

Page 1 of the electronic Form 19b-4 shall accompany paper submissions of Exhibits 2 and 3. If the SRO is filing Exhibits 2 and 3 via paper, they must be filed within five calendar days of the electronic filing of all other required documents.

H. Withdrawals of Proposed Rule Changes, Security-based Swap Submissions or Advance Notices

If a self-regulatory organization determines to withdraw a proposed rule change, security-based swap submission, or advance notice, it must complete Page 1 of the Form 19b-4 and indicate by selecting the appropriate check box to withdraw the filing.

I. Procedures for Granting an Extension of Time for Commission Final Action

After the Commission publishes notice of a proposed rule change or security-based swap submission, if a self-regulatory organization wishes to grant the Commission an extension of the time to take final action as specified in Section 19(b)(2) or Section 3C, the self-regulatory organization shall indicate on the Form 19b-4 Page 1 the granting of said extension as well as the date the extension expires.

Information to Be Included in the Completed Form ("Form 19b-4 Information")

1. Text of the Proposed Rule Change

(a) Include the text of the proposed rule change, security-based swap submission, or advance notice. Text of the proposed rule change should be included either in Exhibit 5 or Exhibit 1 (or Exhibit 1A in the filing of a clearing agency). Changes in, additions to, or deletions

2. Procedures of the Self-Regulatory Organization

Describe action on the proposed rule change, security-based swap submission, or advance notice taken by the members or board of directors or other governing body of the self-regulatory organization. See Instruction E.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Provide a statement of the purpose of the proposed rule change and its basis under the Act and the rules and regulations thereunder applicable to the self-regulatory organization. With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act, except for proposed rule changes that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the self-regulatory organization. With respect to proposed rule changes filed pursuant to Section 19(b)(1) of the Act that have been abrogated pursuant to Section 19(b)(7)(C) of the Act, the statement should be sufficiently detailed and specific to support a finding under Section 19(b)(7)(D) of the Act that the proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. At a minimum, the statement should:

(a) Describe the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will operate to resolve those problems, the manner in which the proposed rule change will affect various persons (e.g., brokers, dealers, issuers, and investors), and any significant problems known to the self-regulatory organization that persons affected are likely to have in complying with the proposed rule change; and

Under Section 11A(c)(5) of the Act, a national securities exchange or registered securities association may not limit or condition the participation of any member in any registered clearing agency.

NOTE 2. Registered Clearing Agencies. Under Section 17A of the Act, rules of a registered clearing agency may not permit unfair discrimination in the admission of participants or among participants in the use of the clearing agency, may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of Section 17A of the Act or the administration of the clearing agency, and may not impose any schedule of prices, or fix rates or other fees, for services rendered by its participants.

NOTE 3. Municipal Securities Rulemaking Board. Under Section 15B of the Act, rules of the Municipal Securities Rulemaking Board may not permit unfair discrimination between customers, issuers, municipal securities brokers, or municipal securities dealers, may not fix minimum profits, or impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by municipal securities brokers or municipal securities dealers, and may not regulate, by virtue of any authority conferred by the Act, matters not related to the purposes of the Act with respect to municipal securities or the administration of the Municipal Securities Rulemaking Board.

4. Self-Regulatory Organization's Statement on Burden on Competition

State whether the proposed rule change will have an impact on competition and, if so, (i) state whether the proposed rule change will impose any burden on competition or whether it will relieve any burden on, or otherwise promote, competition and (ii) specify the particular categories of persons and kinds of businesses on which any burden will be imposed and the ways in which the proposed rule change will affect them. If the proposed rule change amends an

6. Extension of Time Period for Commission Action

If the proposed rule change is subject to Commission approval, state whether the self-regulatory organization consents to an extension of the time period specified in Section 19(b)(2) or Section 19(b)(7)(D) of the Act and the duration of the extension, if any, to which the self-regulatory organization consents.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

(a) If the proposed rule change is to take, or to be put into, effect, pursuant to Section 19(b)(3), state whether the filing is made pursuant to paragraph (A) or (B) thereof.

(b) In the case of paragraph (A) of Section 19(b)(3), designate that the proposed rule change:

- (i) is a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule,
- (ii) establishes or changes a due, fee, or other charge,
- (iii) is concerned solely with the administration of the self-regulatory organization,
- (iv) effects a change in an existing service of a registered clearing agency that either (A)(1) does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and (2) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service or (B)(1) primarily affects the futures clearing operations of the clearing agency with respect to futures that are not security futures and (2) does not significantly affect any securities clearing operations of the clearing agency or any related rights or obligations of the clearing agency or persons using such service, and set forth the basis on which such designation is made,

summary power under Section 19(b)(3)(B), the Commission is required to make one of the findings described above but may not have a full opportunity to make a determination that the proposed rule change otherwise is consistent with the requirements of the Act and the rules and regulations thereunder. The Commission will generally exercise its summary power under Section 19(b)(3)(B) on condition that the proposed rule change to be declared effective summarily shall also be subject to the procedures of Section 19(b)(2) of the Act. Accordingly, in most cases, a summary order under Section 19(b)(3)(B) shall be effective only until such time as the Commission shall enter an order, pursuant to Section 19(b)(2)(A) of the Act, to approve such proposed rule change or, depending on the circumstances, until such time as the Commission shall institute proceedings to determine whether to disapprove such proposed rule change or, alternatively, such time as the Commission shall, at the conclusion of such proceedings, enter an order, pursuant to Section 19(b)(2)(B), approving or disapproving such proposed rule change.

(d) If accelerated effectiveness pursuant to Section 19(b)(2) or Section 19(b)(7)(D) of the Act is requested, provide a statement explaining why there is good cause for the Commission to accelerate effectiveness.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

State whether the proposed rule change is based on a rule either of another self-regulatory organization or of the Commission, and, if so, identify the rule and explain any differences between the proposed rule change and that rule, as the filing self-regulatory organization understands it. In explaining any such differences, give particular attention to differences between the conduct required to comply with the proposed rule change and that required to comply with the other rule.

(iii) A description of how the rules of the clearing agency prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency, as applicable to the security-based swaps described in the security-based swap submission; and

(iv) A description of how the rules of the clearing agency provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility, as applicable to the security-based swaps described in the security-based swap submission.

NOTE. In connection with the factor specified in Item 9(b)(ii)(A) above, the statement describing the existence of outstanding notional exposures, trading liquidity and adequate pricing data could address pricing sources, models and procedures demonstrating an ability to obtain price data to measure credit exposures in a timely and accurate manner, as well as measures of historical market liquidity and trading activity, and expected market liquidity and trading activity if the security-based swap is required to be cleared (including information on the sources of such measures). With respect to the factor specified in Item 9(b)(ii)(B) above, the statement describing the availability of a rule framework could include a discussion of the rules, policies or procedures applicable to the clearing of the relevant security-based swap. Additionally, the discussion of credit support infrastructure specified in Item 9(b)(ii)(B) above could include the methods to address and communicate requests for, and posting of, collateral. With respect to the factor specified in Item 9(b)(ii)(C) above, the discussion of systemic risk could include a statement on the clearing agency's risk management procedures including, among other things, the measurement and monitoring of credit exposures, initial and variation margin methodology,

(c) A clearing agency shall submit security-based swaps to the Commission for review by group, category, type or class of security-based swaps, to the extent reasonable and practicable to do so.

(d) A clearing agency shall file as an amendment to this Form 19b-4 any additional information necessary to assess any of the factors the Commission determines to be appropriate in order to make a determination regarding the clearing requirement.

(e) A security-based swap submission pursuant to Section 3C that also is required to be filed as a proposed rule change under Section 19(b) or an advance notice under Section 806(e) of the Payment, Clearing and Settlement Supervision Act shall not take effect until determinations are obtained under each of the other applicable statutory provisions.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

(a) A designated clearing agency shall provide notice on this Form 19b-4 sixty (60) days in advance of any proposed change to its rules, procedures, or operations that could, as defined in Rule 19b-4, materially affect the nature or level of risks presented by the designated clearing agency.

(b) A designated clearing agency shall include in the advance notice a description of:

(i) the nature of the change and expected effects on risks to the designated clearing agency, its participants, or the market; and

(ii) how the designated clearing agency plans to manage any identified risks.

(c) A designated clearing agency shall file as amendment to this Form 19b-4 any additional information that is required to be filed by the Commission as necessary to assess the effect the proposed change would have on the nature or level of risks associated with the

notice and copies of all written comments on the proposed rule change, security-based swap submission, or advance notice received by the self-regulatory organization (whether or not comments were solicited), presented in alphabetical order, together with an alphabetical listing of such comments. If such notices and comments cannot be filed electronically in accordance with Instruction F, the notices and comments shall be filed in accordance with Instruction G.

(b) Copies of any transcript of comments on the proposed rule change, security-based swap submission, or advance notice made at any public meeting or, if a transcript is not available, a copy of the summary of comments on the proposed rule change, security-based swap submission, or advance notice made at such meeting. If such transcript of comments or summary of comments cannot be filed electronically in accordance with Instruction F, the transcript of comments or summary of comments shall be filed in accordance with Instruction G.

(c) If after the proposed rule change, security-based swap submission, or advance notice is filed but before the Commission takes final action on it, the self-regulatory organization prepares or receives any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, security-based swap submission, or advance notice, the communications shall be filed in accordance with Instruction F. If such communications cannot be filed electronically in accordance with Instruction F, the communications shall be filed in accordance with Instruction G.

Exhibit 3. Copies of any form, report, or questionnaire covered by Item 1(a). If such form, report, or questionnaire cannot be filed electronically in accordance with Instruction F, the form, report, or questionnaire shall be filed in accordance with Instruction G.

SPECIFIC INSTRUCTIONS FOR EXHIBIT 1 – NOTICE OF PROPOSED RULE CHANGE

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- ; File No. SR]

[Date]

Self-Regulatory Organizations; [Name of Self-Regulatory Organization]; Notice of Filing [and Immediate Effectiveness] of a Proposed Rule Change Relating to [brief description of subject matter of proposed rule change]

General Instructions

A. Format Requirements

The notice must comply with the guidelines for publication in the Federal Register, as well as any requirements for electronic filing as published by the Commission (if applicable). For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-XX-XX). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3). Leave a 1-inch margin at the top, bottom, and right hand side, and a 1 1/2 inch margin at the left hand side. Number all pages consecutively, consistent with Rule 0-3 under the Act (17 CFR 240.0-3). Double space all

the proposed rule change amends an existing rule, indicate changes in the rule by brackets for words to be deleted and underlined for words to be added.)

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(Reproduce the headings, and summarize briefly the most significant aspects of the responses, to Items 3, 4, and 5 of Form 19b-4, redesignating them as A, B, and C, respectively.)

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(2) of the Act, the following paragraph should be used.)

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(7)(D) of the Act, the following paragraph should be used.)

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve such proposed rule change, or
- (B) after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number **XX** on the subject line.

Paper Comments:

- Send paper comments in triplicate to [Name of Secretary], Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number **XX**. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more

SPECIFIC INSTRUCTIONS FOR EXHIBIT 1A – NOTICE OF PROPOSED RULE CHANGE,
SECURITY-BASED SWAP SUBMISSION, OR ADVANCE NOTICE FILED BY CLEARING
AGENCIES

EXHIBIT 1A

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- ; File No. SR]

[Date]

Self-Regulatory Organizations; [Name of Clearing Agency]; Proposed Rule Change, Security-
Based Swap Submission, or Advance Notice Relating to [brief description of subject matter of
proposed rule change, security-based swap submission, or advance notice]

General Instructions

A. Format Requirements

The notice must comply with the guidelines for publication in the Federal Register, as well as any requirements for electronic filing as published by the Commission (if applicable). For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-XX-XX). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3). Leave a 1-inch margin at the top, bottom, and right hand side, and a 1/2 inch margin at the left hand side. Number all pages consecutively, consistent with Rule 0-3

Information to Be Included in the Completed Notice

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

(Supply a brief statement of the terms of substance of the proposed rule change, security-based swap submission, or advance notice. If the proposed rule change is relatively brief, a separate statement need not be prepared, and the text of the proposed rule change may be inserted in lieu of the statement of the terms of substance. If the proposed rule change amends an existing rule, indicate changes in the rule by brackets for words to be deleted and underlined for words to be added.)

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, Security-Based Swap Submission, or Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change, security-based swap submission, or advance notice and discussed any comments it received on the proposed rule change, security-based swap submission, or advance notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements. (Reproduce the headings, and summarize briefly the most significant aspects of the responses, to Items 3, 4, 5, 9 or 10 of Form 19b-4, as applicable, redesignating them as A, B, C, D or E, as applicable, respectively.)

III. Date of Effectiveness of the Proposed Rule Change, Security-Based Swap Submission, and Advance Notice and Timing for Commission Action

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(2) of the Act, the following paragraph should be used.)

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer

proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

(If the proposed rule change is to be considered by the Commission pursuant to Section 19(b)(7)(D) of the Act, the following paragraph should be used.)

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve such proposed rule change, or
- (B) after consultation with the Commodity Futures Trading Commission institute proceedings to determine whether the proposed rule change should be disapproved.

(If the proposed change is filed as a security-based swap submission pursuant to Section 3C of the Act, the following paragraph should be used.)

Within 90 days after receiving a security-based swap submission, unless the submitting clearing agency agrees to an extension of time limitation, the Commission shall by order make its determination whether the security-based swap, or group, category, type or class of security-based swaps, described in the security-based swap submission is required to be cleared. In making its determination that the clearing requirement shall apply, the Commission may include such terms and conditions to the requirement as the Commission determines to be appropriate in the public interest.

The clearing agency shall post notice on its website of any clearing requirement that is implemented.

provide its services in a safe and sound manner. The Commission may require modification or rescission of the proposed change if it finds it is not consistent with the purposes of the Payment, Clearing and Settlement Supervision Act or any applicable rules, orders, or standards prescribed under Section 805(a).

(If the proposal is submitted pursuant to more than one filing requirement, the clearing agency shall add the following language in addition to the language above.)

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, security-based swap submission, or advance notice is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number **XX** on the subject line.

Paper Comments:

- Send paper comments in triplicate to [Name of Secretary], Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number **XX**. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 67312 / June 29, 2012

Admin. Proc. File No. 3-14271

In the Matter of

CALAIS RESOURCES INC.
c/o John A. Hutchings, Esq.
Dill Dill Carr Stonbraker & Hutchings, P.C.
455 Sherman Street, Suite 300
Denver, CO 80203

OPINION OF THE COMMISSION

SECTION 12(j) PROCEEDING

Grounds for Remedial Action

Failure to Comply with Periodic Filing Requirements

Company failed to file certain annual and quarterly reports in violation of the filing requirements of Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13. *Held*, it is necessary or appropriate for the protection of investors to revoke the registration of the company's securities.

APPEARANCES:

John A. Hutchings, Dill Dill Carr Stonbraker & Hutchings, P.C., for Calais Resources Inc.

Kyle M. DeYoung, *Neil J. Welch, Jr.*, and *David S. Frye*, for the Division of Enforcement

Appeal filed: August 12, 2011

Last brief received: October 31, 2011

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I.

Calais Resources Inc. ("Calais" or the "Company") appeals from an administrative law judge's decision finding that the Company violated Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13 by failing to file required annual and quarterly reports for a period exceeding six years, and revoking the registration of the Company's securities.¹ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.**A. Background**

Calais is a Canadian corporation located in Nederland, Colorado with a class of securities registered pursuant to Section 12(g) of the Exchange Act.² Calais initially registered its securities as a "foreign private issuer" and filed annual reports on Form 20-F prepared in accordance with Canadian generally accepted accounting principles, with a reconciliation to U.S. generally accepted accounting principles.³ In August 2003, after a financing that resulted in U.S. residents owning more than 50% of Calais's outstanding voting securities, Calais ceased to qualify as a "foreign private issuer" and became obligated to file its annual reports on Form 10-K.

In a letter dated March 2, 2007, the Division of Corporation Finance ("Corporation Finance") informed Calais that the Company did not appear to be in compliance with its Exchange Act reporting requirements.⁴ On March 16, 2007, Calais responded to Corporation Finance's letter by informing Commission staff that it hoped to return to compliance within 120

¹ Exchange Act Section 13(a) requires issuers of securities registered pursuant to Exchange Act Section 12 to file periodic reports in accordance with Commission rules. 15 U.S.C. § 78m(a). Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers to file annual reports, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires issuers to file quarterly reports.

² 15 U.S.C. § 78l(g).

³ Exchange Act Rule 3b-4(c), 17 C.F.R. § 240.3b-4(c), defines "foreign private issuer" as any foreign issuer other than a foreign government. An issuer is not deemed a foreign private issuer if: (a) its outstanding voting securities are more than 50% owned by United States residents and (b) the majority of its executive officers or directors are United States citizens or residents, more than 50% of its assets are located in the United States, or its business is administered principally in the United States.

⁴ At that time, Calais's most recent report was a quarterly report filed by the Company on October 15, 2004 on Form 10-QSB.

days.⁵ Calais further explained that it had not made the required filings because it could not pay its auditor, but assured the staff that it would soon return to compliance because a major investor had agreed to pay for the necessary audits. On May 8, 2007, Calais's counsel informed Commission staff that the Company was about to file its delinquent reports and asked if the reports could be consolidated into a single filing. Corporation Finance denied this request and told Calais to file separate reports. Despite its assurances, Calais failed to file any periodic reports for four additional years. From 2005 through 2010, however, Calais filed nineteen Forms 8-K reporting sales of its securities in private placement transactions exempt from registration under Section 4(2) of the Securities Act of 1933.⁶ On February 24, 2011, we issued an Order Instituting Proceedings ("OIP") with respect to Calais⁷ and an Order Suspending Trading in Calais's securities for ten business days.⁸

⁵ Additionally, a staff member in Corporation Finance stated in a declaration dated October 11, 2011 that she received a letter from Calais dated April 4, 2007 "seeking a 120 day extension" for Calais to make its filings.

⁶ Pursuant to Rule of Practice 323, 17 C.F.R. § 210.323, which permits us to take official notice of any matter in the public official records of the Commission, we take official notice of the Forms 8-K filed by Calais with respect to the Company's sales of its securities on December 20, 2010, August 13, 2008, July 10, 2008, June 18, 2008, April 11, 2008, April 7, 2008, March 27, 2008, February 7, 2008, January 17, 2008, January 4, 2008, December 28, 2007, December 6, 2007, March 19, 2007, August 2, 2006, July 13, 2006, May 4, 2006, February 13, 2006 and February 10, 2006 (regarding the same sales), and December 27, 2005. Collectively, these sales involved over 68 million shares of Calais's common stock and warrants in exchange for cash and other consideration in excess of \$6.2 million. Calais used the cash proceeds from the sales to pay operating expenses of the Company. For example, Calais's Form 8-K filed on July 7, 2008, discloses that the Company used \$125,000 from the sale of stock and warrants to pay "critical accounts payable, including fees owed to legal, audit and accounting service providers, and other corporate expenses."

⁷ The OIP also named six other issuers. We issued an order revoking the registration of the securities of Bio-Life Labs, Inc. pursuant to a settlement agreement. Securities Exchange Act Rel. No. 64093 (Mar. 18, 2011), 100 SEC Docket 39058. The remaining issuers failed to file answers to the OIP and an administrative law judge issued an order making findings and revoking the registrations of their securities. Exchange Act Rel. No. 64482 (May 13, 2011), 101 SEC Docket 41195.

⁸ *Bio-Life Labs, Inc.*, Exchange Act Rel. No. 63951 (Feb. 24, 2011), 100 SEC Docket 38219. The order also suspended trading in the securities of five other issuers named in the OIP.

B. Calais's Remedial Efforts

In its answer to the OIP, Calais admitted that it had not filed any annual or quarterly reports required by the Exchange Act since a quarterly report for the period ended on August 31, 2004, but argued that revoking the registration of its securities would be an "unduly harsh remedy" as the Company was willing and able to come into compliance with its reporting obligations. The law judge held four prehearing conferences during which Calais presented evidence of its efforts to return to compliance.

At the first prehearing conference held on March 29, 2011, Calais stated that it would file its 2010 annual report by April 22, 2011, annual reports for 2009 and 2008 by May 20, 2011, and all of its delinquent reports by June 17, 2011. On May 9, 2011, Calais filed an annual report for the 2010 fiscal year. The next day, at the second prehearing conference held on May 10, 2011, Calais acknowledged that all of its delinquent reports might not be filed by June 16, but represented that the Company would file all of the required reports "certainly well before" July 25, 2011.⁹ The Division of Enforcement ("Divison"), while noting that the 2010 annual report remained under review, reported that the filing contained deficient disclosure on audit fees.

Between the second and third prehearing conferences, in May and June 2011, Calais filed three quarterly reports and two annual reports.¹⁰ On June 14, 2011, the Division filed a declaration from an Assistant Chief Accountant in Corporation Finance noting that Calais had not yet filed all of its delinquent reports and identifying deficiencies in Calais's 2009 and 2010 annual reports.

As a "development" or "exploration" stage company, Calais is required to disclose in its annual reports "cumulative from inception" information as part of the financial statements required to be included with its Forms 10-K.¹¹ Stark Schenkein, LLP ("Stark"), Calais's auditor for the Company's financial statements from June 1, 2004 to the present, included financial information from the period encompassing the inception of the Company (December 31, 1986) through May 31, 2004 ("Inception to 2004 Period") that had been audited by KPMG, LLP

⁹ The OIP ordered that an initial decision be issued by the administrative law judge no later than 120 days from the date of service of the order, resulting in a July 25, 2011 due date for the initial decision. *See* Rule of Practice 360(a)(2), 17 C.F.R. § 201.360(a)(2).

¹⁰ The quarterly reports covered two quarters of 2010 and the first quarter of 2011, and the annual reports covered the fiscal years ended on May 31, 2008 and May 31, 2009.

¹¹ Statement of Financial Accounting Standards No. 7, paragraph 11.

("KPMG"), a former Calais auditor, and referred to KPMG's audit report in Calais's 2009 and 2010 Forms 10-K.¹²

Rule 2-05 of Regulation S-X provides that if the principal accountant examining the financial statements of a company "elects to place reliance on the work of [another independent] accountant and makes reference to that effect in his report, the separate report of the other accountant shall be filed."¹³ Calais, however, did not file KPMG's earlier audit report covering the financial information from the Inception to 2004 Period with its annual reports.¹⁴ Calais represents that, in 2007 and 2008, it sought KPMG's permission to include KPMG's audit report for the Inception to 2004 Period in the Company's filings, but that KPMG refused. David K. Young, Calais's President and Chief Operating Officer, stated in a declaration dated September 15, 2011, that the Company contacted KPMG again in September 2011 and was working with Stark and KPMG to obtain an audit report for the Inception to 2004 Period. Young estimated that it would take "between six and nine months to do so."¹⁵ Calais has provided no subsequent information on the status of that effort or the reasons why KPMG would not allow its audit report to be included in the Company's subsequent annual reports.

At the third prehearing conference held on June 24, 2011, Calais admitted that it had not filed all of the delinquent reports and requested additional time to review the Division's contentions, stating "we don't agree that the material deficiencies which are described are in fact material deficiencies." The law judge scheduled a final, fourth prehearing conference for July 18,

¹² Stark's audit reports for Calais's 2009 and 2010 annual reports state, in relevant part, "[t]he company's financial statements for the period from inception (December 31, 1986) to May 31, 2004 were audited by other auditors whose report expressed an unqualified opinion and included a going concern paragraph on those financial statements."

¹³ 17 C.F.R. § 210.2-05.

¹⁴ Other deficiencies identified in the Assistant Chief Accountant's declaration included the designation of certain information in the Company's financial statements as "unaudited" in apparent violation of Rule 8-02 of Regulation S-X, 17 C.F.R. § 210.8-02, which requires "smaller reporting companies" such as Calais to file audited financial statements with the Commission. Calais's Forms 10-K identify the Company as a "smaller reporting company" within the meaning of Rule 12b-2 of the Exchange Act, 17 C.F.R. § 240.12b-2. Additionally, Commission staff guidance dating from January 16, 2001 states that audit fees disclosed in annual reports should include "those billed or expected to be billed for the audit of the registrant's financial statements for the most recently completed fiscal year and the review of financial statements for any interim period within that year", which Calais had not provided. See <http://www.sec.gov/info/accountants/audindep/audinfaq.htm>.

¹⁵ Young also asserted that it would cost the Company roughly \$500,000 to obtain the audit report.

2011, to provide Calais additional time to report on its efforts to come into compliance with the Exchange Act.

On July 14, 2011, Calais filed the remaining seventeen overdue quarterly reports. The next day, Calais filed a single Form 10-K containing annual report disclosure for the 2005 through 2007 fiscal years. In a letter to the law judge dated July 18, 2011, the Division objected to the comprehensive Form 10-K filing, noting that Commission staff had previously denied Calais's request to make such filings. The Division also noted that the annual report failed to include independent auditor reports covering the Inception to 2004 Period and did not properly disclose audit fees.

At the fourth prehearing conference, Calais conceded that the Company should have filed separate Forms 10-K for fiscal years 2005 through 2007 but argued that the purpose of the filing requirements had been met because the comprehensive Form 10-K filing contained all of the information that the Company was required to provide to the public. Calais further argued that it had reported its audit fees in a manner similar to other issuers and, in any event, any deficiency in such disclosure did not raise a "significant" issue.

The law judge issued the initial decision on July 25, 2011, finding that Calais had admitted to violations of the Exchange Act's reporting requirements and that revocation of the Company's registration of securities was necessary or appropriate in the public interest. In determining to revoke Calais's registration, the law judge found that Calais's violations were serious and recurrent. The law judge also found that because of material deficiencies in Calais's filings, the Company had not cured the violations alleged in the OIP, and that there was no assurance of future compliance.

III.

Exchange Act Section 12(j) authorizes us, as we deem "necessary or appropriate for the protection of investors," to suspend (for a period not exceeding twelve months) or revoke the registration of a security if we find that an issuer has failed to comply with any provision of the Exchange Act or its rules and regulations.¹⁶ Exchange Act Section 13(a) requires issuers of securities registered under Exchange Act Section 12 to file periodic and other reports with the Commission.¹⁷ Exchange Act Rules 13a-1 and 13a-13 require such issuers to file annual and quarterly reports.¹⁸ Calais admits that it failed to file any annual or quarterly reports required by the Exchange Act between the time the Company filed a quarterly report for the period ended

¹⁶ 15 U.S.C. § 78l(j).

¹⁷ 15 U.S.C. § 78m(a).

¹⁸ 17 C.F.R. § 240.13a-1, 240.13a-13.

August 31, 2004 and May 2011. Accordingly, we find that the Company has violated Exchange Act Section 13(a) and Exchange Act Rules 13a-1 and 13a-13.

Although Calais does not dispute its violations, the Company argues that revocation is not warranted here because of its recent efforts to return to compliance and other relevant circumstances.¹⁹ Calais contends that the proceeding should be dismissed because of its "compelling efforts . . . to remedy past violations and insure future compliance." Alternatively, Calais argues that a "suspension of trading in Calais's securities" will be appropriate to "test" its

¹⁹ Both Calais and the Division submitted motions to adduce additional evidence pursuant to our Rule of Practice 452, 17 C.F.R. § 201.452. Rule 452 allows us to accept additional evidence if it is material and there were reasonable grounds for failure to adduce such evidence previously.

Calais raises the only objection to the inclusion of the additional evidence, arguing for the exclusion of statements in the Declaration of David S. Frye, counsel to the Division, summarizing conversations between Frye and two of Calais's former auditors, KPMG and Eide Bailly, LLP ("Eide"). Calais argues that this evidence is hearsay and lacks appropriate indicia of reliability.

We reject Calais's objection. Hearsay is admissible in administrative proceedings, and "we evaluate such evidence based on its probative value, its reliability and the fairness of its use." *Leslie A. Arouh*, Securities Exchange Act Rel. No. 62898 (Sep. 13, 2010), 99 SEC Docket 32306, 32323. Frye's declaration, made under the penalty of perjury pursuant to 28 U.S.C. § 1746, provides relevant details of Calais's efforts to come into compliance with the Exchange Act's reporting obligations. Additionally, Calais offers summaries of conversations with the same auditors, KPMG and Eide, in the September 15, 2011 declaration of David K. Young, Calais's President and Chief Operating Officer.

We have determined to grant the motions to adduce additional evidence. The evidence offered by Calais and the Division is material to this proceeding. The parties did not have the opportunity to supplement the record below by briefing the issues before the law judge as the initial decision was issued a week after the fourth prehearing conference, and certain evidence relates to events that occurred after the initial decision. Since we admit the additional evidence offered by the parties pursuant to Rule 452, we need not reach the question of whether certain of the Division's evidence qualifies for admittance pursuant to Rule of Practice 323, which permits us to take official notice of any matter in the public official records of the Commission. We therefore deny, as moot, the Division's alternative request to admit certain of its exhibits pursuant to Rule 323.

assurances of future compliance.²⁰ As discussed below, we agree with the law judge that revocation is necessary or appropriate for the protection of investors.

In determining the appropriate sanction under Exchange Act Section 12(j), we are guided by the analysis we first set forth in *Gateway International Holdings, Inc.*²¹ In *Gateway*, we held that our sanctions determination "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions, on the other hand."²² We provided a list of non-exclusive factors to be considered in making this determination, including (i) the seriousness of the issuer's violations, (ii) the isolated or recurrent nature of the violations, (iii) the degree of culpability involved, (iv) the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and (v) the credibility of its assurances, if any, against further violations.²³

Calais's violations are serious and recurrent, and they demonstrate a high degree of culpability. Calais failed to file nineteen quarterly reports and six annual reports over a period of six years, depriving both existing and prospective shareholders of current and reliable information about the Company's operations and financial condition, at the same time that it sold a significant number of its securities to investors.²⁴ We also note that Calais did not make any Form 12b-25 filings in connection with these delinquencies.²⁵ In its brief to us, Calais concedes

²⁰ Section 12(j) of the Exchange Act authorizes the Commission to suspend the registration of a company's securities for up to twelve months, while Section 12(k), 15 U.S.C. § 78l(k), governs the Commission's authority to suspend trading in any security. As relevant here, Section 12(k) permits the Commission to summarily suspend trading in certain securities for a period not exceeding ten business days. As previously noted, we suspended trading in Calais's securities on February 24, 2011, for ten business days.

²¹ Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430.

²² 88 SEC Docket at 438-39.

²³ *Id.* at 439.

²⁴ *Impax Labs., Inc.*, Exchange Act Rel. No. 57864 (May 23, 2008), 93 SEC Docket 6241, 6251 (finding the issuer's failure to file six quarterly and two annual reports over the course of eighteen months to be serious and recurrent); *Am. Stellar Energy, Inc.*, Exchange Act Rel. No. 64897 (July 18, 2011), 101 SEC Docket 43810, 43816 (finding the failure to file two annual reports and eight quarterly reports to be serious and the pattern of filing delinquencies over a nine-year period to be recurrent).

²⁵ See Exchange Act Rule 12b-25, 17 C.F.R. § 201.12b-25(a) (requiring issuers to provide notice of inability to file a periodic report, along with supporting reasons, by filing a

(continued...)

that it can offer "no excuses for its failure to timely file periodic reports because it believes the Commission would not find compelling its reasons" for failing to file. Such a "long history of ignoring . . . reporting obligations" under the Exchange Act evidences a "high degree of culpability."²⁶

We have held that a respondent's repeated failure to file its periodic reports on time is "so serious" a violation of the Exchange Act that only a "strongly compelling showing" regarding the other *Gateway* factors would justify a sanction less than revocation.²⁷ Calais argues that it has "exerted significant effort to remedy its past violations" by filing all past due reports, correcting deficiencies in its filings, and attempting to address the remaining deficiencies identified by the Division.²⁸

Calais states that it initially hired Eide as its auditor several months before the OIP issued, and that Eide thereafter completed audits of the Company's financial statements for its 2005 through 2010 fiscal years. Two weeks prior to issuance of the OIP, Eide "advised Calais that it had identified an 'independence issue.'" Calais claims that it then sought an "opinion" from Commission staff that the "relationship which created the 'independence issue' was not so significant as to disqualify" Eide. According to Calais, the staff did not respond and the Company had to retain new auditors, which delayed the preparation of its filings.

However, the responsibility for any delay in the preparation of Calais's long overdue reports rests solely with Calais. Calais lacked annual audits and quarterly reviews dating back to the 2005 fiscal year, but did not engage Eide until October 2010, years after the majority of the audits and reviews should have occurred. We conclude that the incremental delay resulting from

²⁵ (...continued)

Form 12b-25 "no later than one business day after the due date" for such report); Form 12b-25, 17 C.F.R. § 249.322; *Cobalis Corp.*, Exchange Act Rel. No. 64813 (July 6, 2011), 101 SEC Docket 43379, 43389 n.31 (considering, in assessing the sanction, the issuer's failure to file Forms 12b-25 in connection with delays in its periodic reports).

²⁶ *America's Sports Voice, Inc.*, Exchange Act Rel. No. 55511 (Mar. 22, 2007), 90 SEC Docket 879, 884 (involving an issuer who failed to comply with its reporting obligations for a period of more than five years).

²⁷ *Nature's Sunshine Prods., Inc.*, Exchange Act Rel. No. 59268 (Jan. 21, 2009), 95 SEC Docket 13488, 13500; *Impax*, 93 SEC Docket at 6252.

²⁸ Calais amended the Company's annual reports to correct its disclosure on audit fees and revised the characterization of certain information in its annual reports from "unaudited" to "audited." See *supra* note 14 and accompanying text. The Division acknowledges that Calais has corrected these deficiencies.

Calais's retention of new auditors to replace Eide was attributable to Calais's failure to initially timely hire an auditor to conduct the requisite audits and reviews, and is not mitigative.

We have found "revocation of registration to be in the public interest where an issuer's subsequent filings contain material deficiencies."²⁹ Calais argues that we have not revoked the registration of securities where a company has made all past due periodic filings and is current with respect to its periodic reporting requirements. Calais cites to our *American Stellar* and *Nature's Sunshine* decisions in support of this contention.³⁰ But, although Calais disputes the seriousness of the deficiencies, it acknowledges that its filings are not fully compliant with regulatory requirements. Calais is therefore not "current" with respect to its reporting requirements and remains out of compliance until all of the deficiencies have been resolved. Our precedent, including *American Stellar* and *Nature's Sunshine*, does not support the proposition that the mere filing of a past due report satisfies a company's Exchange Act reporting obligations. Moreover, we considered deficiencies in the issuer's filings in the *American Stellar* and *Nature's Sunshine* cases, where we ultimately concluded that revocation of registration was necessary or appropriate in the public interest.

Calais also argues that the deficiencies that remain do not support revocation because they do not go to the accuracy or completeness of the information filed by the Company in its reports. But Calais's contention that its reports contain accurate information responds only to one of the concerns addressed by the Exchange Act's reporting requirements. Exchange Act reports are designed to provide the public with information that is timely as well as accurate.³¹ If issuers were permitted, at their discretion, to consolidate multiple years of annual reports into a single filing, the investing public would not be assured of the timely disclosure mandated by the Exchange Act. Additionally, as previously noted, during the period that Calais failed to file its periodic reports, the Company filed nineteen Forms 8-K reporting sales of its securities. Therefore, investors who would otherwise have had access to current and relevant information

²⁹ *Am. Stellar*, 101 SEC Docket at 43818.

³⁰ *Id.* at 43818 (noting deficiencies in the company's Form 10-K filings, including combining annual report disclosure for fiscal years 2008 and 2009 into a single filing); *Nature's Sunshine*, 95 SEC Docket at 13501 ("Dismissal of this proceeding against Nature's Sunshine, despite its numerous filing delinquencies and unresolved deficiencies, would significantly detract from the Exchange Act's reporting requirements.").

³¹ *Cobalis*, 101 SEC Docket at 43388; *America's Sports Voice*, 90 SEC Docket at 885 (citing *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977) (stating that the reporting requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities")); see also *United States v. Arthur Young & Co.*, 465 U.S. 805, 810 (1984) (observing that "[c]orporate financial statements are one of the primary sources of information available to guide the decisions of the investing public").

about Calais as they purchased the Company's securities had no current quarterly or annual reports of the Company to review during this time.

Calais further contends that its remedial efforts, expenditure of over \$300,000 in fees to address its reporting problems, and ability to now stay current with its periodic filing requirements "is a credible assurance against further violations."³² But Calais failed to file separate annual reports for 2005 and 2006, including the disclosure for those fiscal years in the Company's 2007 annual report. Our rules do not contemplate the consolidation of annual reports into a single, comprehensive, Form 10-K filing covering multiple reporting periods.³³ Moreover, Calais persisted in filing a comprehensive Form 10-K even though Corporation Finance expressly denied, on two separate occasions, Calais's request to consolidate multiple reports in a single filing.³⁴ Calais's decision to file its annual reports in a form that the Company knew Corporation Finance had twice rejected as improper indicates a troubling willingness of the Company to ignore clear staff directives regarding reporting obligations under the Exchange Act.

Calais has also failed to remedy the lack of audit reports covering the Inception to 2004 Period in its annual reports. Calais argues that the lack of audit reports for the Inception to 2004 Period has not resulted in any harm to the investing public because its filings contain accurate, audited financial information. Calais contends that it would be "manifestly unfair to base a sanction of revocation or suspension" on this deficiency.

We do not agree that Calais's deficiencies regarding its financial statements for the Inception to 2004 Period are immaterial. Even if KPMG previously audited the Company's financial statements, Calais is currently unable to obtain KPMG's consent to re-file KPMG's audit report from that period and Stark has not yet been able to issue its own audit report for the financial statements at issue. Without an independent auditor currently willing or able to issue an audit report for the financial statements covering the Inception to 2004 Period, we cannot characterize the information in those statements as audited, even if the statements were formerly the subject of a valid audit report. While Calais states that it intends to work with KPMG and

³² We note that expenditures on compliance efforts are normal business expenses that should not be accorded any special significance especially where, as here, they are incurred as a result of an issuer's failure to comply with statutory obligations.

³³ *Am. Stellar*, 101 SEC Docket at 43818 n.23; *e-Smart Techs., Inc.*, 57 S.E.C. 964, 965 n.3 (2004).

³⁴ Although our rules do not provide for such consolidation, our staff has discretionary authority to accept modified reports pursuant to procedures set forth on our website, www.sec.gov/divisions/corpfin/cfreportingguidance.shtml. As noted, Corporation Finance initially denied Calais's oral request, on May 8, 2007, to consolidate several reports into a single filing. Subsequently, in a letter dated January 31, 2011, Corporation Finance denied Calais's written request to combine several annual reports into a single Form 10-K filing.

Stark to obtain the necessary audit report, until it is filed, the Company's annual reports from 2005 to the present contain unaudited financial statements in violation of Rule 8.02 of Regulation S-X.³⁵

Additionally, we are concerned about the circumstances surrounding the Company's intermittent efforts to address this deficiency. Calais's belated attempts to remedy the lack of comprehensive audit reports do not provide credible assurance against future violations. Calais states that it first requested an audit report from KPMG covering the Inception to 2004 Period in 2007 and 2008, but that KPMG refused to provide the audit report at that time. Calais therefore knew that the audit reports accompanying its annual report filings from May through July 2011 were deficient well before they were filed, but only engaged Corporation Finance on this issue after issuance of the initial decision.³⁶

Calais asserts that it is now working with KPMG and the Company's current auditors to try to obtain the required audit report, but Calais contacted KPMG on this issue again only after the initial decision revoking the registration of its securities was issued. In September 2011, Calais requested access to KPMG's working papers for the Inception to 2004 Period.³⁷ In response, KPMG requested signed consents from Calais and Stark as a condition of granting such

³⁵ We note that, although Commission staff may grant a waiver from the requirement that development stage companies provide audited financial information from inception in its annual financial statements, where that waiver is obtained, the issuer must label the affected information as "unaudited" on the financial statements. *See* Division of Corporation Finance Financial Reporting Manual, p. 27, Section 1180.2(c), *available at* <http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf>. Investors reviewing Calais's annual reports dating from 2005 to the present may mistakenly assume that all of the financial information contained in those reports is audited, as none of the information is labeled "unaudited." Such investors may accord all of the financial information provided in those annual reports equal weight when they might have otherwise viewed the unaudited portion of the financial statements differently from the audited information.

³⁶ Calais requested a waiver excusing the Company from filing audit reports covering the Inception to 2004 Period in a letter dated September 8, 2011. Corporation Finance denied this request in a letter dated September 13, 2011.

³⁷ According to Calais's President, "Calais does not possess sufficient financial records going back to the inception of Calais so as to permit a re-audit of the cumulative from inception (December 31, 1986) through May 31, 2004 information of Calais. Based on the recent advisement from KPMG, LLP, Calais is hopeful KPMG, LLP has sufficient records so as to ultimately allow its current auditors to issue the required audit report."

access and forwarded the necessary documents to Calais in September 2011.³⁸ On October 31, 2011, Calais filed its reply brief on this appeal along with a second motion to adduce additional evidence, which included a declaration of Calais's President, David K. Young, dated October 24, 2011. Young's declaration stated that the consents requested by KPMG had been signed by Stark and Calais, and attached them as exhibits, but did not state whether or when they had been forwarded to KPMG. Furthermore, Calais did not sign its consent form until October 18, 2011, the day after the Division submitted evidence, along with its brief on this appeal, that KPMG had not received the consents.³⁹ Calais's relations with its former auditor, therefore, are consistent with a troubling pattern that the Company has shown of complying with regulatory requirements only when it has concluded that its continued failure to do so will result in significant adverse consequences.

Calais's filings also continue to be dilatory. Calais failed to timely file its quarterly report for the periods ended November 11, 2011 and February 29, 2012, further undermining the credibility of its assurances against further violations.⁴⁰ Additionally, "[i]n determining whether an issuer's assurances against future violations are credible, one factor we consider is whether the issuer is able to adhere to reasonable schedules that the issuer has proposed for the fulfillment of delinquent filing obligations."⁴¹ Calais has repeatedly failed to adhere to self-imposed timeframes for filing its delinquent reports.

³⁸ The document to be signed by Stark stated, "[w]e understand the sole purpose of your review is to obtain information regarding [Calais] to assist you in planning your 2005 to 2011 audits." The document also included representations that Stark would protect the client's confidential information and seek KPMG's permission before providing such information to a third party. KPMG asked Calais to sign a document that stated, "You have our consent to make your work papers available for review by Stark Schenkein LLP and answer any and all questions regarding the work papers."

³⁹ As noted, although Calais estimated that its efforts to obtain an audit report for the Inception to 2004 Period would take six to nine months from mid-September, it has not filed revised audit reports with the affected Forms 10-K or provided an update on the status of its attempts to remedy this deficiency. Additionally, the record does not contain any evidence as to whether or when Calais sent the signed consent documents to KPMG.

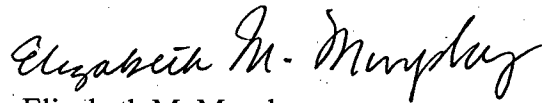
⁴⁰ Pursuant to Rule of Practice 323, we take official notice of the Forms 12b-25 filed by Calais on January 17, 2012 and April 16, 2012, in connection with its delay in filing its Form 10-Qs for the quarters ended November 11, 2011, and February 29, 2012. *See Cobalis*, 101 SEC Docket at 43389 n.31 (considering conduct outside of the scope of the order instituting proceedings in assessing the sanction); *Nature's Sunshine*, 95 SEC Docket at 13497 n.27 (noting that the Commission may consider subsequent filing failures and other matters that fall outside the order instituting proceedings in assessing appropriate sanctions).

⁴¹ *Am. Stellar*, 101 SEC Docket at 43817.

Under these circumstances, a sanction other than revocation would "reward those issuers [like Calais] who fail to file required periodic reports when due over an extended period of time" and "make last minute filings" only after becoming the subject of Exchange Act Section 12(j) proceedings.⁴² Such conduct prolongs "indefinitely the period during which public investors [are] without accurate, complete, and timely reports,"⁴³ significantly undermines Exchange Act's reporting requirements,⁴⁴ and must be addressed with meaningful sanctions.⁴⁵

An appropriate order will issue.⁴⁶

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, AGUILAR, PAREDES and GALLAGHER).



Elizabeth M. Murphy
Secretary

⁴² *Nature's Sunshine*, 95 SEC Docket at 13501; *see also Am. Stellar*, 101 SEC Docket at 43820.

⁴³ *Am. Stellar*, 101 SEC Docket at 43820-43821 (*quoting Nature's Sunshine*, 95 SEC Docket at 13501); *see also Impax*, 93 SEC Docket at 6256 n.34 (declining to order a suspension instead of a revocation where the "hope that Impax would return to compliance within that period would very likely result in the necessity for another proceeding under Exchange Act Section 12(j) at the end of that period"); *America's Sports Voice*, 90 SEC Docket at 885 & nn.16-17 (rejecting respondent's request for a ninety-day grace period).

⁴⁴ *Am. Stellar*, 101 SEC Docket at 43821; *Nature's Sunshine*, 95 SEC Docket at 13501. The need for finality in administrative proceedings provides further justification for our conclusion that revocation is necessary to protect the investing public. *See e-Smart*, 57 S.E.C. at 970 n.18; *Nature's Sunshine*, 95 SEC Docket at 13499.

⁴⁵ If, after revocation, the Company is able to meet the applicable requirements, it may file a Form 10 to re-register its securities under Exchange Act Section 12(g). 15 U.S.C. § 781(g); *see also Cobalis*, 101 SEC Docket at 43389 n.33, *Nature's Sunshine*, 95 SEC Docket at 13502 n.47; *Impax*, 93 SEC Docket at 6256.

⁴⁶ 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. 67312 / June 29, 2012

Admin. Proc. File No. 3-14271

In the Matter of

CALAIS RESOURCES INC.

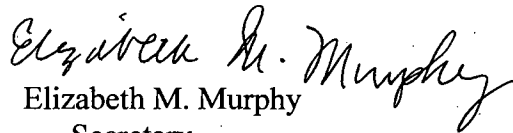
c/o John A. Hutchings, Esq.
Dill Dill Carr Stonbraker & Hutchings, P.C.
455 Sherman Street, Suite 300
Denver, CO 80203

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the registration of all classes of the registered securities of Calais Resources Inc. under Section 12(g) of the Securities Exchange Act of 1934, be, and it hereby is, revoked pursuant to Exchange Act Section 12(j).

By the Commission.


Elizabeth M. Murphy
Secretary

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 67313 / June 29, 2012

Admin. Proc. File No. 3-14401

In the Matter of

CITIZENS CAPITAL CORP.
c/o Billy D. Hawkins, Chief Executive Officer
P.O. Box 670406
Dallas, TX 75367

OPINION OF THE COMMISSION

SECTION 12(j) PROCEEDING

Company failed to file periodic reports in violation of Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13. *Held*, it is necessary and appropriate for the protection of investors to revoke the registration of the company's securities.

APPEARANCES:

Billy D. Hawkins, for Citizens Capital Corp.

Kyle M. DeYoung and *Neil J. Welch, Jr.*, for the Division of Enforcement.

Appeal filed: November 3, 2011

Last brief received: February 13, 2012¹

¹ On January 17, 2012, the Division of Enforcement filed its brief simultaneously with a Motion for Leave to Adduce Additional Evidence (the "Division's Motion to Adduce"). Although Citizens Capital Corp. never filed a "reply brief," it filed two pleadings styled "Opposition to Division of Enforcement's Motion for Leave to Adduce Additional Evidence." Our Rules of Practice do not provide for more than one opposition brief in response to a motion. However, because Citizens Capital's second opposition to the Division's Motion to Adduce addressed generally issues related to its appeal, rather than to the Division's Motion to Adduce, and because Citizens Capital did not otherwise file a reply brief, we have considered it as a reply brief.

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I.

Citizens Capital Corp. ("Citizens Capital" or the "Company") appeals from an administrative law judge's decision finding that the Company violated Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13 by failing to file required annual and quarterly reports and, on that basis, revoking the registration of the Company's securities.² We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

This case concerns repeated failures by Citizens Capital to file Exchange Act periodic reports. The Company became subject to these reporting requirements based on the registration of its common stock pursuant to Exchange Act Section 12(g).³ The relevant facts are as follows.

A. Background

Citizens Capital is a Texas corporation based in Dallas, Texas. Citizens Capital filed a registration statement to register its common stock under Section 12(g) of the Exchange Act, which registration statement became effective on March 19, 1999.

From the time of the initial registration of the Company's securities in March 1999 until November 19, 2001, when it filed its quarterly report on Form 10-QSB for the period ending September 30, 2001,⁴ the Company made all of its required periodic filings.⁵ On April 1, 2002,

² Exchange Act Section 13(a) requires issuers of securities registered pursuant to Exchange Act Section 12 to file periodic reports in accordance with Commission rules. 15 U.S.C. § 78m(a). Rule 13a-1, 17 C.F.R. § 240.13a-1, requires issuers to file annual reports, and Rule 13a-13, 17 C.F.R. § 240.13a-13, requires issuers to file quarterly reports.

³ 15 U.S.C. § 78l(g).

⁴ From the time of its initial registration to present, Citizens Capital operated on a "calendar" fiscal year basis.

⁵ On several occasions during this time period, the Company filed a Form 12b-25 indicating that it would be unable to make the relevant filing timely. See Exchange Act Rule 12b-25(a), 17 C.F.R. § 240.12b-25(a) (requiring issuers to provide notice of inability to file a periodic report, along with supporting reasons, by filing a Form 12b-25 "no later than one business day after the due date" for such report); 17 C.F.R. § 249.322 (Form 12b-25). By filing a timely Form 12b-25, an issuer automatically receives an additional five calendar days to file quarterly reports and an additional fifteen calendar days to file annual reports. In general, during the period from March 1999 through November 2001, Citizens Capital made its required filings

(continued...)

the Company filed a notice on Form 12b-25 of its inability to file timely its annual report for fiscal year 2001, but it ultimately never made this filing.

The Company made no required periodic filings between November 19, 2001, and the initiation of the present proceeding in May 2011. On October 5, 2004, the Company filed a Form 8-K (the "October 2004 Form 8-K"), in which the Company disclosed a private placement of 10,000,000 shares of the Company's common stock.⁶ The October 2004 Form 8-K further acknowledged that the Company had discontinued making its required periodic reports.⁷ On November 4, 2004, the Commission's Division of Corporation Finance ("Corporation Finance") sent the Company a notice (the "November 2004 Notice"). According to the November 2004 Notice, the Company was "not in compliance with its reporting requirements" and could be subject to administrative proceedings unless it "filed all required reports within fifteen days from

⁵ (...continued)

during the additional time provided as a result of its filing the Form 12b-25, but was still delinquent by one day on two occasions in April and August 2001.

⁶ The October 2004 Form 8-K stated that Citizens Capital elected to "evoke its 'demand right' and exercise the 'Liquidating Call Provision' . . . of a secured, promissory note . . . entered into on May 10, 1998 between the Company and the Citizens Capital Corp. ESOP Trust (the '[ESOP] Trust'), an affiliate of the Company." According to the October 2004 Form 8-K, the result of the "demand right" election would be "the total private, secondary placement of 10,000,000 shares of the Company's common stock held by the Trust and/ or affiliates of the Company and the 10,000,000 shares of SCOR Brands, Inc. 144A common stock held by the Company." SCOR Brands Inc. is described in the October 2004 Form 8-K as "the exclusive marketer and distributor of the SCOR Brand line athletic footwear and a wholly owned subsidiary of the Company."

⁷ The October 2004 Form 8-K stated that "[s]ubsequent to the adverse events of September 11, 2001, the Company, as a development stage company pursuing growth through external acquisition and the internal development of it[s] various assets, made the decision to temporarily suspend its periodic financial reporting requirements, and the related expenses thereof, in favor of reallocating its time and financial resources towards insuring the continuance and ongoing progress of the Company and its subsidiaries in meeting it[s] various goals and objectives."

the date of this letter." Citizens Capital, which claims that it did not receive the November 2004 Notice,⁸ never responded. In 2010, the Company also filed a Form D regarding a \$30,000,000 offering of convertible debt by the Company.⁹

B. Institution of Administrative Proceedings

On May 23, 2011, we issued an Order Instituting Proceedings ("OIP") against the Company.¹⁰ The OIP alleged that Citizens Capital was "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" and thereby violated Exchange Act reporting requirements.

In its May 28, 2011 answer to the OIP, Citizens Capital acknowledged again (as it had in its October 2004 Form 8-K) that it had stopped making its required periodic filings after the third quarter of fiscal year 2001, but asked the Commission to "give all due consideration" to certain efforts it had taken to remedy its delinquency, including the retention of a firm of certified public accountants, Montgomery Coscia Greulich LLP ("Montgomery"), to audit the Company's 2009 and 2010 financial statements.¹¹

On June 6, 2011, Citizens Capital submitted a second answer to the OIP. In this second answer, the Company asserted that, during the period between September 2001 and December 2008, Citizens Capital "experienced two material losses to its key management who played material roles to the information gathering, compiling and reporting process." The Company also stated that its "business operations were significantly impacted by both the business and economic post-market impact of the September 11, 2001 terrorist attacks on the United States."

⁸ The November 2004 Notice was sent to the address listed on the Company's November 19, 2001, Form 10-QSB as the "address of principal executive offices," but was not sent to the address listed as the "mailing address."

⁹ The extent to which the Company actually sold securities as part of this offering is unclear.

¹⁰ The OIP also named six other delinquent issuers; each of these other issuers defaulted, and the law judge issued an order revoking the registration of their securities. *See Citizens Capital Corp.*, Exchange Act Rel. No. 65028 (Aug. 4, 2011), 101 SEC Docket 44473.

¹¹ Citizens Capital did not explain why it engaged Montgomery to provide services related to only its 2009 and 2010 financial statements, and not for the other years during which it had not made filings.

As a result, Citizens Capital requested that it not be required to file any periodic reports with respect to the period from September 2001 through December 2008.¹² The Company stated that it intended, by September 1, 2011, to file "a single, Multi year; Comprehensive Form 10-K for the fiscal years ended December 31, 2009 and December 31, 2010 respectively, inclusive of audited financial statements for the periods."

During a pre-hearing conference on July 15, 2011, staff from the Commission's Division of Enforcement (the "Division") stated that Montgomery had informed the staff that the firm had never received a retainer payment from the Company and had therefore not commenced the audit.¹³ Nonetheless, in response to an inquiry from the law judge about whether the Company could become current with its filings prior to the September 28, 2011 deadline for the issuance of the Initial Decision,¹⁴ the Company responded that it believed it could do so.

On August 12, 2011, the Division filed a motion for summary disposition (the "Summary Motion"), seeking revocation of the registration of Citizens Capital's securities. On September 7, 2011, the Company responded to the Summary Motion, stating that "a number of internal and

¹² Other than stating that it had "struggled to stay afloat with challenged resources" during a period when "many companies of various stages of development did not survive," the Company did not elaborate on how the September 11 attacks affected its ability to satisfy its reporting requirements, and it does not repeat that explanation in its pleadings before us. The Company also neither specifically identified the missing personnel that caused it to be unable to file the periodic reports at issue, nor which specific information was missing.

¹³ The record indicates that Montgomery subsequently resigned from its engagement with the Company on August 28, 2011. The Company failed to disclose Montgomery's resignation (and also failed to disclose its earlier engagement of Montgomery) on Form 8-K, as required under Item 4.01 of Form 8-K. Because the Company failed to file these required Forms 8-K, it did not provide any discussion of the circumstances surrounding Montgomery's resignation, as required in Item 304(a)(1)-(3) of Regulation S-K. See 17 C.F.R. § 229.304(a)(1)-(3). The Company also failed to file the required Form 8-K regarding the resignation or dismissal of its prior auditor before its engagement of Montgomery. Thus, it is unclear how long the Company was without an auditor.

¹⁴ As specified in the OIP, under Rule of Practice 360(a)(2), 17 C.F.R. § 201.360(a)(2), the law judge was required to issue an initial decision "no later than 120 days from the date of service of the [OIP]," *i.e.*, September 28, 2011.

external factors inhibited the [Company] from meeting the estimated September 1, 2011 timeline," but claiming that "its current disclosure reports [would be] completed and submitted by September 23, 2011."¹⁵

On September 12, 2011, the Company filed with the Commission a Form 10-K (the "Consolidated Form 10-K"), which stated that it covered each of the fiscal years from December 31, 2001 through December 31, 2010. The Consolidated Form 10-K, however, did not include audited financial statements, despite earlier assurances that the Company intended to provide audited financial statements when it made its delinquent filings. Rather, Citizens Capital asserted for the first time that it was an "inactive entity" during the relevant period and, therefore, exempt from the auditing requirement.¹⁶ Although the Company filed the Consolidated Form 10-K, it has not filed any of its required quarterly reports for 2001 through 2010.

The Consolidated Form 10-K disclosed numerous business developments affecting the Company during the preceding decade. These developments, which the Company characterized as "significant changes . . . to [the Company's] business," included: (1) the formation of a joint venture for "the development of a multi-channel, direct to home, broadcast TV platform;" (2) the capitalization of an athletic apparel manufacturing subsidiary through the exchange of 5,000,000 shares of the Company's common stock for 10,000,000 shares of the subsidiary's stock, the subsequent contracting of a Chinese manufacturer to produce "branded footwear in the basketball and running shoe categories to be sold at [the subsidiary's] online store," and the subsequent "suspension," in 2002, of all "footwear marketing and production due to difficulties in securing sufficient working capital;" (3) the discontinuation of another subsidiary's "commercial printing operation" in December 2003; (4) the transformation of the former commercial printing subsidiary's "Black Financial News magazine publication into the Black Financial News Network video based website;" (5) in February 2008, the "internal development" of a professional football league, which "holds the exclusive television and radio broadcast rights, product manufacturing, product marketing, product merchandising and product distribution rights for each of its twenty uniquely branded teams and team logos," followed by the December 2009 purchase of the football league in exchange for 250,000,000 shares of a subsidiary of the Company.

On September 15, 2011, Citizens Capital filed Forms 10-Q with unreviewed financial statements for the periods ended March 31, 2011, and June 30, 2011, respectively. These were the last filings made by the Company before the law judge issued the Initial Decision on September 23, 2011. The Division of Corporation Finance reviewed these filings and identified several material deficiencies in them, as discussed below.

¹⁵ Citizens Capital's response to the Summary Motion did not mention whether the proposed filings would include audited financial statements, as promised in its earlier communications with the Division and the law judge, nor did it mention the Company's earlier proposed plan to provide filings for only fiscal years 2009 and 2010.

¹⁶ The standards applicable to this claimed exemption are discussed below.

The Company subsequently filed a Form 10-Q with unreviewed financial statements on November 14, 2011, covering the period ended September 30, 2011, after issuance of the Initial Decision, which also contained material deficiencies. On March 26, 2012, after the completion of briefing in this appeal, the Company filed a Form 10-K for fiscal year 2011. The Company's 2011 Form 10-K included unaudited financial statements based on the Company's repeated claim that it was exempt as an "inactive entity" from the requirement to include audited financial statements in its annual reports.¹⁷

Finding no genuine issue with regard to any material fact, the law judge granted the Summary Motion and revoked the Exchange Act registration of Citizens Capital's securities. The law judge found that the relevant facts regarding the Company's violations were undisputed. Although the law judge acknowledged that the Company had "taken steps toward remedying its periodic filing deficiencies," revocation was necessary because its "recent attempts are incomplete and materially deficient."

III.

Exchange Act Section 13(a) requires issuers of securities registered under Exchange Act Section 12 to file periodic and other reports with the Commission. Exchange Act Rules 13a-1 and 13a-13 require such issuers to file annual and quarterly reports. The Company does not deny that it failed to file any periodic reports between November 2001 and September 2011.¹⁸ Accordingly, we find that the Company violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder.

¹⁷ On May 14, 2012, the Company filed its Form 10-Q with unreviewed financial statements for the period ended March 31, 2012. This Form 10-Q repeated Citizens Capital's claim that it was an "inactive entity."

The Company also filed three current reports on Form 8-K during April and May 2012. These Forms 8-K disclosed: (1) the Company's plan to enter into a \$5,000,000 line of credit with a "private investor and selling shareholder" after the investor completed "secondary market transactions" involving the sale of "1,200,000 non-dilutive shares of Citizens Capital Corp."; (2) that the Company had entered into a contract for the acquisition of an industrial warehouse space in Dallas, Texas; and (3) the ESOP Trust's plan to "re-market \$30 million" in Company bonds, "subject to market and other conditions."

¹⁸ In its second answer to the OIP, dated June 6, 2011, the Company acknowledged its "inability to file required reports on a timely basis," identifying the relevant missing reports as "Form 10-K Annual Reports for the periods December 31, 2001 thru [sic] December 31, 2010 [and] Form 10-Q Quarterly Reports for the quarterly periods ended March 2002 thru [sic] September 30, 2010." Similarly, at the July 15, 2011 pre-hearing conference with the law judge, the Company stated that it "[did] not dispute [the charges in the OIP]."

IV.

A. Before us, Citizens Capital argues that revocation is unwarranted. According to Citizens Capital, "[r]evocation of a registrant's securities should be taken only when public investors are in current or imminent danger" and that, given its current reporting status, the Division has "failed to establish and demonstrate the existence of danger to public investors."¹⁹ The Company therefore urges us to "vacate the Initial Decision and dismiss the Administrative Proceeding."

Citizens Capital misconstrues the applicable standard. Exchange Act Section 12(j) authorizes revocation for violations of Exchange Act filing requirements if it is "necessary or appropriate for the protection of investors."²⁰ In determining whether any sanction furthers the protection of investors, we consider: (1) the seriousness of the issuer's violations; (2) the isolated or recurrent nature of the violations; (3) the degree of culpability involved; (4) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (5) the credibility of its assurances, if any, against further violations.²¹ These factors strongly support revocation.

B. Citizens Capital's violations of its reporting obligations are serious. In its October 2004 Form 8-K and its answers to the OIP, the Company acknowledged that it was aware of its filing obligations but had determined unilaterally that it would cease making any periodic reports "in the face of challenged business resources."²² By failing to make the required filings, Citizens

¹⁹ Citizens Capital cites no authority for the "imminent danger" sanctioning standard it advocates, and we are unaware of any such authority.

²⁰ 15 U.S.C. § 78l(j).

²¹ *Gateway Int'l Holdings, Inc.*, Exchange Act Rel. No. 53907 (May 31, 2006), 88 SEC Docket 430, 439. See, e.g., *American Stellar Energy, Inc.*, Exchange Act Rel. No. 64897 (July 18, 2011), 101 SEC Docket 43810, 43816 (imposing sanctions based on *Gateway* factors); *Cobalis Corp.*, Exchange Act Rel. No. 64813 (July 6, 2011), 101 SEC Docket 43379, 43385 (same); *Nature's Sunshine Products, Inc.*, Exchange Act Rel. No. 59268 (Jan. 21, 2009), 95 SEC Docket 13488, 13495 (same); *Impax Labs., Inc.*, Exchange Act Rel. No. 57864 (May 23, 2008), 93 SEC Docket 6241, 6250 (same); *Phlo Corp.*, Exchange Act Rel. No. 55562 (March 30, 2007), 90 SEC Docket 1089, 1109-10 (same); *America's Sports Voice, Inc.*, Exchange Act Rel. No. 55511 (Mar. 22, 2007), 90 SEC Docket 879, 884 (same); *Eagletech Comm'cns, Inc.*, Exchange Act Rel. No. 54095 (July 5, 2006), 88 SEC Docket 1225, 1229-30 (same).

²² We have previously noted that, under certain circumstances, registrants such as Citizens Capital that are unable or unwilling to continue to comply with reporting requirements have the option of deregistering their stock under the Exchange Act, pursuant to the filing of a Form 15. See *Gateway*, 88 SEC Docket at 433 n.10 (setting forth the requirements for deregistration of an issuer's securities). Although the record contains limited information regarding Citizens Capital's situation during the period at issue, its most recent filings indicate
(continued...)

Capital deprived both existing and prospective stockholders of the ability to make informed investment decisions based on current and reliable information, including audited financial statements, about the Company's operations and financial condition.²³

Citizens Capital's violations were recurrent and extended over more than ten years. We have held that a respondent's recurrent failure to file its periodic reports on time is "so serious" a violation of the Exchange Act that only a "strongly compelling showing" regarding the other *Gateway* factors would justify a sanction less than revocation.²⁴ As discussed herein, the Company has made no such showing.

Citizens Capital argues that its subsequent filing history indicates the "absence of scienter." A finding of scienter is not required to establish a violation of the Exchange Act's periodic reporting requirements.²⁵ The Company argues that an issuer's "state of mind is highly relevant in determining the remedy to impose," presumably referring to the "culpability" prong of our *Gateway* analysis. We have, however, found that, as here, a "long history of ignoring . . . reporting obligations" evidences a "high degree of culpability."²⁶ Further, the Company's violations here were intentional, as evidenced by its statement in the October 2004 Form 8-K that it had "made the decision to temporarily suspend its periodic financial reporting . . . in favor of reallocating its time and financial resources"

²² (...continued)

that it has well under 300 stockholders of record, and thus was eligible for deregistration. There is, however, no evidence that Citizens Capital ever sought deregistration as a means of dealing with its filing problems.

²³ See *Impax*, 93 SEC Docket at 6251 (finding issuer's failure to file six quarterly and two annual reports over the course of eighteen months to be serious and recurrent violations).

²⁴ *Nature's Sunshine*, 95 SEC Docket at 13500; *Impax*, 93 SEC Docket at 6252.

²⁵ It is not necessary for us to find that the Company was aware of, or intentionally ignored, its reporting obligations, as scienter is not necessary to establish grounds for revocation. See *Ponce v. SEC*, 345 F.3d 722, 737 n.10 (9th Cir. 2003); *SEC v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998).

²⁶ *America's Sports Voice*, 90 SEC Docket at 884.

C. Citizens Capital's primary argument on appeal is that revocation is unwarranted in light of its recent filings.²⁷ But its filings are materially deficient.

1. The Consolidated Form 10-K that Citizens Capital filed---along with its most recent Form 10-K filed in March 2012---lacked audited financial statements. Although the Company arranged with an accounting firm to audit the Company's 2009 and 2010 financial statements, the firm was never paid (and never conducted any audits). This conduct evidences an inability or unwillingness to expend the necessary resources to comply with regulatory requirements.

Citizens Capital claims that, during the relevant period, it was an "inactive entity" and thus was permitted to include unaudited financial statements in its periodic reports. The "inactive entity" exemption from the requirement to file audited financial statements is available to a registrant only if it meets all of the requirements of Rule 3-11 under Regulation S-X.²⁸ Among other things, Rule 3-11 states that "no material change in the business" may have occurred and that the issuer did not purchase or sell any of its own stock during the relevant period.

²⁷ Citizens Capital cites a settlement order in *Comverse Technology, Inc.*, Exchange Act Rel. No. 65301 (Sept. 8, 2011), 101 SEC Docket 45654, in which we agreed to terminate the proceeding against the respondent issuer "without imposition of a remedy." Citizens Capital claims that this "method of disposition should also be available to [Citizens Capital] without prejudice, inequity or selective availability." As we have stated previously, however, settlements can be reached for any number of reasons, and settlements are not precedent. *Rodney R. Schoemann*, Securities Act Rel. No. 9076 (Oct. 23, 2009), 97 SEC Docket 21726, 21748 n.55 (citing *Richard J. Puccio*, 52 S.E.C. 1041, 1045 (1996) (citing *David A. Gingras*, 50 S.E.C. 1286, 1294 (1992), and cases there cited)). Nor, in any event, are the facts in this case similar to those in *Comverse*.

²⁸ Rule 3-11 of Regulation S-X, 17 C.F.R. § 210.3-11, states that an "inactive entity" may include unaudited financial statements in its required annual reports. Rule 3-11 defines an inactive entity as "one meeting all of the following conditions: (a) gross receipts from all sources for the fiscal year are not in excess of \$100,000; (b) the registrant has not purchased or sold any of its own stock, granted options therefor, or levied assessments upon outstanding stock; (c) expenditures for all purposes for the fiscal year are not in excess of \$100,000; (d) no material change in the business has occurred during the fiscal year, including any bankruptcy, reorganization, readjustment or succession or any material acquisition or disposition of plants, mines, mining equipment, mine rights or leases; and (e) no exchange upon which the shares are listed, or governmental authority having jurisdiction, requires the furnishing to it or the publication of audited financial statements." Although, because of the Company's lack of filings, it is impossible to get a clear picture of its activities during each of the fiscal years at issue, it is clear that, for much of the period covered by the Consolidated Form 10-K, it did not qualify for inactive status, as discussed below.

Citizens Capital asserts that no material change in its business occurred during the relevant period because, according to the Company, the only "material changes" covered by Rule 3-11 are "bankruptcy, reorganization, readjustment or succession or any material acquisition or disposition of plants, mines, mining equipment, mine rights or mining leases." The definition of "material," however, is broader than the Company states and includes "those matters about which an average prudent investor ought reasonably to be informed."²⁹ As noted, the Consolidated Form 10-K lists a number of "significant changes" to the Company's business, including: (1) the issuance of 5,000,000 shares of the Company's stock for the capitalization of an athletic apparel manufacturing subsidiary and the subsequent cessation of all manufacturing and marketing efforts by the subsidiary; (2) the discontinuation of another subsidiary's commercial printing operation; (3) the formation of a "Black Financial News Network video based website;" and (4) the creation and capitalization, in exchange for 250,000,000 shares of a subsidiary's common stock, of a professional football league. These numerous changes to the Company's business discussed in the Consolidated Form 10-K were clearly material and disqualified the Company from "inactive entity" status.

Moreover, an affiliate of the Company, the Citizens Capital Corp. ESOP Trust (the "ESOP Trust"),³⁰ sold shares of the Company's common stock in 2001 and 2004.³¹ Under Rule 3-11, an "inactive entity" may not have purchased or sold any of its own stock during the relevant period. Although the Company seeks to distinguish itself from the ESOP Trust, its sales are imputed to the Company under Commission rules because the ESOP Trust and the Company are both under the common control of Billy D. Hawkins, the Company's chief executive officer and majority shareholder and the sole trustee of the ESOP Trust, making the ESOP Trust an "affiliate" of the Company.³² Citizens Capital further argues that the ESOP Trust sales cited by the Division were too insignificant to negate inactive status, asserting that "[g]enerally, the

²⁹ See 17 C.F.R. § 210.1-02(o). Regulation S-X provides that this definition of "material" applies when the term is used "to qualify a requirement for the furnishing of information as to a subject."

³⁰ The Consolidated Form 10-K states that the ESOP Trust, covering certain Company employees, purchased 15,000,000 shares of Company stock in exchange for a promissory note.

³¹ On November 14 and 15, 2001, the ESOP Trust sold 20,000 shares of the Company's common stock on the public markets for net proceeds of \$169.97. On May 13, 2004, the ESOP Trust sold an additional 1,500,000 shares of the Company's common stock for net proceeds of \$117.49. Also, as noted, the Company filed a Form D in 2010 regarding a \$30,000,000 debt offering by the Company.

³² An "affiliate" of an issuer is defined as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." 17 C.F.R. § 210.1-02(b).

threshold for material significance is 5% to 10%." Rule 3-11, however, contains no requirement that the stock sales at issue reach a certain level.³³

Moreover, the Consolidated Form 10-K was deficient for at least two additional reasons. Under Rule 13a-1, the Company was required to file a separate annual report for each fiscal year during the relevant period,³⁴ which it has not done. There are limited circumstances when the Commission permits an issuer to file a consolidated report. However, the report must, at a minimum, contain all of the information that would have been included had the reports been filed separately (which, as discussed above, was not the case here). Further, the issuer must follow prescribed procedures and obtain express permission before it can file a consolidated report.³⁵ The Company failed to follow the requisite procedures and received no such permission here.

In addition, the Consolidated Form 10-K does not include the conclusions of the Company's principal executive and financial officer regarding the Company's disclosure controls and procedures, as required by Item 307 of Regulation S-K.³⁶ Citizens Capital claims that it

³³ As noted, the Company also filed a Form 8-K in May 2012 indicating that the ESOP Trust planned to conduct a bond offering.

³⁴ See *Am. Stellar*, 101 SEC Docket at 43818 n.23 (citing *e-Smart Techs., Inc.*, 57 S.E.C. 964, 965 n.3 (2004) (stating that the "rules do not provide for the filing of consolidated reports"))).

³⁵ Pursuant to 17 C.F.R. § 200.30-1(e)(2), the Commission has delegated to the Director of Corporation Finance the discretionary authority to accept modified reports pursuant to the Exchange Act, in accordance with procedures set forth on the Commission's website at <http://www.sec.gov/divisions/corpfin/cfreportingguidance.shtml>. The Company did not follow these procedures, in that its request was not specifically directed to Corporation Finance's Office of Chief Accountant ("CF-OCA") as a request for a waiver or interpretation of its reporting requirements, but, instead, was submitted as a filing in an administrative proceeding.

Although the Company copied CF-OCA on its second answer to the OIP, the second answer merely sought permission to file a consolidated report for fiscal years 2009 and 2010, not for all of the years from 2001 to 2010. Further, the request did not mention that Citizens Capital intended to claim the Rule 3-11 exemption from filing audited financial statements with its proposed consolidated report. Therefore, the proposed filing described in the second answer to the OIP did not remotely resemble the actual filing in the Consolidated Form 10-K.

³⁶ 17 C.F.R. § 229.307. Under Item 307, issuers of registered securities must include in their periodic reports the evaluation of management regarding the effectiveness of the issuer's "controls and other procedures . . . that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the [Exchange] Act is
(continued...)

fulfilled its obligations under Item 307, citing Item 9A of the Consolidated Form 10-K, in which the Company's management provides its evaluation of the Company's internal controls over financial reporting. However, the disclosure the Company provided under Item 9A in the Consolidated Form 10-K appears to apply to Item 308 of Regulation S-K (applicable to controls over financial reporting, as opposed to disclosure controls), and not to Item 307.

The Company also cites a "Cautionary Note on Forward-Looking Statements" included in the Consolidated Form 10-K. This section of the Form 10-K discusses risks and uncertainties that could affect any forward-looking statements made by the Company. It is unclear from the Company's brief how the "Cautionary Statement" relates to Item 307. Thus, the absence of an Item 307 statement is another material deficiency in the Consolidated Form 10-K.

2. In September 2011, the Company filed delinquent Forms 10-Q for the periods ended March 31 and June 30, 2011, and in November 2011 and May 2012, the Company filed timely Forms 10-Q for the periods ended September 30, 2011, and March 31, 2012 (collectively, the "2011 and 2012 Forms 10-Q"). Each of the 2011 and 2012 Forms 10-Q contained material deficiencies. The interim financial statements included in the 2011 and 2012 Forms 10-Q were not reviewed by an independent public accountant, as required by Rule 8-03 of Regulation S-X.³⁷ Rule 8-03 also requires that the balance sheets in interim reports include a comparative balance sheet against the Company's preceding fiscal year end, but the 2011 and 2012 Forms 10-Q omitted this required information. In addition, the 2011 and 2012 Forms 10-Q lacked the required conclusions of the Company's principal executive and financial officer regarding the Company's disclosure controls and procedures under Item 307 of Regulation S-K, as discussed above with respect to the Consolidated Form 10-K.³⁸ Moreover, the Company has not filed any quarterly reports for the period covered by the Consolidated Form 10-K.

³⁶ (...continued)

recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms." See 17 C.F.R. § 240.13a-15(e). This requirement is distinct from the requirement under Item 308 of Regulation S-K that the issuer's management include in its periodic reports an evaluation of the issuer's "internal control over financial reporting." See 17 C.F.R. § 229.308. In the Consolidated Form 10-K, Hawkins improperly certified that the Company's management had "[e]valuated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures." See Exchange Act Rules 13a-14(a), 17 C.F.R. § 240.13a-14(a), and 15d-14(a), 17 C.F.R. § 240.15d-14(a).

³⁷ 17 C.F.R. § 210.8-03.

³⁸ As in the Consolidated Form 10-K, Hawkins improperly certified in the 2011 and 2012 Forms 10-Q that the Company's management "[e]valuated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures."

D. The record here causes us concern that the Company will engage in future violations.³⁹ Throughout this proceeding, Citizens Capital repeatedly promised, in its two answers to the OIP and during the pre-hearing conference with the law judge, that it would become current with its reporting obligations by September 2011 and that, in doing so, it would provide audited financial statements,⁴⁰ neither of which it has done. Further, the Company has provided no specific dates in its briefs on appeal by which it intends to come into full compliance by filing all of its delinquent reports, including its missing quarterly reports from 2001 through 2010, and correcting the material deficiencies in the filings it has made. Citizens Capital's pattern of repeated non-compliance undermines the credibility of the Company's claims of future compliance.

The Company's and its management's failure to comply with other reporting requirements further brings into question the likelihood of the Company's future compliance with Section 13(a) and the rules thereunder.⁴¹ Hawkins has repeatedly failed to file various statutorily required reports. For example, in light of his majority stake in the Company, Hawkins was subject to Exchange Act Section 13(d), which requires that any person who becomes, directly or indirectly, the "beneficial owner" of more than five percent of any class of equity securities registered under the Exchange Act file a statement on Schedule 13D with the Commission within ten days of becoming such an owner.⁴² Hawkins does not appear, however, to have filed a Schedule 13D. Nor has Hawkins timely complied with Exchange Act Section 16(a), which requires officers and directors to file initial statements disclosing the amount of all equity securities of the issuer of which such person is the beneficial owner as well as statements disclosing any changes in such ownership and annual statements of such person's beneficial ownership of the issuer's

³⁹ Before us, the Company makes no express assertions that it will comply with its periodic filing obligations going forward in its briefs on appeal. However, before the law judge, Citizens Capital stated, "[g]oing forward, once in full compliance, [Citizens Capital] hereby promises in the future to file its periodic reports with the Commission in a timely manner."

⁴⁰ See *Nature's Sunshine*, 95 SEC Docket at 13499 ("[T]he Company has yet to return to full compliance . . . and has needed 'substantially more time than anticipated' to remedy its delinquencies, 'making us unconvinced that it is realistic to expect that the Company can become current entirely in its reporting obligations in the foreseeable future.'" (quoting *Impax*)). Despite Citizens Capital's claims that it filed the Consolidated Form 10-K "eleven days early," the filing was actually made eleven days *after* the September 1, 2011 date by which it initially estimated that it would become current with its filings.

⁴¹ Our Rules of Practice permit us to take official notice of information in the EDGAR database. 17 C.F.R. § 201.323. We take official notice of all filings (or the lack thereof) by Citizens Capital and its management since the Company's initial registration of its shares.

⁴² 15 U.S.C. § 78m(d). Schedule 13D is Exchange Act Rule 13d-101, 17 C.F.R. § 240.13d-101.

securities.⁴³ The Company also appears to have failed to file proxy statements as required under Exchange Act Section 14.⁴⁴ In addition, despite the material changes to the Company's business and the stock sales by the ESOP Trust discussed above, the Company failed to make disclosures on Form 8-K regarding these developments. The Company also failed to file required Forms 8-K regarding the status of its auditors during the relevant period, including the reasons for any resignation or dismissal. These additional disclosure failures by Hawkins and the Company further heighten our concern about the likelihood of future violations.

V.

Procedural Issues

A. Citizens Capital contends that the law judge erred by granting the Summary Motion. The Company, citing no authority, argues, "[w]hile summary disposition might be appropriate in the establishment of the violation of law, summary disposition in establishing sanctions, if any, and the degree thereof, is wholly inappropriate when the 'finding of facts;' the law and the interpretation of case law are found to be inaccurate, misleading, in error or certain premises of the case are dismissed totally."

⁴³ 15 U.S.C. § 78p(a). In November 2011, Hawkins and certain Company subsidiaries he controls filed annual statements of beneficial ownership for fiscal year 2010. These annual statements of beneficial ownership are required, under Exchange Act Rule 16a-3, 17 C.F.R. § 240.16a-3, to be made within forty-five days of the end of the relevant fiscal year. Thus, these November 2011 filings were late. Further, Hawkins has not filed annual statements for any fiscal year other than 2010 since the Company's inception, including fiscal year 2011.

In March 2012, four Company subsidiaries and the ESOP Trust filed Forms 3, providing their Initial Statement of Beneficial Ownership of Securities. Under Exchange Act Section 16(a)(2), Forms 3 are to be filed within ten days of the event that makes the person subject to reporting obligations under the Rule. The record indicates that the subsidiaries and the ESOP Trust were subject to the requirement to file Form 3 many years prior to the date that the Forms 3 were actually filed.

⁴⁴ Under Texas law, Citizens Capital is required to elect at least one-third of its directors annually. Tex. Bus. Orgs. Code Ann. § 21.408. Assuming that the Company adhered to this provision, it would have been required either to: (1) solicit proxies for a director election and to file a proxy statement with the Commission pursuant to Exchange Act Section 14(a), 15 U.S.C. § 78l(a), and Rule 14a-3 thereunder, 17 C.F.R. 240.14a-3; or (2) file an information statement with the Commission, inclusive of "information substantially equivalent to the information which would be required to be transmitted if a [proxy] solicitation were made," pursuant to Exchange Act Section 14(c), 15 U.S.C. § 78l(c), and Rule 14c-2 thereunder, 17 C.F.R. § 240.14c-2. The Company has filed neither proxy statements nor information statements.

Under Commission Rule of Practice 250,⁴⁵ a law judge may grant a party's motion for summary disposition "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." We have found that summary disposition is appropriate in proceedings like this one brought pursuant to Exchange Act Section 12(j), where the issuer has not disputed the facts that constitute the violation.⁴⁶ As noted, Citizens Capital does not dispute the facts that establish its violations, *i.e.*, its failure to file any of the required periodic reports specified in the OIP. The only fact that Citizens Capital challenges on appeal is the law judge's finding that "as of August 12, 2011, [the Company's] stock was traded on the over-the-counter markets," which the law judge noted in assessing sanctions.⁴⁷ We do not find that the evidence supports the law judge's finding on this point and find no evidence of such trading since 2007.⁴⁸ Nevertheless, our finding regarding this issue does not cause us to question, based on our *de novo* review,⁴⁹ the law judge's overall conclusion about the need for revocation, as discussed herein. Revocation is a prospective remedy and is imposed based on our concern about protecting future investors in the Company.⁵⁰

⁴⁵ 17 C.F.R. § 201.250.

⁴⁶ *See, e.g., Am. Stellar*, 101 SEC Docket at 43814; *Cobalis*, 101 SEC Docket at 43384-85; *Eagletech*, 88 SEC Docket at 1226.

⁴⁷ The other alleged "Errors of Findings of Fact" the Company mentions in opposition to the grant of summary disposition are not facts at all, but rather the law judge's legal interpretation of the availability of the Rule 3-11 exemption and the presence of material deficiencies in the Consolidated Form 10-K and two of the 2011 Forms 10-Q, all of which are discussed in detail above.

⁴⁸ Citizens Capital's stock is what is referred to as a "grey market" stock. "Grey market" stocks have no market makers and are not listed, traded, or quoted on any stock exchange, or the over-the-counter bulletin board. However, customers may trade "grey market" stocks through brokers on an unsolicited basis, and trading data (if any) is publicly available throughout the trading day. *SEC v. Advatech Corp.*, Lit. Rel. No. 20828 (Dec. 15, 2008), 94 SEC Docket 2868. As a "grey market" stock, Citizens Capital had no market makers and was not eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3), 17 C.F.R. § 240.15c2-11(f)(3).

⁴⁹ *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14260 n.44 ("our review . . . of the proceeding is *de novo*"), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

⁵⁰ *See Nature's Sunshine*, 95 SEC Docket at 13501 ("both existing and prospective investors are harmed by the continuing lack of current and reliable information for the [c]ompany" (quoting *America's Sports Voice*, 90 SEC Docket at 885-86)). Without revocation,

(continued...)

B. The Division filed a Motion for Leave to Adduce Additional Evidence (the "Division's Motion to Adduce") simultaneously with its brief in this appeal. Pursuant to Rule of Practice 452, we "may allow the submission of additional evidence" upon a motion that "show[s] with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously."⁵¹ We grant the Division's Motion to Adduce with respect to a Declaration by Chauncey L. Martin, an Assistant Chief Accountant in Corporation Finance, dated January 17, 2012, because the Declaration is material (insofar as it discusses material deficiencies in the Company's November 2011 Form 10-Q) and unavailable prior to the time of the Division's Motion to Adduce, notwithstanding that certain information included in the Declaration repeats information included in earlier declarations Martin submitted before the law judge.

We also grant the Division's Motion to Adduce with respect to a Declaration by Emre Carr, a Senior Financial Economist in our Division of Risk, Strategy, and Financial Innovation, dated January 17, 2012, which pertains to the Company's argument that it was entitled to claim the Rule 3-11 exemption from the obligation to file audited financial statements with its annual reports. Although the Company claimed the exemption in the Consolidated Form 10-K and the law judge considered and rejected the claimed exemption in the Initial Decision, the Company's arguments in support of its claim were developed more fully in its briefs on appeal.

We deny as immaterial, for the reasons discussed above, the Division's motion to adduce a print-out from the website www.otcquote.com, a commercial database, showing the trading status of the Company's stock on the over-the-counter markets as of January 13, 2012. The Division's Motion to Adduce also sought introduction of several Exhibits showing the Company's filings in the Commission's EDGAR database, as of the date of the Motion. As discussed, we take official notice of all of Citizens Capital's filings subsequent to the Initial Decision and, therefore, deny the Division's Motion to Adduce with respect to all such Exhibits.⁵²

⁵⁰ (...continued)

the Company's stock can still be traded on an unsolicited basis, and nothing would prevent its future trading on the over-the-counter markets if it satisfied the necessary requirements.

⁵¹ 17 C.F.R. § 201.452.

⁵² Citizens Capital opposes the Division's Motion to Adduce. The Company argues that the Division's "time and resources would be better spent on behalf of the protection of the American, Public Investment markets" through efforts to control "orchestrated short selling abuses" by, among other things, informing investors that, by placing securities in brokerage accounts, "they are in fact 'assigning' over and ceding the registered ownership of their securities to nominees of certain securities depositories." Citizens Capital fails to explain the relevance of its arguments to the Division's Motion to Adduce or, more generally, to the issues in this appeal.

VI.

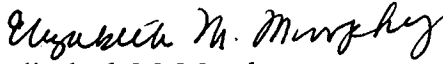
Citizens Capital failed to comply with Exchange Act reporting requirements for more than a decade between 2001 and 2011, even though it acknowledged its obligation to do so as early as 2004. As such, it deprived the public of current, accurate financial and business information about the Company with which to make informed investment decisions and to which it was entitled by law.⁵³ This lack of information is especially troubling because it occurred during a period when the Company admittedly engaged in various and significant changes in its business. The missing reports, presumably, would have significantly aided the public's evaluation of these changes.

Moreover, although the Company now claims that it is committed to returning to compliance, its delinquent and deficient filings and other disclosure failures indicate that it still does not appreciate the importance of regulatory compliance. The Company's continued unwillingness or inability to retain an auditor is particularly troubling. In short, the Company's efforts to remedy its violations are inadequate, and its assurances against future violations lack credibility. Under the circumstances, we believe that revocation is amply warranted by the facts and circumstances and the need to protect investors.

Accordingly, we find that revocation of the registration of Citizens Capital's securities is necessary and appropriate in the public interest.

An appropriate order will issue.⁵⁴

By the Commission (Chairman SCHAPIRO and Commissioners WALTER, AGUILAR, PAREDES and GALLAGHER).


Elizabeth M. Murphy
Secretary

⁵³ *e-Smart*, 57 S.E.C. at 968 n.13 (citing *SEC v. Beisinger Indus. Corp.*, 552 F.2d 15, 18 (1st Cir. 1977)); *America's Sports Voice*, 90 SEC Docket at 885 (citing *Beisinger*, 552 F.2d at 18 (stating that the reporting requirements are "the primary tool[s] which Congress has fashioned for the protection of investors from negligent, careless, and deliberate misrepresentations in the sale of stock and securities.")); see also *United States v. Arthur Young & Co.*, 465 U.S. 805, 810 (1984) (observing that "[c]orporate financial statements are one of the primary sources of information available to guide the decisions of the investing public").

⁵⁴ 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. 67313 / June 29, 2012

Admin. Proc. File No. 3-14401

In the Matter of

CITIZENS CAPITAL CORP.
c/o Billy D. Hawkins, Chief Executive Officer
P.O. Box 670406
Dallas, TX 75367

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the registration of all classes of the registered securities of Citizens Capital Corp. be, and it hereby is, revoked pursuant to Section 12(j) of the Securities Exchange Act of 1934.

By the Commission.

Elizabeth M. Murphy
Elizabeth M. Murphy
Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

June 29, 2012

In the Matter of

AngelCiti Entertainment, Inc.,
BodyTel Scientific, Inc.,
Clearant, Inc.,
DataMetrics Corp., and
Green Energy Group, Inc.
(a/k/a eCom eCom.Com, Inc.),

File No. 500-1

ORDER OF SUSPENSION OF
TRADING

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of AngelCiti Entertainment, Inc. because it has not filed any periodic 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 BodyTel Scientific, Inc. 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 Clearant, Inc. because it has not filed any periodic reports since the period ended June 30, 2009.

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

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Green Energy Group, Inc. (a/k/a eCom eCom.Com, Inc.) because it has not filed any periodic reports since the period ended February

28, 2011. Moreover, the company's Form 10-K for the period ended May 31, 2010 was materially deficient in that it failed to include a report on internal controls over financial reporting, as required by Commission rules.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. EDT on June 29, 2012, through 11:59 p.m. EDT on July 13, 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. 67310 / June 29, 2012

ADMINISTRATIVE PROCEEDING
File No. 3-14932

In the Matter of

**AngelCiti Entertainment, Inc.,
BodyTel Scientific, Inc.,
Clearant, Inc.,
Comdial Corp.,
(n/k/a CMDL Corporation),
DataMetrics Corp., and
Green Energy Group, Inc.
(a/k/a eCom eCom.Com, Inc.),**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE
PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO
SECTION 12(j) OF THE
SECURITIES EXCHANGE ACT
OF 1934**

I.

The Securities and Exchange Commission ("Commission") deems it necessary and appropriate for the protection of investors that public administrative proceedings be, and hereby are, instituted pursuant to Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") against the Respondents named in the caption.

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. AngelCiti Entertainment, Inc. ("AGCI")¹ (CIK No. 1084122) is a revoked corporation located in Boca Raton, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). AGCI is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended March 31, 2008, which reported a net loss of \$2,167 for the prior three months. As of June 25, 2012, the common stock of AGCI was quoted on OTC Link (formerly "Pink Sheets")

¹The short form of each issuer's name is also its stock symbol.

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. BodyTel Scientific, Inc. ("BDYT") (CIK No. 1341259) is a defaulted Nevada corporation located in Jacksonville, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). BDYT 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 August 31, 2008, which reported a net loss of \$13,682,802 for the prior six months. As of June 25, 2012, the common stock of BDYT 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. Clearant, Inc. ("CLRA") (CIK No. 1238579) is a forfeited Delaware corporation located in Orlando, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CLRA 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, 2009, which reported a net loss of \$1,038,000 for the prior six months. As of June 25, 2012, the common stock of CLRA was quoted on OTC Link, had nine market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

4. Comdial Corp. (n/k/a CMDL Corporation) ("CMDZQ") (CIK No. 230131) is a dissolved Delaware corporation located in Sarasota, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). CMDZQ 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, 2004, which reported a net loss of \$7,678,000 for the prior year. On May 26, 2005, CMDZQ filed a Chapter 11 petition in the U.S. Bankruptcy Court for the District of Delaware, which was still pending as of June 25, 2012. As of June 25, 2012, the common stock of CMDZQ was not publicly quoted or traded.

5. DataMetrics Corporation ("DMCP") (CIK No. 27082) is a void Delaware corporation located in Orlando, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). DMCP is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-QSB for the period ended January 31, 2008, which reported a net loss of \$190,000 for the prior three months. As of June 25, 2012, the common stock of DMCP was quoted on OTC Link, had seven market makers, and was eligible for the "piggyback" exception of Exchange Act Rule 15c2-11(f)(3).

6. Green Energy Group, Inc. (a/k/a eCom eCom.Com, Inc.) ("ECEC") (CIK No. 1000459) is a Florida corporation located in Jupiter, Florida with a class of securities registered with the Commission pursuant to Exchange Act Section 12(g). ECEC is delinquent in its periodic filings with the Commission, having not filed any periodic reports since it filed a Form 10-Q for the period ended February 28, 2011, which reported a net loss of \$22,650 for the prior nine months. On November 29, 2004, ECEC filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of Florida, which was closed on March 28, 2008. ECEC's Form 10-K for the period ended May 31, 2010 was materially deficient in that it failed to include a report on internal controls over financial reporting, as required by Commission rules. As of June 25, 2012, the common stock of ECEC was quoted on OTC Link, had eight 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